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THE PACIFIC REPORTER

VOLUME 181

PERMANENT EDITION

COMPRISING ALL THE DECISIONS OF THE

SUPREME COURTS OF CALIFORNIA, KANSAS, OREGON
WASHINGTON, COLORADO, MONTANA, ARIZONA
NEVADA, IDAHO, WYOMING, UTAH
NEW MEXICO, OKLAHOMA

AND OF THE COURTS OF APPEAL OF CALIFORNIA
AND CRIMINAL COURT OF APPEALS
OF OKLAHOMA

WITH KEY-NUMBER ANNOTATIONS

CONTAINING A TABLE OF PACIFIC CASES IN WHICH REHEARINGS HAVE BEEN DENIED

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[1] Resigned June 1, 1919.
[2] Appointed Chief Justice June 2, 1919.
[3] Qualified June 9, 1919.

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AMENDMENTS TO RULES

SUPREME COURT AND DISTRICT COURTS OF APPEAL OF CALIFORNIA*

RULE XX.

REGULAR SESSIONS—MOTIONS—TIME OF NOTICE.

1. For the purpose of hearing motions of which notice is required to be given, the Supreme Court will be in session at San Francisco on the first Monday of each month at ten o'clock a. m. Motions may also be presented and submitted on the first day of each regular session of said court at Sacramento and Los Angeles.

2. Each District Court of Appeal or division thereof shall be in session for the hearing of causes at such times and for such periods as said court or division may, by order, direct.

Each of said courts and divisions shall, by general order, provide for a regular session for such purpose to be held at least once in each quarter.

For the purpose of hearing motions a District Court of Appeal having only one division, and Division One of each District Court of Appeal having two divisions, shall be in session on the fourth Monday in each month at ten o'clock a. m., and Division Two of each District Court of Appeal having two divisions shall be in session on the second Monday in each month at ten o'clock a. m.

3. In all cases where notice of a motion is necessary, unless for good cause shown, the time is shortened by the court, or by the Chief Justice or Presiding Justice thereof, the notice shall be ten days.

*Since the publication of the rules in 176 Pac. viixiv, the above rule has been changed, so that the words "or by the Chief Justice thereof," are made to read "or by the Chief Justice or Presiding Justice thereof."

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PACIFIC REPORTER

VOLUME 181

(92 Or. 360)

PUFFER v. BADLEY.

(Supreme Court of Oregon. May 27, 1919.)

1. BROKERS ⟸43(2)—COMPENSATION—AGREEMENT—STATUTE OF FRAUDS.

L. O. L. § 808, as amended by Laws 1917, p. 786, declaring an agreement employing a broker to buy or sell real estate for compensation to be invalid unless in writing and subscribed by the party to be charged or his agent, describing the land and stating the commission to be paid, is satisfied by a written agreement so executed after the performance of the services.

2. BROKERS ⟸8(2)—EMPLOYMENT—CONTRACT EVIDENCE OF AGENCY—ADMISSIBILITY.

A written agreement, to pay a broker a stated compensation for selling real estate, satisfying the statute of frauds and purporting on its face to have been made after the sale, was properly admitted in evidence to show the relationship of principal and agent in a suit for money had and received by such broker.

3. BROKERS ⟸8(3)—EMPLOYMENT—EVIDENCE OF AGENCY—SUFFICIENCY.

In an action to recover money received by defendant as plaintiff's agent in selling real estate, based upon defendant's alleged failure to disclose a true offer made by the purchaser for the land sold, evidence *held* sufficient to sustain finding that defendant was plaintiff's agent.

4. BROKERS ⟸37—ACTION TO RECOVER MONEY RECEIVED — EVIDENCE—VALUE OF CONSIDERATIONS RECEIVED FROM SALE.

Evidence as to the market value of lots conveyed to plaintiff by defendant as part of the purchase price for land sold by plaintiff to another through defendant as agent is admissible in action to recover the sum received by defendant in payment for such lots as part of an original cash offer for plaintiff's land, not disclosed by defendant to plaintiff, to show that plaintiff did not act capriciously in repudiating the transaction.

5. APPEAL AND ERROR ⟸1054(1)—HARMLESS ERROR—TRIAL WITHOUT A JURY—ADMISSION OF INCOMPETENT EVIDENCE.

In an action tried by a court without a jury, admission of irrelevant and incompetent testimony, objected to, is not prejudicial error, where no injury to the party objecting resulted therefrom.

6. APPEAL AND ERROR ⟸1011(1)—REVIEW—CONFLICTING EVIDENCE.

Finding by the trial court is conclusive on appeal, where there was a sharp conflict in the evidence.

7. ATTORNEY AND CLIENT ⟸104—NOTICE TO ATTORNEY—IMPUTATION TO PRINCIPAL.

Knowledge of an attorney, who was only acting for plaintiff in passing upon the sufficiency of title to several properties, that a purchaser of land from plaintiff through defendant, a broker, had made a certain offer for the land, and that some of the properties received by plaintiff in part payment for her land actually belonged to the defendant, does not charge the plaintiff with constructive knowledge, where such attorney in every other detail was attorney for the purchaser.

8. BROKERS ⟸36—ACCOUNTING BY BROKER—TENDER—SUFFICIENCY.

The fact that, when a principal tendered her broker a deed to lots conveyed to her by him, and demanded payment of money retained by such broker from the proceeds of land sold by him for her, she made no mention of furniture included with a lot conveyed to her does not invalidate the rescission, where the broker refused to rescind.

Department 1.

Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Action by Cora E. Puffer against O. V. Badley. From a judgment for plaintiff defendant appeals. Affirmed.

This is an action for money had and received by the defendant for the use of the plaintiff. The complaint is in the usual form, and the answer is a general denial. Upon stipulation the case was tried by the court without a jury. The evidence discloses the following facts: The plaintiff, a widow, was the owner of certain business property on Washington Street in Portland, upon which there was a mortgage for $13,000. The property was assessed at $31,200. Being in financial straits, she was trying to sell this property, and the defendant, learning this fact, informed J. R. Ellison of the fact, and the latter authorized defendant to offer plaintiff

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$10,000 in cash, and his residence property at the corner of 37th and Morrison streets in Portland, which was valued at $5,000. Plaintiff insists that this offer was never disclosed to her, but that defendant told her that Ellison was willing to pay her $4,000 in cash and convey to her the residence property mentioned, and certain other lots, which in fact belonged to defendant. The latter offer was finally accepted by her, and when she conveyed her property to Ellison, she received the $4,000, in cash, less a commission of $750 which she paid to defendant, and some incidental expenses, and also received deeds to the properties already referred to. In one of the houses conveyed to her by defendant, there was some furniture which was included in the conveyance. Thereafter, discovering that defendant had received $6,000 of the original cash offer, in payment for the lots which he had deeded to her, and that he had not disclosed to her the offer as made by Ellison, plaintiff tendered him a deed to such property and made a demand for the $6,000, which was refused, and she brought this action. At the conclusion of the trial, the court made findings of fact, and entered a judgment in favor of plaintiff, from which defendant appeals. The further facts will be found in the opinion.

A. G. Thompson, of Portland, for appellant.

Geo. W. Gearhart, of Portland (H. H. Northup, of Portland, on the brief), for respondent.

BENSON, J. (after stating the facts as above). [1] Our attention is first called to the fact that the court admitted in evidence, over defendant's objection, a written instrument which reads thus:

"For services rendered in the sale of my property located between 16th and 17th street on Washington street and more fully described as Number 531 on Alder street and 528, 528½ and 530 on Washington street in the city of Portland, state of Oregon, I hereby agree to pay to O. V. Badley the agent who sold said property to one J. R. Ellison the sum of seven hundred and fifty ($750.00) dollars and I hereby order and direct Geo. W. Gearhart the attorney for J. R. Ellison to pay to O. V. Badley said sum of $750.00 when final settlement is made and Mr. Ellison's part of the agreement for the exchange of the properties is fulfilled, said contract being a part of this memorandum. Cora E. Puffer.

"Received payment 8—25—1917.

"O. V. Badley."

This document was introduced by the plaintiff as evidence of the fiduciary relation existing between plaintiff and defendant in the transactions involved herein. Defendant argues that it is inadmissible for the reason that it does not satisfy the requirements of section 808, L. O. L., as amended by Laws 1917, p. 786, which is the statute of frauds. The portions of this statute which are to be considered in this connection, are as follows:

"In the following cases the agreement is void unless the same or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, or by his lawfully authorized agent; evidence, therefore, of the agreement shall not be received other than the writing, or secondary evidence of its contents, in the cases prescribed by law: * * * 8. An agreement entered into subsequent to the taking effect of this act, authorizing or employing an agent or broker to sell or purchase real estate for a compensation or commission; provided, however, that if the note or memorandum of such agreement be in writing and subscribed by the party to be charged, or by his lawfully authorized agent, and contains a description of the property sufficient for identification, and authorizes or employs the agent or broker named therein to sell such property, and expresses with reasonable certainty the amount of the commission or compensation to be paid such agent or broker, such agreement of authorization or employment shall not be void for failure to state a consideration."

[2] It is clear that the writing in question satisfies every requirement of the statute, including the signature of the defendant, but it is urged that the instrument discloses upon its face the fact that it was executed after the sale was made, and was not signed by the defendant until after the payment of the commission therein specified. We are of the opinion, however, that a written memorandum of the agreement executed after the performance of the services satisfies the demands of the statute just as effectively as if it were written and signed prior thereto, and in this view we are supported by the cases of In re Balfour & Garrette, 14 Cal. App. 261, 111 Pac. 615; Carrington v. Smithers, 26 Cal. App. 460, 147 Pac. 225; Muir v. Kane, 55 Wash. 131, 104 Pac. 153, 26 L. R. A. (N. S.) 519, 19 Ann. Cas. 1180; Ide v. Stanton, 15 Vt. 685, 40 Am. Dec. 698. The writing in question was properly admitted in evidence, and very clearly tended to establish plaintiff's contention that the relation of principal and agent existed between herself and defendant in the transactions which are the subject-matter of the controversy.

[3] It was defendant's contention that he was at no time acting as the agent for plaintiff, but that throughout the entire negotiations he was representing Ellison only. In support of this theory he offered in evidence the deposition of R. W. Zimmerman, who at the time of taking the deposition, and at the time of trial, was with the American Expeditionary Force in France. By this evidence it was sought to establish that Zimmerman was a real estate broker, acting independently of defendant, with whom plaintiff had "listed" her property for sale; that he, as her agent, had conducted the negotiations with defendant as the agent of Ellison; had communicated to her, by telephone, the full

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details of Ellison's original offer, which had been rejected by her; that before the bargaining was finally concluded, he was called into the public service, and left the conclusion of affairs entirely in the hands of Badley, the defendant.

This evidence was not excluded by the court, but was admitted "subject to the objection," the court evidently treating the case, so far as procedure is concerned, as if it were a suit in equity. However, the court at the same time announced that in weighing the evidence he should not consider the evidence tending to prove agency in Zimmerman, for the reason that, if there were any such agency, its proof rested in parol, and was incompetent, as violating the statute of frauds as prescribed in section 808, L. O. L.

It may be—although it is not necessary for us to decide—that such parol evidence is admissible collaterally, to show the relationship of the parties, where the enforcement of the specific contract is not an issue, but, having all of the evidence before us, and giving it all of the effect to which it is entitled, the finding of the trial court that the defendant was the agent of plaintiff is fully justified.

[4, 5] Plaintiff introduced, over the objection of defendant, the testimony of B. D. Sigler as to the market value of the properties which were conveyed by defendant to plaintiff, and this ruling is assigned as error. Plaintiff concedes that under the pleadings this evidence is not strictly relevant to the issues, but urges that it was relevant and competent for the purpose of showing that plaintiff did not act capriciously in repudiating the transaction of which she complains, but had a real grievance. For this purpose it was admissible; but, even if it were otherwise, we are unable to discover wherein the defendant suffered any injury therefrom, since the final determination of the cause is based upon the fact that the relation of principal and agent existed between the parties, and that defendant, while acting as agent for plaintiff, failed to disclose to her the true offer made by Ellison for her property. In Williams v. Burdick, 63 Or. 41, 125 Pac. 844, we find this language:

"In an action tried by a court without a jury, the receipt of incompetent evidence, properly excepted to, is not prejudicial, unless injury has necessarily resulted."

[6] It is also urged that plaintiff must fail by reason of the fact that she had both actual and constructive knowledge of Ellison's offer, and of the fact that some of the properties belonged to defendant before the deal was finally consummated. Regarding actual knowledge, the defendant introduced evidence to the effect that Zimmerman, in a telephone conversation, informed Mrs. Puffer of Ellison's offer, and that she rejected it. This testimony is flatly contradicted by her, and the conflict is conclusively disposed of by the finding of the trial court.

[7] The contention of defendant in reference to constructive knowledge is based upon the theory that George W. Gearhart was acting as legal adviser for plaintiff in the transaction, and that he had full knowledge of the facts. The record discloses that Gearhart was representing Ellison in the matter, while Mrs. Puffer was relying upon the services and advice of Judge H. H. Northup. Judge Northup at this time became ill, and asked Mr. Gearhart to act for him in passing upon the sufficiency of the title to the several properties, as disclosed by the several abstracts. This he did, and Mrs. Puffer accepted his assurance as to the title in the tracts of land. It is conceded by all that in every other detail Mr. Gearhart was the attorney for Ellison. Therefore any knowledge which Gearhart may have had as to the Ellison offer, and the source of the real estate which was actually conveyed, cannot be imputed to the plaintiff, for:

"The rule that notice to an agent is notice to his principal is not applicable unless the notice has reference to business in which the agent is engaged under authority from the principal, and is pertinent to matters coming within that authority; and hence a principal is not affected with knowledge which the agent acquires while not acting in the course of his employment, or which relates to matters not within the scope of his authority, unless the agent actually communicates his information to the principal." 2 C. J. 863.

[8] It is further urged that when plaintiff tendered to defendant a deed to the properties conveyed to her by him, and demanded payment of the money he had received therefor from Ellison, she made no mention of the furniture which was in the Firland house. In regard to this it may be said that there is evidence to the effect that when she made her demand for a rescission, the defendant promptly announced that the transaction was a closed incident, and that he would not rescind. Under such circumstances, further details would have been futile, and not required.

We find no reversible error in the record, and the judgment is affirmed.

McBRIDE, C. J., and BURNETT and HARRIS, JJ., concur.

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(92 Or. 368)

GUNTLEY v. NORTHERN PAC. TERMINAL CO. OF OREGON et al.

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(Supreme Court of Oregon. May 27, 1919.)

1. APPEAL AND ERROR ⟸927(3, 7)—REVIEW—NONSUIT — DIRECTION OF VERDICT — EVIDENCE.

Appellate court, in considering appeal where trial court's action in overruling motions for nonsuit and for a directed verdict is assigned as error, will assume that plaintiff's testimony is true.

2. MASTER AND SERVANT ⟸289(25)—INJURY TO EMPLOYÉ—CONTRIBUTORY NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

In warehouse employé's action for injuries from spike in box car door placed alongside of warehouse, at foot of steps, with spike protruding toward steps, involving question of whether employé was contributorily negligent in failing to avoid the door, evidence *held* to sustain verdict for employé.

Department 2.

Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Action by John H. Guntley against the Northern Pacific Terminal Company of Oregon and another. Judgment for plaintiff, and defendants appeal. Affirmed.

The plaintiff alleges that the Northern Pacific Terminal Company is an Oregon corporation with its principal office in Portland, engaged in the switching and transfer of cars and trains from spurs, switches, side tracks, and warehouses to and upon different lines in the city of Portland, for profit, gain, and hire; that the defendant American Can Company is a New Jersey corporation, authorized to do business in the state of Oregon and engaged in the manufacture of tin cans and containers, for which it employs agents, servants, and laborers, and is conducted for profit; that about October 2, 1917, the plaintiff was employed by the defendant can company as a common laborer in and about municipal warehouse No. A in the city of Portland, near the plant of that company, and that on the date mentioned the defendants placed "alongside of the south front of said warehouse, at and near the said steps, a box car door, and from said door there protruded a spike, being a fortypenny nail, from the said door on the outside, and plaintiff being compelled to pass down the said steps and by and alongside of said door, and while so passing his shoe of his right foot was caught and became fastened on said spike, thereby suddenly and violently throwing plaintiff to the ground, and thereby seriously and permanently injuring plaintiff as hereinafter complained of." It is further averred that the defendants carelessly and negligently placed and left the door against the side of the warehouse "near and at said steps and at and alongside of said walk and foot passage and where said servants, employés, and laborers were required to pass and travel along," and allowed and permitted "a spike as aforesaid to stick and protrude out from said door, and thereby, and on account of said carelessness, recklessness, and negligence, plaintiff received" the injuries of which he complains. The plaintiff alleges that prior to his accident he had rejected the provisions of the "Workmen's Compensation Act," and his rejection was accepted by the can company and filed with the state Industrial Accident Commission.

The defendants filed separate answers, admitting their corporate character, but denying that the plaintiff had rejected the "Workmen's Compensation Act" as alleged, and traversing all other material allegations of the complaint. As a further and separate defense the defendants pleaded in effect, "that the pathway and steps along which plaintiff was passing were free of obstruction, and that the injury received by the plaintiff, if any, was caused wholly and solely by the recklessness and negligence of the plaintiff himself, and was not caused in any degree by any recklessness or carelessness on the part" of either of the defendants. The plaintiff replied to each answer, denying all new matter.

The case was tried before a jury, which returned a verdict for the plaintiff against both defendants, upon which judgment was entered, and from which they appeal.

During the trial each defendant moved for a judgment of nonsuit, and, after the testimony was all taken, for a directed verdict, which motions were overruled. After judgment was entered each defendant moved for a new trial, and those motions also were overruled. The defendants assign as error that there is insufficient evidence to justify the verdict and judgment; "that the said verdict and judgment are against the law, and with reference thereto it appears from the plaintiff's own evidence that the alleged injury to the plaintiff occurred in broad daylight, and that the car door and alleged spike on which plaintiff claims to have been injured were plainly visible to any one using his sense of sight; that there was ample room for plaintiff to pass and repass to avoid the same; that the same was not in the direct path on which plaintiff was going at the time of the injury, and that any person using reasonable prudence could pass and repass the place where the said door and the said spike were placed without coming in contact with the same;" and that the court erred in overruling the defendants' motions for nonsuit and for a directed verdict. No exceptions were taken to the charge of the trial court.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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James G. Wilson, of Portland (Geo. B. Guthrie and Teal, Minor & Winfree, all of Portland, on the brief), for appellants.

J. C. Simmons, of Portland, for respondent.

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JOHNS, J. (after stating the facts as above). The question to be determined is whether or not the evidence is sufficient to sustain the verdict. It appears from the record that, while employés of the terminal company were engaged in switching, they found a car door lying on the track at a point near the steps of the warehouse which the plaintiff descended at the time he received his alleged injuries; that, with the assistance of some employés of the can company, they removed the door from the track and placed it against the wall of the warehouse at the foot of the steps; that large spikes protruded through and on the outside of the car door towards the steps; that in going from the office to the warehouse the plaintiff usually came down the steps and took a path that ran over to the warehouse and that on the morning in question, in going down those steps, his foot came in contact with one of the spikes protruding from the car door, as the result of which he fell to the ground and sustained his injuries.

The accident happened about 7:05 a. m. on October 2, 1917, when the weather was clear. The testimony of numerous witness for the defense tended to show that the car door had been removed from the track and placed against the wall of the warehouse about 10 or 12 days before the accident, from which it was contended that the plaintiff in the ordinary course of his work knew that the car door was there and should have seen the protruding spikes; that he had an unobstructed pathway, and that therefore he was guilty of contributory negligence which would bar his recovery. It must be conceded that the evidence of such witnesses was positive and unqualified on that point.

The plaintiff testified as follows:

"Q. Had you noticed that door there prior to that morning? A. I never seen that door before. * * *

"Q. The first time you saw this door was when you got hurt? A. When I got hurt was the first time I ever seen that door.

"Q. You didn't know how it got there, or anything about it, did you? A. No, sir. * * *

"A. I sat there, and I was looking at that door; I looked up and I saw the hinges broken, and I looked down at the bottom, and I seen that spike. That was the first time I noticed it. * * *

"Q. Now, Mr. Guntley, isn't it a fact that that door had been there alongside of the warehouse since the 23d day of September, 1917? A. I never seen that door before, until that time. * * *

"Q. And you hadn't noticed that door? A. I never seen that door anywhere, until I got hurt that morning. * * * No; but in sitting there on those steps, waiting to be taken home, I was looking at that door, as I stated before. That is why I say—I claim that that door was pulled over on that platform about 14 inches. * * *

"Q. And [you] came out there and sat again; that was the first time you ever knew there was a nail there? A. That was the first time I ever knew the nail was there."

Ben Paul, a witness for the plaintiff, testified thus:

"Q. Now, were you down at the warehouse on the 1st of October? A. Yes, sir.

"Q. What was done there on that day, the 1st day of October, and the day before Mr. Guntley got hurt, in reference to a box car door; what was done? A. Well, the door came off of the car, and that is all I know; so the morning before it was put up there, a fellow that was on the train, some railroad fellows, came up there, and asked Mr. Gunderson to help put the door up— * * *

"Q. Well, then, what did you and Mr. Gunderson do, Mr. Paul? A. Well, we put up the door, and carried—the railroad fellows came in on the switch that morning, and the door laid across the track where there is a little switch that turned, and closed their switch, and they couldn't throw the switch on account of the door being there; and so these railroad fellows came up there and asked Mr. Gunderson if they could get anybody to help them, and I happened to be inside of the building, No. A, working, and he happened to see me, and he asked me to come and help him; so we picked up the door and set it up beside the building. * * *

"Q. Was that the day before Mr. Guntley got hurt? A. It was a day or two before he got hurt. I couldn't remember just what day it was. Me and a couple of boys put it up, and I went back to my work.

"Q. Where did you get the door from? A. We got it across the track. * * *

"Q. Then where did you put it, Mr. Paul, from this place? A. We carried it in and put it beside the building, right by the lower steps where you go up to the little office door. * * *

"Q. And who assisted you in putting that door up there? A. Mr. Gunderson.

"Q. And who else? A. The railroad fellows.

"Q. The fellows that were with the engine? A. With the engine; yes, sir.

"Q. And Mr. Gunderson is with the American Can Company? A. Yes, sir.

"Q. And what position did he hold at that time? A. Well, he holds—he is superintendent, or something. I don't understand; but I know he hired me to go to work.

"Q. Some kind of an officer or foreman? A. Yes, sir. * * *

"Q. Well, what did you see there? A. Well, I seen three spikes in the door.

"Q. And how far were they protruding out of the door, if any at all? A. Well, they were out from the door about 2½ inches. * * *

"Q. And how high from the ground was that spike that was bent toward the steps? A. Well, I judge it was about a couple of inches from the ground, or 3, or something like that."

James Carsner testified for the plaintiff as follows:

"Q. I will ask you in going from this place to the Amercian Can Company, is it traveled

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by the laborers and the servants in that warehouse—whether or not this route down there to the American Can Company is traveled? A. Across the railroad? Yes, sir.

"Q. That is usually and customarily traveled? A. Yes, sir; it is the short cut through there.

"Q. And what would be the long cut? A. You would have to come out here, and come down these stairs and around back here, and go around by the crates and around by the factory. There are crates right there by the municipal scales."

[1] The testimony of this witness tended to show that the door was removed from the track and placed against the warehouse the day before the accident. Assuming, as we must for the purposes of this opinion, that the testimony on the part of the plaintiff was true, it would show that the switching crew of the terminal company found the car door lying on the track in front of the engine, and with the aid of Mr. Gunderson, the foreman of the can company, it was moved from the track and placed against the wall of the warehouse at the foot of the steps which were used by employés of the can company in going to and from the office to the warehouse, and that on the outside, projecting from the car door, were three or four large spikes pointing toward the steps; that the car door was removed from the track the day before the accident, and was never seen by the plaintiff until the morning that he received his injuries, and that he was injured in going down the steps in his customary manner, by coming in contact with one of the protruding spikes, without any knowledge of its presence there.

The spike in the car door was the proximate cause of the injuries, and the door had been placed against the warehouse wall by the joint action of the employés of both defendants. While those employés testified positively that it was placed there about 10 days before the accident, the above testimony on the part of the plaintiff tends to show that it was so placed the day before the accident, and the plaintiff testified that he saw it for the first time on the morning of the accident.

Among others, the court gave the following instructions:

"The law requires a person to use his ordinary senses of sight and hearing for the protection of himself against injury.

"If you believe from the evidence in this case that the door in question was placed in a position so as to give ample room for passage alongside of it, and that a person paying ordinary attention to his walking would have noticed the same and avoided said door, then and in that event you are instructed that the defendants are not liable in this case, and the plaintiff cannot recover anything herein.

"If you believe from the evidence that the plaintiff at the time of the alleged injury by which he claims to have been injured in this case was rushing down the stairs, and not paying the attention to where he was going that an ordinarily prudent man would have under the circumstances, and by reason of said fact the injury occurred, then, and in that event you are instructed that the plaintiff was guilty of contributory negligence, negligence contributing to the injury, and therefore could not recover.

"It is indisputably shown in this case that the place where the plaintiff claims to have been injured was on premises belonging to the city of Portland, and not owned by the defendant the Northern Pacific Terminal Company, or by the defendant the American Can Company. There was no duty on the part of the defendant Northern Pacific Terminal Company, or on the part of the defendant the American Can Company, to keep said premises in a safe condition for the plaintiff, and the only duty owed by the defendant Northern Pacific Terminal Company and the defendant the American Can Company was not wantonly to injure the plaintiff.

"Before a plaintiff can recover any sum whatever from a defendant, the defendant must have violated some duty which he owed to that plaintiff. If you find from the evidence, therefore, that the door in question was placed at the point in question by any employé of the Northern Pacific Terminal Company of Oregon, or by the American Can Company, but was not placed there wantonly or maliciously, then and in that event you are instructed that the plaintiff cannot recover in this case any verdict whatever against the defendant Northern Pacific Terminal Company or the defendant the American Can Company.

"If you find from the evidence that the door in question, at the time of the alleged injury, was in a location where any ordinarily prudent person would have placed the same, under the circumstances, then there was no negligence on the part of the defendants, or their employés, in placing the same at said point, if you find they did so place the said door, and in that event your verdict should be in favor of the defendants."

[2] Under this charge, favorable to the defendants, the jury found for the plaintiff. After a careful reading of the entire record, we think that there was sufficient evidence to sustain the verdict.

The judgment is affirmed.

McBRIDE, C. J., and BEAN and BENNETT, JJ., concur.

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(92 Or. 237)

UKASE INV. CO. v. SMITH et al.

(Supreme Court of Oregon. May 20, 1919.)

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1. PARTITION ⟸12(1) — PERSONS WHO CAN SUE—LIENHOLDERS.

Under L. O. L. § 435, providing that the only persons who can sue in partition are those who hold as tenants in common, have an estate of inheritance, or for life or years, or a vested remainder or reversion, a mere lienholder cannot institute such a suit.

2. MORTGAGES ⟸137 — NATURE OF MORTGAGEE'S RIGHT.

A mortgagee has no estate or title to realty, but only a lien which is enforceable by foreclosure of his mortgage.

3. PARTITION ⟸88—RELIEF INCIDENTAL TO PARTITION—INCUMBRANCES ON PROPERTY—MORTGAGE LIEN.

Under L. O. L. §§ 422–483, governing the partition of real property, reading together section 437, making the lien of a creditor or an undivided portion a lien upon the severed portion thereafter, and section 461, requiring notice to be given that the estate is sold subject to a lien, all that can be done in a suit of partition concerning a mortgage lien is to attach it to the partitioned portion of the property to which it belongs.

4. ABATEMENT AND REVIVAL ⟸8(5)—ANOTHER ACTION PENDING—IDENTITY OF CAUSES OF ACTION.

A mortgage foreclosure suit is not abated by a pending suit for partition of the mortgaged premises brought by the mortgagor and to which the mortgagee was made a party defendant, the procedure for foreclosure under L. O. L. §§ 422–434, affording greater relief to the mortgagee than he could obtain in a partition suit, which is intended to adjust rather than enforce the rights of parties, and under which no personal decree against the debtor could be obtained.

5. ABATEMENT AND REVIVAL ⟸8(4)—OTHER ACTION PENDING.

Lis pendens is not a good plea unless the judgment in the first action, in affording the same or greater relief, would bar a judgment in the second.

Department 1.

Appeal from Circuit Court, Multnomah County; J. P. Kavanaugh, Judge.

Suit by the Ukase Investment Company against Walter V. Smith and wife, to which F. H. Welcome was made a defendant. A demurrer to defendants' plea in abatement was sustained, and decree entered for plaintiff, and defendants appeal. Decree affirmed.

The plaintiff brought this suit to foreclose a mortgage given to it by Walter V. Smith and his wife upon his undivided interest in fee in certain real estate described in the complaint. The defendant Welcome is made a defendant on the allegation that he is the holder of a tax certificate for taxes assessed and unpaid on Smith's share in the property. Smith and his wife interposed a plea in abatement to the effect that before the commencement of the instant foreclosure proceeding he had instituted a suit to partition the property, to which suit the plaintiff here was made a defendant, and that as such it has there answered, declaring the amount and nature of its lien by virtue of the mortgage in question, and contended that the realty could not be divided without material injury to the rights of the parties, in consequence of which the entire estate should be sold, and, among other things, that the proceeds of the sale of Smith's portion should be applied to the payment of such judgment as the plaintiff here might recover in its foreclosure suit, which was pending at the time its answer was filed. A demurrer to this plea was sustained by the circuit court, and, as stated in the brief of the appellant, Walter V. Smith:

"Only one question is presented to the court by the appeal, namely, can the plaintiff maintain its suit over the objection of the defendants while the partition suit is pending and undetermined?"

A. H. McCurtain, of Portland (Bauer & Greene and A. H. McCurtain, of Portland, on the brief), for appellants.

Wirt Minor, of Portland (Teal, Minor & Winfree, of Portland, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). Partition of real property is governed by statute. The procedure laid down in this state is part of the Code of 1862, which contains also provisions for the foreclosure of liens upon real property. The latter is delineated in chapter 5 of title 6, L. O. L., and the former in the following chapter, L. O. L. §§ 422–483. It is primary learning that all parts of the same statute must be construed together, and so that all shall stand if possible.

[1] As stated in section 435, L. O. L., the only persons who can institute a suit in partition are those who hold as tenants in common, and have an estate of inheritance, or for life or years, or by virtue of a vested remainder or reversion in any real property. No mere lienholder can sue in partition. It is required by the following section that the interest of all persons in the property shall be particularly set forth in the complaint, as far as known to the plaintiff.

[2] We must remember in passing that in Oregon a mortgagee has no estate or title to realty, but only a lien which is enforceable by foreclosure of his mortgage. It is laid down in section 437 that, at his own election,

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a plaintiff may prosecute as a defendant a creditor having a lien on the property or any portion thereof. The section concludes with this language:

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"When the lien is upon an undivided interest or estate of any of the parties, such lien, if a partition be made, is thenceforth a lien only upon the share assigned to such party; but such share shall be first charged with its just proportion of the costs of the partition, in preference to such lien."

Section 442 is here set down in full:

"If it be alleged in the complaint and established by evidence, or if it appear by the evidence, without such allegation in the complaint, to the satisfaction of the court, that the property or any part of it is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof, and for that purpose may appoint one or more referees. Otherwise, upon the requisite proofs being made, it shall decree a partition according to the respective rights of the parties, as ascertained by the court, and appoint three referees therefor, and shall designate the portion to remain undivided for the owners whose interests remain unknown or not ascertained."

Thus far it is plain that the normal result of a suit in partition is to divide the property as it stands, making the liens upon hitherto undivided portions a charge thereafter only upon tracts designated as the property of the lien debtors. Such a conclusion is the rule. A sale of the property is the exception.

It remains to be seen by an examination of the statute whether the result, as to a mortgage lien, is changed by the subsequent sections of the enactment. It is true that by section 440 a lien creditor defendant is required to declare in his answer how his lien is created, the amount of the debt secured thereby and remaining due, and whether such debt is secured in any other way, and, if so, the nature of such other security. The reason for the requirement respecting the nature of the other security is found in section 457, which gives the court the power to require such a lien creditor to marshal his securities, exhausting other assurances for the payment of his debt before attacking the undivided interest in the land which is made the subject of partition. The reason for calling upon the lien creditor to declare the amount of his lien is that under section 437 the court may declare the amount of the lien which thenceforward attaches to the portion of the land set apart to the lien debtor. By section 444 a decree confirming a partition is binding and conclusive on parties who have an interest in the estate as owners in fee, or as tenants for life or for years, or as entitled to the reversion, remainder, or inheritance of such property or any part thereof after the termination of a particular estate therein, etc. This category does not include mortgage lien holders, for, as already pointed out, such persons have no estate in the realty sought to be partitioned. Indeed, section 445 expressly declares that the decree and partition shall not affect any person except such as are specified in the preceding section. Section 447 provides that if the court is satisfied from the report of the referee that the property or any separate part thereof is so situated that a partition cannot be made without great prejudice to the owner, it then can make a decree directing the referees to sell the same or any part thereof. In that event, as required by section 449, before making the order of sale, if lien creditors, other than those by judgment or decree, have not been made parties, they must be made defendants on motion of either of the original parties. By the following section the plaintiff may produce the certificate of the county clerk, showing unsatisfied liens by judgment or decree affecting the property, or any part thereof, and unless this certificate is furnished the court may appoint a referee to ascertain the amount and priority of such judgment liens. Notice to such creditors may be served, and a procedure is prescribed to be observed before the referee in ascertaining the amount of such liens as arise from judgment or decree. Manifestly this procedure does not include more than the liens of the latter class, and excludes the consideration of liens by mortgages.

We note that under section 456:

"The proceeds of the sale of the incumbered property shall be distributed by the decree of the court, as follows:

"1. To pay its just proportion of the general costs of the suit;

"2. To pay the costs of the reference;

"3. To satisfy the several liens, in their order of priority, by payment of the sums due, and to become due, according to the decree;

"4. The residue among the owners of the property sold, according to their respective shares."

In our judgment, the liens mentioned in the order of distribution refer to those already adjudicated by a judgment or decree. It is provided in section 458 that the proceedings to ascertain the amount of the liens, as already stated, shall not delay the sale nor affect any other party whose rights are not involved in such proceedings. It is said in section 461:

"All sales of real property made by the referees shall be made by public auction to the highest bidder, in the manner required for the sale of real property on execution. The notice shall state the terms of sale, and if the property or any part of it is to be sold subject to a prior estate, charge, or lien, that shall be stated in the notice."

A sale may be made on credit. Section 462. Securities may be taken by the referee

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for the payment of the purchase price. Section 463.

[3] Reading together, as we must, section 437, making the lien of a creditor on an undivided portion a lien upon the severed portion thereafter, and section 461, requiring notice to be given that the estate is sold subject to a lien, we conclude that all that can be done in a suit of partition respecting a mortgage lien is to attach it to the partitioned portion of the property to which it belongs. If it is to be foreclosed in the partition suit, there would be no reason for announcing to the purchaser that the land it affects will be sold subject to its lien; for the very purpose and scope of a foreclosure sale is to divest the property from the lien and pass it unincumbered to a purchaser. The partition statute is utterly silent respecting the enforcement of a mortgage lien. The whole purpose and intent of the partition procedure is to adjust rather than to enforce the rights of the parties. The reason for the distinction made in the statute between liens by judgment or decree and other liens is that the amounts of the former have already been adjudicated, the issues have been determined, and nothing remains to be done except to enforce the decree. The ministerial act of the county clerk in certifying to their existence is sufficient to insure their liquidation out of the proceeds of sale. On the other hand, the validity of and the amount due on a mortgage are yet to be determined. More than that, there is a wide difference between declaring and establishing a right of a party respecting a tract of land and the enforcement of that right. It is true the Ukase Investment Company as defendant in the partition suit asks for a sale of the property; but the reason it gives is that the realty cannot be divided without prejudice to the owners. Moreover, the complaint there states that the company is the owner in its own right of one-third of the land, and in that character it may urge the sale instead of division of the tract. It also prays that the share of Smith in the proceeds of sale be applied towards satisfaction of any judgment it may thereafter obtain against him in the foreclosure suit; but this falls far short of seeking foreclosure in the partition proceeding. It only means that if the company becomes a judgment creditor, as it may by final decree in foreclosure, it can share as such in the distribution prescribed in section 456. This is quite consistent with the sale in partition of Smith's part subject to the mortgage as authorized by section 461.

In other words, in its character as a judgment creditor the company would be entitled to its distributive share of whatever Smith's share would bring subject to the mortgage, and besides, as mortgagee might sell on foreclosure as against the purchaser for the balance of the debt remaining unpaid.

[4] We come then to the question, already stated, whether this mortgage foreclosure suit can be maintained while the partition suit is yet undetermined. In other words, will the partition suit abate the foreclosure suit? The matter is thus treated in 1 C. J. 72:

"As has also been stated, one of the generally recognized tests of the identity of causes of action is this: Is full and adequate relief obtainable in the prior suit? If it is, then the second suit is unnecessary and vexatious and should abate; but it is otherwise if the whole relief sought in the second suit is not obtainable in the first. If the relief which may be given or the remedies available in the second suit are more extensive than can be attained in the first, a plea to the second suit of the pendency of the first is not good. The rule in equity is the same as at law, that the plea of a prior suit pending can be pleaded when, and only when, all the relief sought in the second action is obtainable in the first."

[5] The principle seems to be that lis pendens is not a good plea unless the judgment in the first action would bar a judgment in the second. Foster v. Napier, 73 Ala. 595; Dick v. Gilmer, 4 La. Ann. 520; Martin v. Splivalo, 69 Cal. 611, 11 Pac. 484; Gilpin v. Carroll, 92 Md. 44, 47 Atl. 1021. The rule is otherwise stated thus: If more relief can be had in the second suit than in the first, the latter will not support a plea in abatement of the former. Larter v. Canfield, 59 N. J. Eq. 461, 45 Atl. 816; Jordan v. Underhill, 91 App. Div. 124, 86 N. Y. Supp. 620; Reis v. Applebaum, 170 Mich. 506, 136 N. W. 393; Griffing v. Griffing Iron Co., 61 N. J. Eq. 269, 48 Atl. 910; Carr v. Lyle, 126 Mich. 655, 86 N. W. 145. Or, as stated in Way v. Bragaw, 16 N. J. Eq. 217, 84 Am. Dec. 147:

"To abate the second suit, the remedy in the first must be coextensive, and equally beneficial to the complainant."

Recurring to the provisions of chapter 5 of title 6 we find that a lien upon real property, other than that of a judgment or decree, shall be foreclosed, and the property adjudged to be sold to satisfy the debt secured thereby by a suit. In such a proceeding the lien creditor may recover a personal decree against the debtor, which, under certain circumstances, may be satisfied out of other property belonging to the debtor. No provision for such relief is authorized by the partition procedure. In foreclosure a sale for the satisfaction of the decree may be compelled at the suit of the plaintiff, and it is for cash, subject, of course, to the right of redemption as upon sale by execution. Whether a sale shall be made at all and, if made, the terms thereof are subject to the discretion of the court in a partition suit,

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with the restriction that the court cannot order a sale unless it shall be made to appear that actual partition of the land cannot be made without detriment to the owners. Under such circumstances the mortgagee is not bound to surrender his remedy by foreclosure at the option of any tenant in common who desires to partition the land, and much less if the latter also happens to be the mortgagor. When the latter gave the mortgage it was subject to the provisions of the statute respecting the foreclosure, coupled with a personal judgment against himself. He cannot circumscribe or hinder this right of the mortgagee by mere election to make him a party defendant in a partition suit. In brief, the established procedure for foreclosure affords greater and more efficient relief to the creditor than he can obtain in a partition suit, the primary object of which is to adjust rather than to enforce the rights of the parties. For this reason, if for no other, the foreclosure is not to be abated by the partition. The decree of the circuit court is affirmed.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

(107 Wash. 115)

KIENBAUM et al. v. RATHFON REDUCTION WORKS et al. (No. 14832.)

(Supreme Court of Washington. May 15, 1919.)

1. MINES AND MINERALS ⟸54½, New, vol. 6A Key-No. Series—MORTGAGES—CONSIDERATION.

A contract under which a deed was taken to mining property to secure repayment of advances to be made *held* not to require the party making the advances to pay a certain claim in full, but only to apply thereon a pro rata share of royalties received.

2. MINES AND MINERALS ⟸54½, New, vol. 6A Key-No. Series—MORTGAGES—CONSIDERATION — CONDITIONS PRECEDENT TO FORECLOSURE.

Where a party took a deed to mining property to secure advances to be made, agreeing to apply a certain share of royalties received toward the payment of a certain indebtedness owing by the mining company, it was a condition precedent to decreeing a foreclosure that the royalties be deposited with the mining company for the benefit of such third person, and the party making the advances was not entitled to a foreclosure by showing that it had applied all the royalties on other debts of the mining company which it had assumed.

3. BILLS AND NOTES ⟸126 — ATTORNEY FEES.

The allowance of an attorney's fee of $300 in a suit on a note for $8,572.76, providing for a reasonable attorney fee, was sufficient.

Department 2.

Appeal from Superior Court, Ferry County; C. H. Neal, Judge.

Action by Fred Kienbaum and others against the Rathfon Reduction Works and others. Judgment for defendants, and plaintiffs appeal. Reversed and remanded, with directions.

A. H. Kenyon, of Spokane, for appellants.
George V. Alexander, of Republic, for respondents.

FULLERTON, J. Some time prior to March 10, 1908, the county of Ferry became the owner, through tax foreclosure proceedings, of two certain mining claims situated within its boundaries. On the day named it leased the property to one Richard Mulroy for a term of two years; the lease providing that Mulroy should mine the property, ship and smelt the ores so mined, and turn over to the county a certain percentage of the smelter returns. The lease also granted Mulroy an option to purchase the property for a stated consideration, agreeing that the sums received as royalties should be credited on the purchase price if the option was exercised. Mulroy assigned his interests in the lease to one J. L. Harper, and Harper in turn assigned to a corporation known as the New Republic Company.

The option to purchase was not exercised by the lessee or his assigns, and on March 8, 1910, the county entered into an agreement with the New Republic Company for a sale of the property. In this agreement the purchaser agreed to pay for the property the sum of $29,075.83, in the manner following: It agreed to enter into and hold possession of the property; operate the same; ship and smelt the ores taken from the mine; pay to the county a certain percentage of the net smelter returns for the first year; an increased percentage of such returns for the first half of the second year; a further increased percentage for the second half of the second year, and at the end of the second year to pay to the county such balance of the purchase price as remained, after crediting thereon the sums received from the smelter returns; the county agreeing to deed the property to the purchaser or its assigns on the payment of the purchase price.

On September 23, 1910, the New Republic Company assigned its contract of purchase to D. W. Rathfon, A. L. Bradley, and F. W. Bewley. As a consideration for the assignment, the assignees assumed the obligations of the assignor to the county of Ferry, and, in addition to the royalties payable to the county by the terms of that contract, agreed to pay into the treasury of the New Republic Company a royalty of 5 per cent. on the values of the smelted ores until the expira-

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tion of the contract with the county, and, if they then purchased the property, would pay to the New Republic Company the sum of $100,000. They further agreed to organize a holding company and assign to such company the contract of purchase. Pursuant to this agreement the assignees organized a corporation under the name of Rathfon Reduction Works, and made the assignment as agreed; the corporation, as part of the consideration for the assignment, assuming the obligations of the assignors with the New Republic Company. The Rathfon Reduction Works entered into possession of and operated the property. It did not, however, meet the final payment due the county at the time it matured, and extensions of time were granted it by the county. The Rathfon Reduction Works seems not to have been at all times able to meet its current expenses, and Rathfon, Bradley, and Bewley advanced moneys to its use. These sums were carried on the books of the corporation as the "Rathfon Trustee Account," and were the acknowledged obligations of the company, which it had agreed to repay with interest. At the time of the transfer by the New Republic Company to Rathfon, Bradley, and Bewley the company owed certain obligations, the principal one of which was a note to John Hollis for the sum of $7,500. This note was expected to be liquidated from the royalties agreed to be paid to the company in the agreement of transfer.

On January 7, 1914, the note and account mentioned were unpaid. The Rathfon Reduction Works seemed also to be unable to satisfy the county that the obligation remaining due to it on the purchase price of the property would ultimately be paid. This condition led to the following agreement between the appellants in the present action, who were then stockholders in the Rathfon Reduction Works, and that corporation, namely:

"Agreement for which, for valuable consideration, the receipt whereof is hereby acknowledged, Fred Kienbaum, John Hollis, and F. B. Babcock, parties of the first part, and the Rathfon Reduction Works, a corporation, party of the second part, agrees each for himself, his heirs or assigns, to be firmly bound by these presents as follows, to wit:

"The parties of the first part undertake and agree that on or before March 1, A. D. 1916, they will pay or cause to be paid to the treasurer of Ferry county all of the amount due and necessary to fully satisfy the requirements of the present lease and bond, thereby completing title and transfer by deed in fee simple to the Rathfon Reduction Works all of the mining property named in said lease and bond, more particularly described as the Republic and Cecelia lode mining claims and mining claims, and to pay the amount of one certain note for $7,500 given to John Hollis, trustee, by the New Republic Company, and the amount of indebtedness represented in legal account credited to D. W. Rathfon, trustee, on the books of the Rathfon Reduction Works, or the sum total of all money advanced by D. W. Rathfon, A. L. Bradley, and F. W. Bewley due and not paid on or before March 1, 1914, and all of which payments shall be made upon the following terms and conditions:

"Thirty per cent. of all net smelter or bullion returns mined and milled from the above-mentioned mining property shall be immediately paid to the Waverly Exchange Bank for the benefit of the said parties of the first part under the terms of this agreement, on all ore shipped or milled after March 1, 1914. Net smelter returns shall mean the amount received after freight and treatment charges have been deducted, and net bullion returns shall mean the amount received after deducting reasonable milling charges.

"A correct account of all amounts and interest accruing on said John Hollis Trustee note, D. W. Rathfon Trustee account, and the amount due and payable to Ferry county on lease and bond shall be kept and payments made, set aside or credited as follows: Considering at date of each payment the amount due and not yet paid by the company to or for Ferry county, John Hollis trustee note, and D. W. Rathfon Trustee account as each a separate unit; then pay to each party or fund its respective pro rata share as represented in the aggregate of all the amounts, excepting always that 5 per cent. of such net smelter or bullion returns which are presumably paid to the New Republic Company shall first be deducted from any payment on the John Hollis note, and the balance of note prorated.

"If any time it shall be necessary for the parties of the first part to advance money to complete payment on lease and bond, then the said party of the second part shall cause to be executed a note and first mortgage on the above-mentioned property covered by lease and bond in favor of the said parties of the first part for the whole amount due them; note and mortgage due and payable on or before March 1, A. D. 1916, and to bear interest at the rate of 10 per cent. per annum.

"On March 1, A. D. 1916, the party of the second part shall assume and pay any remaining balance on said John Hollis Trustee note and D. W. Rathfon Trustee account, thereby relieving the said party of the first part from any further responsibility in the matter.

"The said party of the second part shall continue to operate and carry on the business of mining the property during the life of this agreement, under the same restrictions, conditions, and method of mining as required by the present lease and bond.

"The party of the first part shall at all times protect the party of the second part in legal possession of the said mining property, and if any payments are due or necessary to be made to Ferry county to fully protect the company's interests, then any such amount of payment may be made directly to said Ferry county and the remainder paid to the Waverly Exchange Bank as above mentioned.

"For and in consideration of the above-mentioned guaranty, possible payments, and services, the said Rathfon Reduction Works, party of the second part, will properly issue to the Waverly Exchange Bank 82,124 shares of the capital stock of said company and deliver same

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to said bank under proper escrow agreement to hold such stock until all of the above-mentioned indebtedness shall be paid, and then deliver to the order of the above-mentioned parties of the first part.

"Signed and executed at Republic, Wash., this 6th day of January, A. D. 1914."

Pursuant to the agreement the appellants, on March 3, 1914, paid to Ferry county on the purchase price of the property the sum of $5,000, and on July 22, 1914, paid the further sum of $16,950, the balance due thereon, taking a deed from the county directly to themselves. The Rathfon Reduction Works continued to operate the property for some time longer paying in royalties to the Waverly Exchange Bank under the provisions of the agreement set forth the sum of $10,300. Out of this sum the appellants paid a portion of the Hollis note and certain other obligations, but paid no part thereof on the Rathfon Trustee account. On this account there was due on January 6, 1914, the sum of $9,060.23.

The appellants treated the deed from Ferry county to them as security for the sums advanced by them for the use of the Rathfon Reduction Works, and on November 22, 1916, began the present action to foreclose it as a mortgage. In their complaint the appellants set forth the several agreements hereinbefore mentioned, including the agreement between themselves and the Rathfon Reduction Works; set forth their advancements to the county of Ferry made in pursuance of the agreement; alleged ownership of the Hollis note, and that there remained due and unpaid thereon the sum of $8,572.76, and that the sum of $1,500 is a reasonable sum to be allowed as attorney's fees for bringing suit thereon. While they alleged generally a full performance of the terms of the agreement, no mention was made of the Rathfon Trustee account, nor was mention made of the $10,300 paid to the Waverly Exchange Bank for their use. The prayer was for the recovery of $35,801.88, for an attorney's fee of $1,500, and a foreclosure of the lien and a sale of the property thereunder in the usual manner. The answer put in issue certain of the allegations of the complaint, set up the several agreements hereinbefore outlined, and pleaded a breach on the part of the appellants of the agreement entered into between the parties hereto. It also set forth the payment of the royalties to the Waverly Exchange Bank pursuant to the last-named agreement, that the appellants had failed to account for the same, and that it had not paid the Rathfon Trustee account. The prayer was for relief appropriate to its allegations. A reply was filed putting in issue the affirmative allegations of the answer.

On the issues as framed the cause was tried to the court. At the conclusion of the evidence the court found the deed from Ferry county to the appellants to be a mortgage and security for the sums advanced and agreed to be advanced by the appellants, and that the appellants were entitled to a decree foreclosing it as a mortgage. Striking the account between the parties, the court further found that there remained due on the Hollis note, after applying the payments thereon applicable thereto, the sum of $587.14; that the sums paid to the county of Ferry, with interest, amounted to the sum of $27,206.27; that the appellants had agreed to pay the Rathfon Trustee account, and had not paid the same; that the amount due thereon, with interest, was $11,956.31; and that the appellants were entitled to an attorney's fee of $300. A decree was entered for the aggregate of these sums; the court decreeing, however, that no execution or order of sale should be entered on the decree until the appellants should pay to the respondents the amount of the Rathfon Trustee account.

On this appeal the appellants assign that the court erred: (1) In holding that they were obligated to pay the Rathfon Trustee account; (2) in holding, if they are obligated to pay such account, that the sum due them was the amount found by the court, the amount being less than the sum actually due; and (3) in holding that the sum of $300 was a reasonable sum to be allowed as attorney's fees.

[1] The appellants contend in support of the first assignment of error that the contract between the parties by its express terms does not obligate them to pay the Rathfon Trustee account. This contract we have hereinbefore set out in full. Its perusal will show that it is somewhat inartificially drawn. In the first paragraph, after the introductory matter, it seems to be expressly provided that the appellants will pay the account on or before March 1, 1916. But this is followed by a statement that payments "shall be made on the following terms and conditions," and this clause by provisions for the operation of the mine by the respondents, for the payment to the Waverly Exchange Bank for the use of appellants of certain royalties, and for the prorating by the appellants of these royalties on this account with others named. Then follows an explicit provision that on "March 1, A. D. 1916, the party of the second part, Rathfon Reduction Works, shall assume and pay any remaining balance on said * * * Rathfon Trustee account, thereby relieving the said party of the first part, the appellants, from any further responsibility in the matter." This, it seems to us clear, is not an absolute agreement to pay the account. The appellants but promised to pay thereon a pro rata share of the royalties they should receive from the operation of the mine up to a certain date, and, if it was not then paid,

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the remainder was to be assumed by the respondents. As between these parties, therefore, there was no binding agreement to pay the account.

We are aware that the trial court rested its conclusion on the acts of the parties, construing those acts to be an interpretation of the contract in accordance with the respondent's contention. But we can find no justification in the evidence for this conclusion. The appellants' acts, it seems to us, indicate a repudiation of any obligation with respect to the account rather than an agreement to pay it.

[2] This conclusion, however, does not mean that the appellants are to escape liability entirely with respect to the account. They did not pay thereon the pro rata share the account was entitled to receive of the royalties and for this they are liable. Nor can it be satisfied by crediting the amount due on the obligation of the respondent to the appellants. In the execution of the contract the parties recognized the fact that the account was due to third persons who had advanced the money which it represented to the respondent, and recognized the fact that it was to be applied to their uses. Such sums as were received from the royalties therefore must be paid to the respondent for the benefit of the persons making the advancement as a condition precedent to a decree of foreclosure.

In arriving at the amount due the court credited the entire amount received from the royalties to the Hollis note. Owing to the view the court took of the contract, this was a proper disposition of that fund. Since we hold that a part of this fund is payable to the trustee account, the credit on the Hollis note is too large by the amount rightly payable to the trustee account.

[3] The attorney's fee allowed was sufficient. The deed, even as construed as a mortgage, did not carry with it an attorney's fee for its foreclosure other than the attorney's fee allowed as a part of the statutory costs. The only part of the obligation sued upon which provided for an attorney's fee in costs of suit was the Hollis note, and for suit thereon the attorney's fee allowed was reasonable.

The decree entered is therefore reversed, and the cause remanded, with instructions to ascertain the amount due on the sums advanced by the appellants to Ferry county, with interest, ascertain the amount due on the Hollis note, and credit thereon the sums paid the Waverly Exchange Bank as royalties for the use of the appellants, less the pro rata share thereof payable to the Rathfon Trustee account; require the appellants to pay into court for the use of the beneficiaries of the trustee account the last-mentioned sum, and when it is so paid enter a decree of foreclosure in the usual form for the sums ascertained to be due.

PARKER, MOUNT, HOLCOMB, and MAIN, JJ., concur.

(107 Wash. 86)

FIRST SECURITY & LOAN CO. v. ENGLEHART. (No. 15096.)

(Supreme Court of Washington. May 14, 1919.)

1. STATUTES ⟸231—CONSTRUCTION—CODE.

Probate Code 1917, § 92, being a complete and comprehensive act upon the subject-matter of its title, must be construed as a whole, and the sections and subdivisions must be harmonized, read, and construed together.

2. EXECUTORS AND ADMINISTRATORS ⟸231—CLAIMS AGAINST ESTATE—CONSTRUCTION OF STATUTE.

Probate Code 1917, § 107, providing that a claim against estate not filed within six months after date of publication of notice to creditors shall be barred, is mandatory.

3. EXECUTORS AND ADMINISTRATORS ⟸222(1)—NONINTERVENTION WILL—CLAIMS AGAINST ESTATE—NECESSITY OF FILING.

Probate Code 1917, § 92, does not dispense with the necessity of filing claim against estate being administered under a nonintervention will, in view of section 107, providing that claims not filed shall be barred; latter statute applying to administration of estates under nonintervention as well as under other wills.

4. EXECUTORS AND ADMINISTRATORS ⟸227(3)—CLAIMS AGAINST ESTATE—SUFFICIENCY OF CLAIM.

Under Probate Code 1917, § 108, an unsworn statement of a claim filed against an estate is insufficient.

Department 1.

Appeal from Superior Court, Yakima County; Harcourt M. Taylor, Judge.

Action by the First Security & Loan Company against Gertrude S. Englehart, executrix of the last will and testament and trustee of the estate of Ira P. Englehart, deceased. From a portion of the judgment rendered, plaintiff appeals. Affirmed.

Richards & Fontaine, of North Yakima, for appellant.

Rigg & Venables, of North Yakima, for respondent.

MITCHELL, J. On June 30, 1916, Ira P. Englehart gave his note for $14,370 to the First National Bank of North Yakima. To secure its payment he deeded to plaintiff, First Security & Loan Company, two pieces of real property, and assigned to it 30 shares of the capital stock of the Klickitat & Sim-

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coe Irrigation Company. A trust agreement in writing was entered into at the same time whereby it was agreed that plaintiff should hold title to the property to protect and secure the indebtedness due the bank. It gave plaintiff the right to sell the property at such price as it deemed advisable at any time the bank considered it necessary. It provided that, if the proceeds of sales of the property were not sufficient to pay the debt, Englehart was obligated to pay the balance. Englehart died on December 8, 1916, leaving a nonintervention will by which he devised all his property to his wife, Gertrude S., and their two children. The will was admitted to probate by the superior court of Yakima county on December 12, 1916, and Gertrude S. Englehart, nominated therein as executrix, was duly appointed and on the same day qualified as executrix. On December 15, 1916, for the purpose of making proof of the solvency of the estate, the attorney for the executrix requested and received from the bank a statement of the Englehart indebtedness. The statement was not verified. No other statement of the claim was ever presented to the executrix or her attorney. Pursuant to an order of the superior court she gave due and proper notice to creditors, the first publication of which was on December 18, 1916. In January, 1917, a part of the property held in trust was sold, with the written consent of the executrix, and the proceeds applied on the note. Thereafter, on February 23, 1917, May 25, 1917, August 10, 1917, and November 7, 1917, the executrix made payments on the note at the bank and was at all times familiar with its face value.

After December 18, 1917, the time within which creditors were allowed to present their claims having expired, the bank was notified that because of its failure to present a duly verified claim the estate would not be responsible for any amount, and that it must look only to the property held in trust to secure the payment of the note. Thereupon the bank assigned its rights and transferred the note to plaintiff, which brought this action demanding judgment against the executrix as such for the amount due on the note; that the trust property remaining on hand be sold and the proceeds applied on the amount found due; and that the deficiency, if any, be declared a just and valid claim against the estate. Upon a trial the court made findings and conclusions, and entered judgment favorable to plaintiff, except that it was not entitled to have the amount due on the note allowed as a claim against the estate, but that it must look solely to the security held by it for the satisfaction of the debt.

Plaintiff has appealed from that portion of the judgment denying it a judgment against the estate, or the defendant as executrix thereof, other than the right to have the trust property sold and the proceeds applied to the payment of the debt.

Appellant states the appeal presents only two questions:

"First. Was it necessary under the existing status of our probate law to present the claim to the executrix, who was administering the estate under a nonintervention will? Second. If presentation was required, what was necessary to constitute such a presentation as would establish the debt as a valid claim against the estate?"

As to the first proposition, it will be observed that the Probate Code of 1917 became effective about the middle of the year within which creditors were notified to present their claims in this estate. Insisting there is a difference in the 1917 law as compared with the law prior thereto, with respect to the matter of the presentation of claims where the estate is being administered under a nonintervention will, appellant contends the later law controls in this case. The difference between the pertinent portions of the old and of the new statute concerning nonintervention wills is that, whereas the prior law (Session Laws of 1897, § 1, p. 285, same being section 1444, Rem. Code) provides:

"* * * That in all such cases the claims against such estates shall be paid within one year from the date of the first publication of notice to creditors to present their claims, unless such time be extended by the court, for good cause shown, for a reasonable time. * * *"

—the present law (Probate Code of 1917, § 92; c. 156, p. 666, Laws of 1917) provides:

"* * * It shall not be necessary to take out letters testamentary or of administration, except to admit the will to probate and to file a true inventory of all the property of such estate and give notice to creditors and to the state board or person having charge of the collection of inheritance tax, in the manner required by existing laws."

This court, in the case of Foley v. McDonnell, 48 Wash. 272, 93 Pac. 321, upon quoting the provisions of the nonintervention will statute of 1897 with reference to notice to creditors to present claims, and the statute requiring creditors to present their claims, said:

"These two provisions last above quoted seem to make it clear that, in cases of nonintervention wills, creditors shall present their claims within one year of the publication of notice, and failure so to do bars such claim the same as in other classes of wills. It is true this court held otherwise in Moore v. Kirkman, 19 Wash. 605, 54 Pac. 24, and possibly in other cases. But these cases arose under the statute before 1897, when the amendments above quoted were made to the statute in force at that time. Under the present statute, we are of the opinion that it is the duty of the executor, under wills like the one in question, to publish a notice to creditors, and failure of the creditors to file a claim within the year bars such claim."

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[1] Discussing the probate law of 1917, counsel for appellant notices that subdivision 13 of it is devoted to "Settlement of Estates Without Administration," contains the section with reference to nonintervention wills, has no provision directing creditors to present their claims, and makes the argument that this subdivision seems, and apparently is intended, to be complete in itself and to contain all the law governing the administering of estates under nonintervention wills. We are not convinced by the argument. The law of 1917 is designated "Probate Code," and entitled "An act to establish a code of probate law and procedure, including the making and probating of wills, administration of estates of deceased persons," etc. It consists of 223 sections, and, besides a portion designated "General Provisions," it has 23 subdivisions, being altogether a complete and comprehensive act upon the subject-matter of its title. The whole constitutes a general system which must be respected as such in all attempts at construction. The sections and subdivisions are in pari materia, and by the well-established rule must be harmonized, read, and construed together, thus forming a complete statutory structure enacted all at the same time. State ex rel. Miller v. Griffen, 46 Wash. 489, 90 Pac. 661; 2 Lewis' Sutherland, Statutory Construction (2d Ed.) p. 847.

Section 107 of the Probate Code of 1917 (page 672) requires that:

"Every executor * * * shall, immediately after his appointment, cause to be published * * * a notice to the creditors of the deceased, requiring all persons having claims against the deceased to serve the same on the executor * * * or his attorney of record, and file [the same] * * * within six months after the date of the first publication of such notice. * * * If a claim be not filed within the time aforesaid, it shall be barred."

[2] This statute is but a repetition of the prior law as found at sections 1470 and 1472, Rem. Code, except that formerly a creditor had a year in which to present his claim. Such statute of nonclaim is mandatory. Empson v. Fortune, 172 Pac. 873, and cases cited; In re Parkes' Estate, 178 Pac. 83.

Counsel for appellant, contending for the negative as to each, the necessity for presenting a claim, and the necessity for its verification in the case of a nonintervention will, relies upon numerous Texas cases, and the early case of this court of Moore v. Kirkman, 19 Wash. 605, 54 Pac. 24. Obviously they are not in point, because our present statute differs from the statutes those cases construed. The statute of Texas provides:

"Any person capable of making a will may so provide in his will that no other action shall be had in the county court in relation to the settlement of his estate than the probating and recording of his will, and the return of an inventory, appraisement and lists of claims of his estate." Article 1995, Revised Statutes of Texas 1895; Vernon's Sayles' Texas Civil Statutes 1914, vol. 2, art. 3362.

It is to be observed that the Texas statute makes no provision for notice to creditors. Our statute, prior to 1897, which was section 955, vol. 2, Hill's Code, was to the same effect as the Texas statute, which accounts for the rule of Moore v. Kirkman, supra, as remarked by this court in the case of Foley v. McDonnell, supra.

[3] So that, if we consider this case in the light of the 1917 statutes with reference to administering estates under nonintervention wills, notice to creditors and the necessity for presenting claims, or the similar statutes in force just prior thereto, it necessarily follows there was necessity for the appellant to present its claim to the executrix prior to the expiration of one year from the date of the first publication of her notice to creditors.

[4] Appellant's second point is important because only an unsworn statement of the claim was furnished by the bank. We have seen that the statute at all times since 1897 required every executor to give notice to creditors to present their claims. By section 108 of the Probate Code of 1917, "every claim served and filed," and by the prior law (section 1473, Rem. Code) "every claim presented," is required to be supported by the affidavit of the claimant that the amount is justly due, no payments have been made thereon, and there are no offsets to the same. To declare that there may be a proper presentation of a claim against an estate without its being supported by the affidavit of the claimant would at once nullify the law. This court, in the case of Empson v. Fortune, supra, in writing on this subject, after stating that the claim there involved was not supported by the oath of any one as required by the statute, and that it was contended the obligation was not such as is required to be supported by affidavit upon its being presented to an executor, and that it was further contended the executors had waived formal presentation of the claim, gave a list of cases of this court effectually answering those contentions, and said:

"By these decisions it has become the settled law of this state that the proper presentation of a claim is a fact to be proven essential to the cause of action, and that an executor or administrator cannot, because of the mandatory provisions of our claim statute, waive such presentation so as to estop himself from defending upon the ground of want of such proper presentation."

Again, in the case of Ward v. Magaha, 71 Wash. 679, 129 Pac. 395, this court said:

"Claims against estates are collectible under the statute, and not otherwise."

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The statutes are plain. A claim must not only be presented, but it must be supported by affidavit.

Judgment affirmed.

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CHADWICK, C. J., and TOLMAN, MACKINTOSH, and MAIN, JJ., concur.

(106 Wash. 561)

SHERIDAN et ux. v. O. E. DOHERTY, Inc. (No. 15092.)

(Supreme Court of Washington. April 28, 1919.)

1. LANDLORD AND TENANT ⟸79(1)—SUBLETTING—UNLAWFUL DETAINER.

If a lessee sublets the premises, or a portion of the premises, for the entire term, or the remainder of the term, the subletting will operate as an assignment, either of the entire estate or pro tanto, as the case may be, and the original lessor can maintain an action of unlawful detainer against the sublessee upon the expiration of the original lessee's term.

2. LANDLORD AND TENANT ⟸79(1), 296(2)—SUBLETTING.

A sublease for a term beyond the original term, the sublease containing independent and restrictive covenants, personal to the original lessee, distinguishing it in form from the original lease, is not a subletting which will bar the relation of landlord and tenant, but is an assignment which will give the owner the right to maintain unlawful detainer as against the sublessee at the expiration of the original term.

3. LANDLORD AND TENANT ⟸79(1)—RELATION—SUBLETTING.

In order to sustain a sublease, so that the relation of landlord and tenant does not exist between the owner and the subtenant, there must be a reversionary interest in the premises, however small it may be.

4. LANDLORD AND TENANT ⟸301(1)—SUMMARY PROCEEDINGS—SUBTENANTS.

A lessor may maintain an action of unlawful detainer against an assignee of the lease.

5. APPEAL AND ERROR ⟸1154—CORRECTION OF JUDGMENT.

Where the court in an unlawful detainer action entered a judgment, in form a judgment of ejectment, the judgment will not be reversed on appeal, but will be affirmed, with directions to enter a formal judgment under the statute.

Department 1.

Appeal from Superior Court, King County; John S. Jurey, Judge.

Action by John E. Sheridan and wife against O. E. Doherty, Incorporated. Judgment for plaintiffs, and defendant appeals. Affirmed.

Hughes, McMicken, Ramsey & Rupp and John P. Garvin, all of Seattle, for appellant.

Ryan & Desmond, of Seattle, for respondents.

CHADWICK, C. J. The facts of this case are admitted. One Gerald was a sublessee of the Seattle Brewing & Malting Company, which held by lease from the Gottstein Investment Company, the owner. The lease from the Investment Company to the Brewing Company, as well as the lease from the Brewing Company to Gerald, expired on August 31, 1917. On November 1, 1916, Gerald sublet a part of the premises to the appellant for a term expiring August 31, 1921. Unlike the two former leases, appellant's lease contained several restrictive covenants and clauses. The lease of the Brewing Company and the lease of Gerald having expired by limitation on August 31, 1917, and not having been renewed, the owner (Gottstein Investment Company) leased the entire premises to respondents. Appellant refused to quit upon demand. A notice was served under the forcible entry and detainer statute, and after three days appellant was ousted under the process of the court. The ouster was sustained at the trial, and judgment entered.

The principal reliance of appellant is that, whereas, an action of unlawful detainer will not lie unless the conventional relation of landlord and tenant exists between the parties (Meyer v. Beyer, 43 Wash. 368, 86 Pac. 661; Shannon v. Grindstaff, 11 Wash. 536, 40 Pac. 123; Seattle Operating Co. v. Cavanaugh, 6 Wash. 325, 33 Pac. 356), and there being no such relation by contract or by estoppel resting in the conduct of the parties, the court was in error in overruling its demurrer to the complaint and entering judgment upon the admitted facts.

It is admitted that ejectment will lie, but it is argued that, having seized upon the summary remedy given by statute in aid of the right of a landlord to repossess himself of his property at the termination of a lease, the court must accept the theory of the respondents and proceed only in the exercise of its special jurisdiction; that it cannot try out the general issue of title and take a judgment which is in legal effect a writ of ejectment. State ex rel. Seaborn Shipyards Co. v. Sup'r Ct., 172 Pac. 826; Jeffries v. Spencer, 86 Wash. 133, 149 Pac. 651; Big Bend Land Co. v. Huston, 98 Wash. 640, 168 Pac. 470. Whether this conclusion logically follows depends upon the soundness of the premise assumed by counsel; that is, that there is no privity of contract or estate between the parties and hence no relation of landlord and tenant.

It is argued that the owner, or one claiming under him, cannot maintain unlawful

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detainer, unless it is shown that the defendant holds in the same estate as the one who stands in immediate contractual relation with the owner or his immediate successor in interest; in other words, that appellant having taken possession under a lease containing restrictive clauses and covenants differing in form from the conditions and covenants contained in the contract of his immediate lessor, there is no such privity of estate or contract as will sustain a summary proceeding, that a forcible detainer implies a breach of contract, and, appellant being in no way answerable to respondents, either by express words or by the implication of its contract, they must find their remedy, if any, in ejectment.

[1] To sustain this theory we must assume as a premise that the demise from Gerald to appellant is in fact and in law a sublease. It is established that, if a lessee sublet the premises or a portion of the premises for the entire term or the remainder of a term, the subletting will operate as an assignment either of the entire estate or pro tanto, as the case may be. Tiffany, Landlord & Tenant, § 151; Taylor, Landlord & Tenant (9th Ed.) § 16; Underhill, Law of Landlord & Tenant, § 624; McAdam, Landlord & Tenant (4th Ed.) § 233. In Weander v. Claussen Brewing Ass'n, 42 Wash. 226, 84 Pac. 735, 114 Am. St. Rep. 110, 7 Ann. Cas. 536, the question was whether the relation of landlord and tenant existed between the owner and a sublessee of a part of the premises for the entire term. The court said:

"In order to pass upon this question it is necessary to determine what was the legal effect of the written instrument which they jointly executed. Appellant contends that it was a lease, and that it constituted him a tenant of respondent, while the latter urges that it was in law an assignment, and not a lease, for the reason that it transferred all rights which respondent acquired from its lessor, including the entire term under its lease, with no reversionary interest reserved. The instrument is in the form of a lease, and contains apt words designating it as such; but it covers the entire term which respondent had acquired by its own lease. No portion of the term whatever is reserved for reversion to respondent. It is conceded that the terms and covenants of the instrument are in the exact words of the lease held by respondent, and no other or new covenants are included therein. We think, under the authorities, that the legal effect of such an instrument is that of an assignment in full of the lease by its holder; that it is not a new lease, which creates a new lessor and subtenant, with the relation of landlord and tenant between the two, but the new nominal lessee becomes an assignee of the whole leasehold estate affected."

So if Gerald had sublet to appellant in the terms of his own lease, and for a term equal in time, respondents could maintain an action of unlawful detainer upon the expiration of Gerald's term, unembarrassed by the plea that the conventional relation of landlord and tenant did not exist.

[2] The controlling question then is whether a sublease for a term beyond the original term—the sublease containing independent and restrictive covenants distinguishing it in form from the contract of the immediate lessor with the owner or landlord—is a subletting which will bar the relation of landlord and tenant, or is an assignment entire or pro tanto, which will create the relation and thus give the owner or one claiming under him avail of the right to maintain unlawful detainer as against a sublessee holding over after the expiration of the original term. It is said with much show of reason and sustaining authority that the relation of landlord and tenant never exists between the owner and a subtenant, for there is neither privity of contract or of estate to sustain the relation. 16 R. C. L. p. 879; Shannon v. Grindstaff, supra.

We are not inclined to raise the question whether the contract as between Gerald and appellant was one other than of subtenancy; for the transaction may be called a lease between the second and third parties, and nevertheless operate as an assignment as between the original lessor and such third party. 16 R. C. L. pp. 824, 825. When the question is raised between the owner and the sublessee, the courts have not hesitated to look to the legal effect of the contract. No importance is attached to the words "demise" or "lease," or to the form, covenants, or conditions of the contract, if its legal effect be to convey the entire term. Underhill, Landlord & Tenant, § 626; Woodhull v. Rosenthal, 61 N. Y. 382.

[3, 4] It is upon this principle that a subletting for the entire or remainder of a term is held to be an assignment, giving the owner a right to maintain an action of unlawful detainer as against one claiming as a sublessee, is sustained. There is another principle—and we deem it to be decisive of this case. It is that in order to sustain a sublease there must be a reversionary interest in the premises, however small it may be. The only covenants which may be relied upon to assert or sustain a reservation of a reversion in Gerald (his demise being for a time beyond his term) is a right to re-enter for nonpayment of rent or condition broken. But it is held that a right of re-entry for condition broken or for the nonpayment of rent cannot exist as an independent condition, but only as an incident to an estate or interest for the protection of that for which it is reserved.

"A mere reservation of rent, or a reservation of a right of re-entry for a breach of any of the conditions of the lease, will not change the legal relation of the parties, * * * and the introduction of new covenants into the instrument does not change the legal effect of giving

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up the reversion." Wood, Landlord & Tenant (2d Ed.) p. 179, note.

"The right of re-entry for nonpayment of rent, or for condition broken, is not of itself a reservation of a reversion, or any part of the estate granted, but is a mere chose in action. When enforced, the grantor is in through the breach of the condition, and not by the reverter." Craig v. Summers, 47 Minn. 189, 49 N. W. 742, 15 L. R. A. 236; Weander v. Claussen Brewing Ass'n, 42 Wash. 226, 84 Pac. 735, 114 Am. St. Rep. 110, 7 Ann. Cas. 536, and cases there cited; Ohio Iron Co. v. Auburn Iron Co., 64 Minn. 404, 67 N. W. 221; Underhill, Landlord & Tenant, § 626.

But, if we grant that Gerald had a reversionary interest up to the time his lease expired, it ceased when he quit, leaving the sublease in legal effect no more than an assignment for his term.

"A lease by a lessee to a third person, extending beyond his own term, is not a sublease, but is in legal effect an assignment of his lease." Mulligan v. Hollingsworth (C. C.) 99 Fed. 216.

"So, if a lessee for three years assigns his term for four years, or demises the house for four years, he does not by this gain a tortious reversion, and it does but amount to an assignment of his interest." Hicks v. Downing, 1 Lord Raym. 99; Wollaston v. Hakewill, 3 Man. & G. 297; Taylor, Landlord & Tenant (9th Ed.) § 111.

It seems fundamental that Gerald could not transfer a greater interest or estate in the premises than he could assert against his own landlord.

"The transfer * * * of the tenant's entire interest in the whole premises, leaving no reversion in him, has almost invariably been regarded, not as a sublease, but as an assignment. * * * And the fact that the transfer is in form a sublease, or reserves rights as against the transferee similar to such as are ordinarily reserved on a lease, has ordinarily been considered immaterial." Tiffany, Landlord & Tenant, § 151.

[4] The covenants relied on to take this case out of these rules in no way touch the reversion. They are personal to Gerald, and when his interest expired by the lapse of time they lost all their contractual force. The condition that appellant would not keep, sell, or give away intoxicating liquors upon the premises, and like conditions, were purely personal, and in no way affect the primary estate or reversion. Therefore, to sustain itself under the covenants and restrictive clauses of its lease, appellant must show that some fragment of the term remains in its lessor. To hold otherwise would put us to the extremity of holding that a transfer, in form a sublease coequal in time with the original lease, would be an assignment, making the sublessee liable as a tenant holding over; but if the original lessee assumes to grant more than the whole of his estate, his grantee will be protected as a sublessee, and as such may insist upon ejectment, instead of the more summary remedy of unlawful detainer. The legal effect of an assignment of a lease is to put the assignee in the shoes of the assignor. This is but another way of saying that the sublessee cannot claim more as against the owner or one claiming under him than the immediate lessor could have claimed.

When we have determined that the demise is in legal effect an assignment, and not a subletting, it follows that we must hold that the owner or one claiming under him may oust appellant as one holding over after the expiration of his term, for the privity of estate is established.

"If the sublease so effectually passes the whole term that it must be held to be an assignment, then privity of estate is established, and the sublessee becomes bound by the covenants of the original lease, irrespective of his intention." St. Joseph, etc., R. Co. v. St. Louis, I. M. & S. R. Co., 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607; Shannon v. Grindstaff, 11 Wash. 536, 40 Pac. 123; Capital Brewing Co. v. Crosbie, 22 Wash. 269, 60 Pac. 652.

So that whether the duty of appellant to quit at the expiration of the term of its immediate lessor lies in the covenants of the lease to Gerald, or arises out of the statute or the general rules of law, the result is the same. He is a tenant holding over; the conventional relation of landlord and tenant is established, and he may be ousted by summary process.

[5] It is complained that the court entered a judgment in form a judgment of ejectment; but, if this be granted, it cannot avail appellant. The case of State ex rel. Seaborn Shipyards Co. v. Superior Court is not in point. We held in that case that one who came into court under the forcible entry and detainer statute (chapter 2, tit. 6, Rem. Code) could not by amendment to his pleadings convert his action into one for ejectment; this because of the special jurisdiction exercised by the court in such cases. Here the case was brought as one for unlawful detainer, and was tried as such. If the court committed error in the form of its judgment, why we are here for the correction of such errors.

The judgment will be affirmed, with directions to enter a formal judgment under the statute.

MAIN, MACKINTOSH, TOLMAN, and MITCHELL, JJ., concur.

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(107 Wash. 1)

BENNER v. BILLINGS. (No. 15173.)

(Supreme Court of Washington. May 12, 1919.)

1. FRAUDS, STATUTE OF ⊂⊃44(4) — SALE OF CORPORATE STOCK — "GOODS, WARES, AND MERCHANDISE."

A consummated sale of corporate stock upon which a partial payment is made constitutes the sale and delivery of goods, wares, and merchandise, and deferred payments thereon are enforceable, even if by the terms of the contract they reach beyond the period of one year; Rem. Code 1915, § 5289, not applying.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Goods.]

2. BANKRUPTCY ⊂⊃302(1)—ACTION FOR PURCHASE PRICE OF CORPORATE STOCK.

A trustee in bankruptcy of a corporation need not, in an action to recover the purchase price of corporate stock, allege or prove that he is without sufficient funds to pay all the creditors and expenses of the bankruptcy proceedings.

3. BANKRUPTCY ⊂⊃303(3)—SALES OF STOCK—ACTION FOR PURCHASE PRICE.

In action by trustee in bankruptcy of a corporation to recover an alleged balance due on the purchase price of stock, evidence *held* to show that there was sale, and not the giving of an option to purchase to the defendant.

4. CORPORATIONS ⊂⊃229—STOCKHOLDERS' LIABILITY — RELEASE BY CORPORATIONS — EFFECT AS TO CREDITORS.

A purchaser of corporate stock on installments, at all times cognizant of the growing insolvency of the corporation, cannot, as far as creditors are concerned, be released from his liability to pay therefor by any agreement or arrangement between himself and the corporation or its agents, or by resolution of the directors, or by the stockholders, or by a transfer to another person incapable of paying for the stock, nor by reduction of the number of shares to be paid for.

5. INTEREST ⊂⊃16—PURCHASE PRICE OF CORPORATE STOCK—DEFERRED PAYMENTS.

Where one purchased corporate stock and agreed to pay certain fixed amounts on fixed dates, he became liable for 6 per cent. interest on such installments after they became due, by virtue of Rem. Code 1915, § 6250.

Department 1.

Appeal from Superior Court, Pierce County; E. M. Card, Judge.

Action by J. D. Benner, trustee in bankruptcy of the National Service Company, against Orville Billings. Judgment for plaintiff, and defendant appeals. Affirmed.

Hayden, Langhorne & Metzger, of Tacoma, for appellant.

Carkeek, McDonald, Harris & Coryell, of Seattle, and J. L. Snapp, of Tacoma, for respondent.

MITCHELL, J. In October, 1917, this action was commenced in the superior court of Pierce county by J. D. Benner, as trustee in bankruptcy of the National Service Company, a corporation, against Orville Billings, to recover the balance due on the purchase price of certain donated, paid-up treasury stock of the corporation. The complaint in substance alleged the incorporation of the National Service Company; that it was adjudged bankrupt on February 10, 1916, and plaintiff was appointed trustee in bankruptcy on May 17, 1916, and thereupon qualified as such trustee; that on December 30, 1914, defendant and the National Service Company entered into an agreement wherein and whereby the company on that day sold and delivered to defendant 1,850 shares of its capital stock then in its treasury for which defendant then and there agreed to pay the sum of $15,900 in the following manner, to wit, $3,900 in cash, $12,000 in monthly installments of $1,000 each, the first of such installments to be paid February 1, 1915, and one thereof each month thereafter until all had been paid; that in pursuance of said agreement defendant paid the National Service Company on December 31, 1914, $3,900 in cash; and that there is still due under said agreement the sum of $12,000 with interest. To the complaint the defendant demurred on the grounds that the court was without jurisdiction of the subject-matter; that it did not state sufficient facts to constitute a cause of action; and that the action was not commenced within the time limited by law. The demurrer being overruled, defendant filed an answer denying he purchased 1,850 shares of the stock, or any at all, claiming the transaction was only an option to purchase the stock, on which he admitted he paid $3,900; denied owing $12,000, or any other sum; and affirmatively set out in considerable detail the history of the transaction upon which the suit is based, giving his version, explanation, and interpretation of and alleging errors contained in certain records concerning the transaction from and by which he claimed the deal was only an option to purchase, and not a purchase; and further alleged that he and his successors in interest had fully paid for the 1,850 shares of stock alleged to have been taken under an option agreement only; and that the alleged agreement for the purchase of 1,850 shares of stock, if ever made, was not enforceable because he signed no agreement, contract, note, or memorandum thereof, in writing, as required by the statute of frauds, and that he relies on section 5289, Rem. Code, as a defense to the action. A reply of denials was filed to the affirmative portions of the answer. Upon trial to the court without a jury there were findings, conclusions, and judgment entered in favor of

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plaintiff in the sum of $6,071.62, including interest. Defendant has appealed.

Upon the whole record we find the controlling facts to be about as follows: Two persons, as partners, were engaged in an advertising scheme somewhat similar to the "Green Trading Stamp" idea, and in September, 1914, they incorporated the business under the name of the "National Service Company." The capital stock of the company was paid for by transferring to it the partnership business, and the company assumed all the debts of the partnership. The company received into its treasury the gift of some of its stock to be sold for needed funds. Its principal place of business was in Tacoma, it was doing business in Portland and attempted to establish itself in Seattle. Appellant was solicited to purchase some of this donated, paid-up stock. He became interested and did buy. After preliminary negotiations, the deal involved in this suit is best explained by the record made of it at the time. The minutes of a meeting of the trustees of the corporation held on December 30, 1914, at its office, after showing who were present, and that the meeting was called to order, recite, among other things, the following:

"Upon motion duly made and seconded, Orville Billings was elected trustee, to serve out the unexpired term of Mr. Butt, and until his successor should be elected and qualify. Mr. Billings having taken the trustee's oath, was admitted to the meeting. * * * Mr. Billings made a verbal offer to the trustees to purchase 1,850 shares of the capital stock of this company, and to pay therefor the sum of $15,900, and to pay for the same in the following manner: $3,900 in cash, and the balance at the rate of $1,000 per month, the first payment to be made February 1, 1915. Upon motion duly made and seconded, it was resolved that the aforesaid offer be accepted, and that this company sell, out of the shares of stock held in the treasury of the company, 1,850 shares to Mr. Billings for the sum of $15,900, payable, $3,900 in cash, the balance at the rate of $1,000 per month, payments beginning February 1, 1915. The meeting thereupon proceeded to the election of a president and manager of the company. Upon motion duly made and seconded, Orville Billings was elected president of the company."

It may be here mentioned appellant denies he was at the meeting and of others present some testify he was there, while others say they do not remember if he was.

It appears that appellant had already paid and been given credit for $1,000 on this sale, and on the next day, December 31, 1914, he paid and was given credit for $2,900. At the same time he was charged up with $12,000 and the "stock in treasury" account credited with 1,850 shares. The minutes of the next meeting of the trustees, January 8, 1915, show, among other things:

"Present, the following named trustees, Orville Billings, J. T. Gregory, James R. Thompson, Herbert E. Post. President Billings called the meeting to order. * * * The minutes of the previous trustees' meeting of December 30, 1914, were read and approved. * * * It being reported to the meeting that Mr. Billings had paid $3,900 on his stock subscription at this time, and that the certificates of the stock purchased by him should be deposited in some independent escrow, the following resolution was moved, seconded, and unanimously carried, Resolved that stock certificates Nos. 29, 30 and 31 of this company, for 1,060,350, and 790 shares of stock, respectively, made out in the name of Orville Billings, be deposited in the Bank of California, N. A., of this city, in escrow, to be held by said bank and delivered over to Mr. Billings, or his order, upon payment of the sum of $12,000, and that a copy of this resolution be delivered to the said Bank of California, N. A., as its instructions herein."

The minutes of this meeting were signed by Orville Billings as president. The minutes of the annual stockholders' meeting of the corporation, January 11, 1915, show, among other things:

"The meeting was called to order by President Billings. Upon roll call it was ascertained that the following stock was present and represented either in person or by proxy: Orville Billings, 2,200 shares [other names and number of shares]."

The meeting was adjourned until the next day, and the minutes were signed by Orville Billings, president. The minutes of the adjourned stockholders' meeting, January 12, 1915, show that Orville Billings as president called the meeting to order, and represented 2,200 shares of stock. These minutes were signed by him as president. It appears that about or soon after the purchase of the 1,850 shares the appellant purchased for $1,100, 350 other shares from a stockholder (which accounts for the total of 2,200 shares mentioned in the minutes), and later on, from time to time, made other purchases, until he finally held 2,800 of the total 5,000 shares of the capital stock of the corporation. It appears that soon after appellant took charge of affairs there was an informal understanding he should receive 25 per cent. of all net profits of the company, later at a trustees' meeting changed to $500 per month for his services as president and manager, and provided also a change in his contract of purchase of stock from payments of $1,000 to payments of $500 per month. The company was during all this time involved, and appellant advanced his personal funds to keep the company going, until at a trustees' meeting, May 3, 1915, according to the minutes, appellant, who presided mentioned therein as having purchased 2,200 shares of the capital stock, was given credit thereon in the sum of $2,768.81 on account of advancements made for the benefit of the company, and also $2,000 on account of salary earned since January 1, 1915. At this meeting it was by resolution provided that, appellant having

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paid all but $5,231.19 for the 2,200 shares of stock purchased by him, it should be considered that he be relieved from the payment of the balance and excused from his agreement to purchase stock represented by that balance. These minutes further show that another trustee "expressed a desire to take charge of the active management of all the business of said company and relieve the said Orville Billings of the said work as president and general manager thereof, and offered to devote his time and services to the furthering of the business of the company at the salary which the company had been paying to Mr. Billings, if the company would transfer to him, or authorize Mr. Billings to do so, the shares of stock which had been bought by Mr. Billings, but had not been paid for, and if they would accept him as a purchaser thereof and as a debtor therefor in the place of Mr. Billings," and that thereupon by resolution the offer and plan were adopted. The minutes of this meeting were signed by Orville Billings as president. This new manager, without financial responsibility, according to the testimony, never received any of the stock, and if he served as manager it was for a short time only, after which he entered some private employment of appellant. Later on, this same stock of appellant's purchase remaining unpaid for was attempted to be put off on one Stearns, chosen as manager, with a large salary, but he failed to accomplish any thing. Stearns was without means, and practically unknown to all the officers of the company except appellant. Appellant is a man of large means and business ability. He controlled the affairs of the company after he became its president and manager. Friction arose between him and other officers, who resigned. As to the condition of the company when he went in, he testified:

"I found there was considerable indebtedness. I found they owed the P. S. B. & T. Co. $1,100, and all the money I put in this deal went to pay debts. The $3,900 paid in went to pay debts. There was no question I was buncoed."

He explained his purchase of stock by saying, as he was going into it to work, he wanted to reap the benefits if he made it a winner. He testified:

"On February 20, 1915, when my salary was fixed at $500 and after I had paid in $3,900 there was still some $4,200 of indebtedness against the company. At that time the company didn't have very much assets, and I have never been able to find that they ever did have very much assets."

After the trustees' meeting of May 3, 1915, he never called to get the 1,531 shares the company found he had then paid for, as to which he said:

"I didn't care much about them. I didn't figure they were worth anything."

He said the manager who succeeded him never paid him anything for the remaining 679 shares. In fact, the stock was never delivered by him until he turned it over to Stearns, as to which he testified:

"Well, I rather considered it the same as a gift, because I had got to the point then where I could not see any point of the National Service Company making anything, and any transactions I made after that I would almost consider a gift, because I didn't think it was worth anything."

During appellant's management, about February 20, 1915, a number of officers who had given their personal notes for stock surrendered all claims to the stock in cancellation of their notes. About May 4, 1915, an action was commenced in the superior court of King county to have a receiver appointed for the company. Successfully resisting such appointment, appellant made an affidavit setting up his contract of purchase of the stock, and his agreement and ability to pay $1,000 per month therefor. This affidavit was made subsequent to the meeting of the trustees purporting to change his payments to $500 per month, and after the meeting attempting to release him altogether and to fasten his obligation upon the succeeding manager. On September 20, 1915, upon complaint of appellant, a receiver for the company was appointed by the superior court of Pierce county. Thereupon a petition in bankruptcy was filed in the United States District Court, and the company was adjudged a bankrupt. In the bankruptcy proceedings claims were proved and allowed in the sum of $4,313.29, and respondent, who qualified as trustee, was directed to bring this suit.

[1] The first assignment of error is the overruling of the demurrer to the complaint. Appellant contends the contract declared upon is void as by its terms it was not to be performed within one year. This is the same contention made by affirmative matter set out in the answer. Reliance is had on section 5289, Rem. Code, to the effect that any agreement, contract, or promise shall be void unless it is in writing and signed in cases where by its terms it is not to be performed within a year, and our attention is called to the case of Union Sav. & Trust Co. v. Krumm, 88 Wash. 20, 152 Pac. 681. Neither the statute nor the case cited is applicable here. The statute covers situations like that discussed in the case cited where the subject-matter is the rendition of services, the case holding that an oral contract for a year's services, which is to commence in futuro, is within the statute. This is not such a case, but a sale and delivery of the stock of a corporation, upon which a partial payment was made. It is not a contract for the sale of stocks at a future date, but a consummated sale. Such a transaction constitutes the sale and delivery of goods, wares, and merchan-

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dise according to the authority of Hewson v. Peterman Mfg. Co., 76 Wash. 600, 136 Pac. 1158, 51 L. R. A. (N. S.) 398, Ann. Cas. 1915D, 346, and certainly deferred payments thereon are enforceable even if by the terms of the contract they reach beyond the period of one year.

[2] It is further argued the complaint is insufficient for failure to allege respondent, as trustee, is without sufficient funds to pay all the creditors and the expenses of the bankruptcy proceedings, and the case of Hibschman v. Bevins, 103 Wash. 317, 174 Pac. 5, is relied on. The case is not in point. It was a suit to set aside a fraudulent conveyance, which, being good between the parties, could not be set aside by a creditor or a trustee in bankruptcy if the debtor had sufficient other property to pay his debts. Here respondent, who represents the company, is suing to recover a debt due by appellant directly to the company which has been judicially declared to be a bankrupt, and the question if this money is needed to pay debts is wholly immaterial. Nor does the case of De Muth v. Faw, 103 Wash. 279, 174 Pac. 18, help appellant; for it was a suit by a creditor to collect a debt due by a corporation then in the hands of a trustee in bankruptcy. It is also claimed there was no tender of the stock at and before suit. The complaint alleges it was sold and delivered. In this respect, so far as the proof is concerned, the attempt made by appellant, after he practically became the company, by a so-called escrow to circumvent his contract will in no sense alter the terms of the contract. Even after the meeting at which he presided declared he was entitled to receive 1,531 shares of the stock, he declined to call for it because it was not worth having; and later he transferred the remaining 679 shares to Stearns, considering it in effect a gift.

[3, 4] Assignments of error 2 to 19 relate to findings and conclusions signed and the refusal of the court to sign those presented by appellant. They present what counsel claim is the pertinent question in the case, viz. Was the transaction a sale or was it an option? This is more largely a question of fact. Notwithstanding some testimony to the contrary by witnesses who were allowed to explain their understanding of the deal, the record written and made by those same witnesses is plain that the transaction was a sale. The conduct of appellant after the initial transaction, while he was in control of the affairs of the company, pictures well but an attempt on his part to evade his obligation. The law will not permit him, at all times cognizant of the growing insolvency of the company, by such subterfuge to become released from his contract—which was about the only tangible valuable asset the company had at all times after he became connected with it—to the detriment of the rights of its creditors. On this subject the American rule, which results from the trust-fund doctrine, is that the funds of a corporation cannot be thus frittered away. The obligation of appellant in this case to pay for the treasury stock of the corporation was one of its assets, and it is clear he could not be altogether released from its payment, or his liability therefor limited by any agreement or arrangement between himself and the corporation or its agents, or by any resolution adopted by its directors, or by the stockholders themselves, to the prejudice of the creditors. Nor could there be any reduction of the number of shares to be paid for, nor escape from liability by a transfer of shares to a person who for any cause is incapable of responding in respect of such liability, as against the rights of existing creditors. 7 R. C. L. 358, § 339; Nathan v. Whitlock (N. Y.) 9 Paige, 152; National Carriage Mfg. Co. v. Story & I. Commercial Co., 111 Cal. 531, 44 Pac. 157; National Bank v. Case, 99 U. S. 628, 25 L. Ed. 448.

[5] The only other assignment of error that need be noticed is that the court allowed interest on $5,231.19 the unpaid installments of the purchase price of the stock. The amounts and dates of maturity were certain and fixed by the positive terms of the contract the forbearance of which, under the terms of the statute (section 6250, Rem. Code), called for interest at 6 per cent. per annum, the amount allowed in the judgment.

Judgment affirmed.

CHADWICK, C. J., and TOLMAN, MACKINTOSH, and MAIN, JJ., concur.

(106 Wash. 687)

KNIGHT et ux. v. ELLSWORTH.
(No. 15130.)

(Supreme Court of Washington. May 12, 1919.)

1. MASTER AND SERVANT ⟸6 — RELATION—EVIDENCE.

Evidence *held* to show that a written lease whereby parties were to divide profits of a chicken-raising venture was modified by parol agreement whereby wages were to be paid by the lessor for work done by the lessee as superintendent in connection with the enlargement of the farm and the business.

2. WORK AND LABOR ⟸29(3) — COMPENSATION.

In action for value of services as superintendent of a farm for 24 months by one not an experienced farm superintendent, a judgment for $2,626.80 *held* excessive by $1,671.

Department 1.

Appeal from Superior Court, King County; M. H. Van Nuys, Judge pro tem.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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Action by F. R. Knight and wife against P. C. Ellsworth. There was a judgment in favor of plaintiffs, and defendant appeals. Judgment modified.

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J. E. McGrew, of Seattle, for appellant.
Ned Roney, of Seattle, for respondents.

MACKINTOSH, J. The respondent, a carpenter, and the appellant, a retired lawyer, in June, 1914, entered into an agreement for the operation of a 15-acre chicken ranch on Vashon Island, in King county, having in contemplation the equal division of the prospective profits. After two years of operation the appellant is in possession of a farm of 89 acres and has made expenditures of over $70,000 in connection with the venture; the respondent has contributed 24 months of continuous effort, and, jointly, they are interested in this lawsuit.

The agreement provided that the appellant was to lease to the respondent 15 acres for the term of one year and to furnish with the premises certain personal property; the respondent agreed to work and cultivate the premises and provide one-half the feed, attend to the feeding and raising of chickens, and, generally, to take care of the 15 acres. The two parties were to share jointly in the profits, and the agreement was to be extended from year to year so long as the parties mutually agreed thereon. After having operated for several weeks under this agreement, the appellant purchased 35 acres adjoining the 15 original acres, which had been merely surface cleared. In the spring of 1915, 20 more acres were purchased by the appellant adjoining that already acquired; this property being logged-off land. Later other lands, some purchased and some leased, were added to the appellant's property until he had under cultivation 89 acres. An immense amount of work was done in the clearing of this land and placing it in usable shape. Stumps were blasted, rocks removed, and ditches were dug. Some twenty buildings were built upon the property, most of them upon the original 15 acres. Many of them were new, and some were alterations of older buildings. They consisted of a house, barn, sheds, coops, pits, pens, chicken houses, and chicken brooders. The property was fenced and generally put in first-class condition. During the 2 years of operation from 5 to 25 men were constantly employed about the place. Many of the buildings constructed were erected to be used only in connection with the chicken venture. At the end of 2 years it was demonstrated that there were to be no profits in connection with that phase of the activities, and the respondent began this action, claiming wages from the appellant for the 24 months that he had, as he claimed, acted as the respondent's superintendent, his claim being that as new land was added to the original 15 acres it was not used for the purpose of extending the chicken business, but was stocked as a model farm, and that the respondent rendered services upon this farm that were not included in the terms of his original contract, and claims that the original contract was modified by a subsequent oral agreement whereby the respondent was to act as superintendent and overseer in the development of the larger farm, for which he was to receive a reasonable wage. The appellant claims that all the land purchased and leased, as well as the improvements made thereon, were made for the purpose of enlarging and improving the chicken business, and that by oral agreement the terms of the written contract were extended to cover all these additional expenses, and that the contract was made to apply to all the subsequently acquired lands. Appellant further claims that the respondent worked the place as a whole, and that he was liable for the farm work on the place, as provided by the written contract, and claims that, after allowing the respondent one-half of the small production of the farm, the respondent is liable for one-half the net loss. Respondent is also indebted, it is claimed, to the appellant for money advanced for his personal use, and that that indebtedness of the respondent vastly exceeds any sum that might be due on account of his services. The appellant concedes that all the permanent improvements placed upon the property during the entire period are properly chargeable to him.

The trial court, after taking an accounting, found in favor of the respondent in the sum of $2,626.80. From this judgment the appellant prosecutes this appeal.

The statement of facts in this case, covering several hundred pages, is filled with the examination of witnesses in regard to various items of expense as they appear in the books of appellant, who was the one who kept the accounts; he paying out all moneys upon checks or orders issued by the respondent. There are hundreds upon hundreds of items of account, and the examination of the records and exhibits in this case involved a task which counsel in their briefs mildly described as Herculean. The farm developed from the original chicken ranch into what has been properly described as a model farm. An immense amount of labor was expended in the transition, and there has been no segregation of the work which was performed upon the original 15 acres and upon the various other tracts. Crops were raised, but the proceeds were not segregated as to the point of their origin. Sheep and hogs were raised and slaughtered without separate record. The time of the men employed upon the various buildings was not segregated as to the building where the work was performed. The respondent boarded the men, and their board is commingled with the other accounts

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in the case. The whole record is in a seemingly hopeless tangle. The respondent himself, answering the question, "Did you keep an account of what work was done on the 15 acres," said, "No, sir; I did not keep any separate account of that work."

[1, 2] The evidence of the respondent tending to establish a subsequent oral agreement modifying the original written contract is comprised in conversations which he relates he had with the appellant, wherein the appellant is alleged to have said to him: "Fred, these buildings must be put up. Hire men and put them up. I do not ask any man to work for me for nothing; I am too independent." Later on, in another conversation in regard to the clearing of the land, the appellant said: "Fred, that is charged to the property; it could not be charged to anything else. You go ahead. This work all has to be done. I will see that you get yours. I don't want any man to work for me for nothing." Still later on, it is alleged, the respondent said to the appellant: "This is not the chicken business; this is not in my contract." And the appellant is alleged to have replied: "Fred, this all has to be done. Go ahead and do it. I don't want any man to work for me for nothing; I am too independent." The appellant denies having entered into any such oral modification of the original contract, and produces evidence of a mortgage given by the respondent to the appellant which tends to establish that the respondent had no idea that the appellant was to be indebted to him for wages, but, weighing all of the testimony, we are satisfied that the trial court was correct in determining that the relation between the parties was modified from that established by the written contract, and that, while the parties were still jointly interested in the chicken venture, the appellant was responsible (as he admits) for the expense of the permanent improvements, and that he should be held responsible to the respondent for a fair compensation for his services in superintending the work on the lands acquired in addition to the original 15 acres. The respondent admits that under his contract he was to "raise chickens and work the 15 acres." He again said: "The work on the 15 acres should be charged to me." He then testifies in answer to the question, "Did you keep any separate accounting on the time expended on the permanent improvements and on the 15 acres, and what you raised on the 15 acres," "No; I never did keep any separate time on that." The respondent, not having kept any books of account, of course, is of very little assistance in determining what items are properly chargeable to the different accounts, and the appellant himself, while on the stand, was not able to explain the multitude of items which he had charged on his books to the different accounts. The special judge who tried this case has extracted, by an infinitude of patience, from the seemingly hopeless confusion, an account which he has embodied in his findings and conclusion, which appears to be supported by the evidence in the record. It is as nearly exact as the circumstances of the case permit, and with it we must be and are satisfied, with this one exception: The respondent has been allowed in the accounting salary as superintendent at the rate of $156 per month for practically 9 months of the time and at the rate of $202 for 15 months. It seems to us that, in view of the fact that the respondent was not an experienced farm superintendent, and the further fact that he was simultaneously interested in a venture which, although it proved finally disastrous, was entered into with the expectation of leading to fortune, could not have been permitted to enjoy not only the expectation of profit in the chicken business but also a concurrent salary as large as that awarded him by the trial court. In our view of the facts we think the salary allowance should have been reduced by the sum of $1,671, leaving a balance due to the respondent of $955.80, for which judgment may be entered. Both parties will pay their own costs.

CHADWICK, C. J., and MAIN, TOLMAN, and MITCHELL, JJ., concur.

(107 Wash. 125)

PIERCE v. PIERCE. (No. 14971.)

(Supreme Court of Washington. May 15, 1919.)

1. DIVORCE ⟸13—GROUNDS — STATUTORY PROVISIONS—RETROACTIVE OPERATION.

Laws 1917, c. 106, § 1, subd. 8, providing that divorces may be granted by the superior court on application of the party injured, where the parties are estranged and have lived apart for eight years and the court is satisfied that they can no longer live together, is not retroactive.

2. STATUTES ⟸263 — RETROSPECTIVE CONSTRUCTION—INTENTION OF LEGISLATURE.

That an amendment, to insert "after the year 1917," to the divorce law, was proposed, but lost, does not disclose that the Legislature intended the law should take effect retroactively.

3. DIVORCE ⟸172—JUDGMENT—CONCLUSIVENESS OF ADJUDICATION.

In a husband's suit for divorce, a former adjudication by the court in another case between the parties, as to who was at fault for the separation, is conclusive.

4. DIVORCE ⟸53 — INABILITY TO LIVE TOGETHER—FAULT OF HUSBAND.

A divorce will not be granted a husband on the ground of estrangement of the parties and

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their living apart for eight years, where the husband is wholly to blame.

5. DIVORCE ⟸223—ALLOWANCE OF COUNSEL FEES AND COSTS—DISCRETION OF COURT.

The allowance of costs and attorney's fees to a wife in a husband's suit for divorce is a matter largely discretionary with the trial court.

Chadwick, C. J., dissenting.

Department 2.

Appeal from Superior Court, King County; A. W. Frater, Judge.

Action for divorce by Henry J. Pierce against Violetta E. Pierce. From a decree of divorce in favor of plaintiff, defendant appeals. Reversed as to part of the judgment granting a divorce.

Graves, Kizer & Graves, of Spokane, for appellant.

Kerr & McCord, of Seattle, for respondent.

MOUNT, J. This action was brought for divorce based upon subdivision 8, § 1, c. 106, p. 353, Laws 1917, amending Rem. Code, § 982. The statute is as follows:

"Divorces may be granted by the superior court on application of the party injured, for the following causes."

Then, after enumerating seven subdivisions:

"8. Where the parties are estranged and have lived separate and apart for eight years or more and the court shall be satisfied that the parties can no longer live together."

The complaint alleged, among other things:

"That long prior to the 1st day of January, 1909, the plaintiff and defendant became estranged, that unhappy differences arose between them and they realized that they could no longer live together as husband and wife, and that they have ever since continuously been and are now estranged. That on the 1st of January, 1909, the plaintiff and defendant, by reason of said estrangement and unhappy differences, mutually agreed to live separate and apart, each from the other, and entered into a written agreement of separation, bearing date January 1, 1909, which said agreement was acknowledged before a notary public by the said Henry J. Pierce on the 26th day of January, 1909, and by the said Violetta E. Pierce on the 17th day of April, 1909. That by the terms of said agreement the parties thereto not only agreed to live separate and apart, but the said plaintiff agreed that he would not reside in the city of Buffalo, county of Erie, or within 25 miles of any boundary of said city, and the said defendant agreed that she would not reside in the city of New York, or within 25 miles of any boundary of said city.

"That said parties by said agreement stipulated that each should be released and discharged from the performance of all marital duties as fully and completely in all respects as if the parties had never intermarried.

"That said separation has been continuous and without interruption for a period of more than eight years prior to the date of the commencement of this action, and that said estrangement has existed for a period of more than eight years prior to the commencement of this action, and that the plaintiff and the defendant can no longer live together as husband and wife."

For answer, the defendant pleaded three separate defenses, to the effect that the separation was caused solely by the fault of the plaintiff; that the plaintiff, in January, 1908, commenced an action for divorce in the circuit court of the city of St. Louis, Mo., in which he alleged that the defendant had abandoned him and had rendered to him such indignities as made his life intolerable; that the defendant appeared in that action and it was there determined that the plaintiff had abandoned the defendant, and the divorce was denied; that, subsequently, in the year 1909, the plaintiff brought an action in Spokane county, in this state, against the defendant, upon substantially the same grounds; that a finding was made in the case that the plaintiff had abandoned the defendant, and a divorce was denied; that after the first action, hereinbefore named, was brought by the plaintiff in Missouri, the defendant, being a resident of the state of New York, brought an action in that state to require the plaintiff to provide maintenance and support for herself and their children; and that that action for support and maintenance was compromised by the plaintiff entering into an agreement to turn over to the defendant certain property and to pay her $300 per month for the support of herself and their children. The defendant, for further and separate answer, alleged, in substance, that since the year 1911 she had been willing to resume marital relations with the plaintiff and live with him as his wife wherever he might elect to make their home. The defendant prayed that the action be dismissed, and that she should have an allowance for suit money and attorney's fees. On the trial of these issues the court granted the plaintiff a divorce, but required him to pay to the defendant the sum of $400 per month for the support and maintenance of herself and their children and $2,000 suit money and attorney's fees. The defendant has appealed from that judgment.

[1] The first contention made by the appellant is that subdivision 8 of the divorce statute is not retroactive. This subdivision was an amendment to the original divorce statute. It was passed in 1917. The amendment is quoted above. It will be noticed from a reading of the statute that it does not appear upon its face to relate back beyond the date of its passage. It simply says that—

"Divorces may be granted by the superior court on application of the party injured, for the following causes: * * *

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"8. Where the parties are estranged and have lived separate and apart for eight years or more and the court shall be satisfied that the parties can no longer live together."

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No pretension is made in this case that the parties have become estranged and have lived separate and apart eight years since the passage of that amendment. The sole contention is that the parties became estranged and have lived separate and apart for eight years, the greater portion of which time, necessarily, was prior to the enactment of this amendment. We are asked now to give this statute a retroactive effect, so as to make it apply to estrangements which existed prior to the passage of the act. In Graves v. Dunlap, 87 Wash. 648, 152 Pac. 532, L. R. A. 1916C, 338, Ann. Cas. 1917B, 944, we said:

"It is a rule of construction that a statute will not be given a retroactive effect unless by its terms it is shown clearly that that was the legislative intent."

In 14 Cyc. 594, it is stated:

"A statute declaring the causes for which divorces may be granted is ordinarily to be given a prospective operation only and does not authorize a divorce for a specified cause which occurred before the statute was enacted."

In Nelson on Divorce and Separation, vol. 1, at section 12, it is stated:

"The obvious intent is that the law will apply to misconduct occurring after the passage of the act. Under some constitutions an act making prior misconduct a cause for divorce will be held void so far as retrospective. * * * Whether void or not, the courts generally decline to give such statutes a retrospective interpretation. The rule is that statutes are to be given a prospective operation only, unless the terms show clearly that a retrospective operation was intended. A divorce law will not be given a retrospective operation even though the terms might admit of it."

In Jarvis v. Jarvis, 3 Edw. Ch. (N. Y.) 462, where a new section had been added to the statute of New York providing for limited divorces, extending the right thereto to cases in which it had not theretofore existed, it was said:

"In order to give her the benefit of the remedy which the bill seeks, the revised statutes, as applicable to her case, must be construed to have a retrospective effect. It is a rule however, never to apply a statute retrospectively by mere construction. If its terms are such as clearly to indicate that the Legislature intended it should operate upon or apply to past transactions of a civil nature, then the courts may permit it so to apply, provided it takes away no previously vested rights, nor impairs the obligations of contracts within the meaning of the federal Constitution. But, if a statute is silent in its terms or at all ambiguous in relation to its effect and application to past events, courts of justice are bound not to apply it to any other than to those which have arisen since the law took effect and are not at liberty to consider it other than as a prospective law operating prospectively upon the affairs and conduct of men."

To the same effect are Barrington v. Barrington (Ala.) 76 South. 81; Carson v. Carson, 40 Miss. 349.

This is a rule of almost universal application. An examination of the statute in relation to divorce does not disclose any intention on the part of the Legislature that the act should have a retroactive effect. It must therefore be held not retroactive.

[2] Counsel for the respondent cites the record of the Legislature referring to the passage of the act, to the effect that an amendment was proposed thereto as follows:

"That section 1, line 17, insert 'after the year 1917.'"

This amendment was lost. The argument apparently is that, because this amendment was lost, it shows an intention on the part of the Legislature that the act should take effect retroactively. If we may examine the legislative record in order to determine the legislative intent—a question we do not now decide—we are of the opinion that the result claimed does not follow. The reason the amendment was lost was plainly because the Legislature concluded that the amendment was not necessary, for the reason that the act would not take effect retroactively, even if that amendment were not made. The mere fact that this amendment was lost does not disclose that the Legislature intended this amendment to the divorce law to be retroactive. The statute not being retroactive, it follows that respondent was not entitled to a divorce.

[3] There is another equally good reason why the divorce should not have been granted. The statute provides that divorces may be granted by the superior court on the application of the party injured, for the causes therein named. It was conclusively shown upon the trial that the parties to this action in two other cases—one in the state of Missouri, and the other in this state had litigated the question of fault for the separation, and that in each of those cases it was determined that the respondent was at fault and not the appellant. In the case which came to this court (Pierce v. Pierce, 68 Wash. 115, 123 Pac. 598), the principal facts relating to the history of the case and parties are set out. It is unnecessary to again set them out here. In that case, referring to the question of fault for the separation, we said:

"The record convinces us that appellant has deserted his wife and children without just cause. * * * There is no showing of conduct on respondent's part which we can accept as an excuse for appellant's abandonment of her and the children. * * * No sufficient showing has

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been made to justify us in awarding a decree in appellant's favor against the protest of the respondent who has done no wrong. In her pleadings and evidence, she has alleged and testified that she will again receive appellant in her home; that she will live with him as his wife; that she will do all she can to renew their former relations and make him a happy home, and that she will forgive and forget the past. These offers, which she has repeatedly made and still makes, have been continuously and persistently rejected. The record is devoid of even a suggestion that he at any time has sought a reconciliation, or consented to live with his wife and family."

[4] That case adjudicated the question and effectively determined who was at fault for the separation. This court has upon different occasions said, in substance, that a divorce will not be granted to a husband who is wholly at fault. Johnsen v. Johnsen, 78 Wash. 423, 139 Pac. 189, 1200; Maloney v. Maloney, 83 Wash. 656, 145 Pac. 631. It follows, for this reason, that the trial court should have denied a divorce to the respondent.

[5] Appellant further contends that the allowance for costs and attorney's fees made by the lower court was entirely insufficient. The appellant testified that her expenses in coming to this state from Buffalo, N. Y., with her witnesses, were more than $800 and this did not include her living expenses while on the way and while here. The writer is satisfied that under the circumstances of the case the allowance made by the lower court should be doubled; but we are not in harmony upon this question, and, since the matter is largely discretionary with the lower court, we decline for that reason to direct any further allowance.

For the reasons above given, that part of the judgment of the lower court granting a divorce is reversed.

Appellant will recover her costs.

PARKER and FULLERTON, JJ., concur.

HOLCOMB, J., concurs in the reasons expressed above, and the reversal of the case, but is convinced appellant should be awarded double the allowance of suit money and attorney's fees.

CHADWICK, C. J. (dissenting). The court holds that the act of 1917, amending section 982, Rem. Code, and adding thereto as a ground for divorce:

"Where the parties are estranged and have lived separate and apart for eight years or more and the court shall be satisfied that the parties can no longer live together"

—is retroactive, and for that reason respondent cannot predicate an action upon an estrangement occurring before the passage of the act, albeit the parties have been estranged and have lived separate and apart for more than eight years prior to the beginning of the action.

That the amendment is not a bill of attainder or an ex post facto law goes without saying. The power of the Legislature to enact retroactive—or, more aptly to the case at bar, retrospective—laws, provided they do not impair the obligation of existing contracts, is not denied; it is admitted by counsel, and may be passed without extended discussion. The question is not, then, whether the Legislature had power to pass the law, but whether the Legislature intended that the remedy should operate as well upon pre-existing, existing, and future causes. It has been held in Graves v. Dunlap:

"It is a rule of construction that a statute will not be given a retroactive effect, unless by its terms it is shown clearly that that was the legislative intent."

And so in Jarvis v. Jarvis, Barrington v. Barrington, Carson v. Carson, and the texts cited in the majority opinion.

The best statement of the rule I have found is in Carson v. Carson, where the court, finding itself drawn up to the snubbing post of the law, condemned the policy of passing retrospective laws, but held that the court was not "at liberty to hold an act of the Legislature to be void merely because of its retrospective character, when no constitutional provision has been violated." The act in that case was held to be obnoxious, not because it was retrospective in the sense that it gave a remedy for pre-existing causes, but because the act purported "to operate alone upon acts that have already passed and has no prospective operation whatever." In the Carson Case we have the rule and its limitation, which is: The Legislature having power, an act will not be rejected as retrospective, unless it purports to operate "alone" upon past events.

After the very proper holding that a law will not be given retroactive effect, unless by its terms it is clearly shown that that was the legislative intent, the writer of the opinion finds boldly that the rejection of an amendment seeking to fix the operation of the law to causes arising after 1917 indicates the legislative intent that the act should only operate in the future. He says further:

"The reason the amendment was lost was plainly because the Legislature concluded that the amendment was not necessary, for the reason that the act would not take effect retroactively even if that amendment were not made."

This is no more than judicial dogmatism. It is unsound. It violates the natural inferences arising from the conduct of the Legislature, and convicts it of rejecting a declaration of record of its true intent and a deliberate purpose to encourage, if not to create,

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a doubt that arises in all cases where acts are remedial of concurrent and continuing wrongs or conditions.

As I read the record, a rejection of the amendment indicates a legislative intent to make the act applicable to existing and continuing conditions. If we are to credit the Legislature with sufficient technical learning to know that the amendment was not necessary because it knew the act was prospective only, is it not more natural to infer that with such knowledge it would have removed all questions and saved the issue now presented, and which has arisen in hundreds, if not thousands, of like cases? The effect of the court's holding is that, whereas, some member of the Legislature said, "Let us agree that this act is prospective only," and the Legislature by vote of its members rejected his proposal, therefore the act is not retrospective. The fact that the Legislature by its solemn and formal vote said that the act should not be prospective only is a legislative declaration that it intended that it should be retrospective. To meet the demands of this court the Legislature must hereafter treat every subject-matter by both an affirmative and a negative vote—must first vote that "it shall be," and then vote that "it shall not be.".

Admitting, then, that retrospective laws are not favored by the courts, it does not follow that the act in question is either retrospective or retroactive in a legal sense. The character of an act is the most important guide in determining whether it is retrospective. Remedial statutes, although retrospective, are not regarded as obnoxious per se. The statute in question involves no vested rights. Its purpose is to cure an evil offensive to society; that is the living apart, under a tie of matrimony, of persons who are permanently estranged. The authorities sustain me in the assertion that a remedial statute is not retrospective or retroactive because a part of the requisites of its actions are drawn from a time antecedent to its passage, or, as said by Lord Denman, 12 Q. B. 127, "because a part of the requisites for its action is drawn from time antecedent to its passing." Endlich, Interpretation of Statutes, § 280.

The rule quoted by the majority is not the only rule of statutory construction; there are others, one of which is as well grounded as the one relied on, and more consists with the duty of courts to declare and give effect to the legislative will. It is, where a statute is remedial, either of past or future events or conditions, every reason exists for a liberal interpretation. It appearing to me that the intent of the Legislature is made certain by reference to the terms and provisions of the act, i. e., "* * * where the parties *are* estranged and *have* lived separate and apart," etc., and such intent having been asserted by an affirmative act of the Legislature, its attention being riveted upon the very point at issue, the amendment should be held to apply to a condition existing prior to and at the time the act was passed.

The other ground upon which the court rests its decision is that, although the act be upheld as applying to past events, a divorce can only be granted to the injured party, and, it having been twice judicially determined that respondent had no ground for divorce, he is therefore not injured and may not recover. Under the law as it was at the time the amendment was passed, divorces could be granted only (with one exception to be hereafter noted) where there had been a positive injury, a wrong visited by one spouse upon the other. But it is the duty of the courts to give effect to a statute, if it is possible to do so without violating settled rules, and the words "the party injured" should either be rejected as inconsistent with the eighth subdivision of the act as amended, which is the part relied on by respondent, or we should say that, society in general having an interest in all matters of marriage and divorce, where the parties to a marriage are estranged, and have lived separate and apart for eight years or more, and the court shall be satisfied that the parties can no longer live together, either party may be in law the injured party and apply for a divorce. In other words, both parties are innocent and both parties are injured, if the fact of estrangement be established, and either or both may apply for a divorce upon that ground. "Injured," "to be injured," "injured party," does not necessarily imply a physical or a moral wrong. It may mean any deliction, wrong, or condition that would bring a party asserting it within the bound of a statute which recognizes it as a cause of action. It is not a question of such injuries as might be involved in the adultery of one or the other of the spouses, abandonment, cruel treatment, drunkenness, etc.

"Statutes relating to divorce should receive a liberal and equitable construction. The legislative intent should be ascertained and carried out in a manner calculated to afford the intended remedy. Such statutes are not penal and should not be given a strict construction. They are to be construed with reference to the apparent policy of the Legislature as gathered from the entire act. To execute this policy, the meaning of the statute may be contracted or expanded from the ordinary or literal meaning of the terms." Nelson on Divorce, § 12.

This must be so, if the amendment of 1917 is to be sustained at all; for, if a party may not be an injured party in the sense in which I have outlined, no divorce could ever be granted upon the ground of estrangement continuing for any period of years, and the act of the Legislature was abortive. For before a divorce could be granted upon the

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ground of estrangement the complaining party would have to make a showing of injury—that is to say, make a showing of some of the causes set out in the other subdivisions of the act—and the divorce (if one were granted) would be because of these positive injuries and not because of the entrangements; in other words, the law will be exactly as it was before the amendment of 1917 was passed.

My thought may be further illustrated, and, as I believe, may be sustained, by a reference to subdivision 8 of the original act (section 9 of the act as amended). In 1886 (Laws 1885–86, p. 120) the Legislature amended the divorce statute, so as to provide for a divorce—

"In case of incurable chronic mania or dementia of either party, having existed for ten years or more, the court may, in its discretion, grant a divorce."

The effect of the court's opinion is to write this subdivision out of the books, for how can it be said that any spouse may be "injured," in the sense relied upon by the majority, when the other spouse has become the involuntary victim of incurable chronic mania or dementia? Yet in a broad legal sense this may be so, for there may be, as I have undertaken to make plain, an injury in a sense other than a positive wrong.

I apprehend that all of the judges of this court who have sat as superior court judges have granted divorces under the eighth subdivision of the act—the ninth subdivision of the amendment—being the insanity clause, and felt that they were obeying the will of the Legislature as it is to be gathered from the act, and that an injury, in the sense of positive wrong, was not essential to the granting of a decree. That the parties in this case are estranged is certain. No one can read the record, and come to any other conclusion than that the appellant is not sincere, and is not truthful in asserting her desire for a reconciliation. The court below, after a careful trial, held:

"It is manifest to the court that the defendant is not sincere nor truthful in stating that she desires a reconciliation between the plaintiff and herself, and that the defendant is estranged from the plaintiff, and that the plaintiff is estranged from the defendant."

Appellant has no intention, and has had no intention, of resuming marital relations with respondent. She is standing upon technical right, and insisting that a marriage that has long since ceased to be real shall remain as a burden to the parties and as an offense to society.

My conclusion would eliminate all questions of res adjudicata, for if it is the law in cases of estrangement that either or both parties may be the party injured, because of the continuation of an intolerable relation, it being established that the estrangement is permanent and that the parties will no longer live together, the present action rests in a new cause of action that was not in any way passed upon or determined by the court in the previous suits, and respondent should be given his remedy.

(107 Wash. 57)

LLOYD v. NORTHERN PAC. RY. CO.
(No. 15193.)

(Supreme Court of Washington. May 13, 1919.)

1. NEGLIGENCE ⟸136(30) — IMPUTED NEGLIGENCE—QUESTION FOR JURY.

In action for damage to automobile struck by a train at a crossing, whether owner's servant, who had been allowed to take automobile for a pleasure ride, was acting in the course of his employment, so that his contributory negligence would be imputed to the master by reason of having received an express package addressed to the master without any special instructions from the master, *held* for jury.

2. NEGLIGENCE ⟸90—CONTRIBUTORY NEGLIGENCE OF BAILEE.

Where a master permits a servant to use an automobile for his own purposes, the servant is only a bailee, and where the automobile is damaged by the negligence of a third person, negligence of the servant cannot be imputed to the master, regardless of whether in legal effect the automobile was hired or gratuitously loaned to the servant.

3. BAILMENT ⟸1—MASTER AND SERVANT—PROPERTY UNDER CONTROL OF SERVANT.

Where a master permits a servant to use an automobile for his own pleasure, whether in legal effect hired to the servant or gratuitously loaned to him, the relation between them is merely that of bailor and bailee.

Chadwick, C. J., dissenting.

Department 2.

Appeal from Superior Court, Franklin County; John Truax, Judge.

Action by N. C. Lloyd against the Northern Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Cannon & Ferris, of Spokane, and Edward A. Davis, of Pasco, for appellant.

M. L. Driscoll, of Pasco, for respondent.

PARKER, J. The plaintiff, Lloyd, seeks recovery of damages for injury to his automobile, claimed to have been caused by the negligent operation of one of the trains of the defendant railway company, at a public crossing in the village of Eltopia, in Franklin county. Trial in the superior court for that county, sitting with a jury, resulted in ver-

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dict and judgment in favor of the plaintiff, from which the defendant has appealed to this court.

Respondent's automobile was being driven by Richard Colley on Sunday, June 24, 1917, when it was struck by one of appellant's trains, causing the injury thereto for which recovery is sought. For a period of some three months prior thereto Colley had been working for respondent upon his farm situated some two miles distant from Eltopia, under an employment agreement by which Colley was to receive a certain sum per month, and the use of the automobile for his own pleasure, from time to time, as occasion therefore might arise. During the afternoon of the Sunday in question Colley took a young lady for a pleasure ride in the automobile. Just what their destination was is not clear; but upon their return they went a short distance out of their way, with a view on the part of Colley of going through Eltopia and calling upon the railway company's agent there and procuring an express package which he thought might be there for respondent. He had not been instructed by respondent to call for any such package; nor is there anything in the record to show that either he or respondent thought of his calling upon the agent of the railway company for any such package when he started with the automobile. He had, however, on some previous occasions, brought packages from the agent of the railway company, which had been shipped to Eltopia in respondent's name. This he had done without any special instructions from respondent. Upon this occasion Colley received from the agent a package addressed to respondent, and placed it in the automobile, when he and the young lady proceeded in the automobile on their way towards respondent's farm, which rendered it necessary for them to cross appellant's track in Eltopia; and it was while so crossing the track that the automobile was injured by being struck by one of appellant's trains. While the jury returned a general verdict in favor of respondent awarding him damages in the sum of $450, the jury were also asked and answered special interrogatories submitted by the court as follows:

"Interrogatory 1. Was there negligence on the part of the Northern Pacific Railway Company, which negligence was the proximate cause of the damage to plaintiff's automobile? Answer: Yes.

"Interrogatory 2. Was there negligence on the part of Richard F. Colley the driver of the automobile, contributing to the damage to the plaintiff's automobile? Answer: Yes.

"Interrogatory 3. At the time of the collision was Richard F. Colley driving or using the automobile for or on behalf of the plaintiff, N. C. Lloyd, or in connection with the plaintiff's business, or in the course of his employment as an employé of the plaintiff? Answer: No.

"Interrogatory 4. At the time of the collision, was Richard F. Colley driving the automobile for private purposes or for his own pleasure? Answer: Yes."

A motion for judgment in appellant's favor, notwithstanding the verdict, was timely made by its counsel, the denial of which by the trial court is assigned as error.

[1] The first contention made in appellant's behalf is, in substance, that the evidence conclusively shows that Colley was, at the time of the injury of the automobile, acting in the course of his employment for respondent, so that his contributory negligence thereby became the contributory negligence of respondent preventing his recovery, and that the trial court should have so decided as a matter of law. It seems to us that, under the circumstances here shown, the question whether or not the driving of the automobile at the time it was injured was being done by Colley as the agent and employé of respondent, or was being done by him for his own private purpose and pleasure, was a question for the jury to decide. Aside from the fact that Colley procured from the railway company's agent the package for respondent, and had it in the automobile when it was injured, there seems to be but little room for arguing that he was at that time doing anything other than for himself. And we think the mere fact that he had procured the package just before the automobile was injured, and then had it with him in the automobile, did not so plainly render his driving the automobile at the time it was injured the performance of his duties as respondent's employé that it could be so decided as a matter of law. The jury, we think, might, under all the circumstances, have well concluded that Colley's procuring of the package was a mere matter of accommodation, as if such act had been performed by a neighbor. Our conclusion upon this branch of the case finds support in our decisions in Hammons v. Setzer, 72 Wash. 550, 130 Pac. 1141, George v. Carstens Packing Co., 91 Wash. 637, 158 Pac. 529, and Warren v. Norguard, 103 Wash. 284, 174 Pac. 7.

[2, 3] It is further contended in appellant's behalf that the contributory negligence of Colley, as found by the jury, was in any event imputable to respondent, preventing his recovery, and that the trial court should have so decided as a matter of law. This contention is rested upon the theory that because of the relationship between Colley and respondent with reference to the automobile, though it only be that of bailor and bailee, respondent cannot recover for the injury to the automobile, because Colley's contributory negligence would prevent his recovery for injury to the automobile. There was a time when the decisions of the courts seemed to support this view of the law; but in recent years the weight of authority is we think, decidedly to the contrary.

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In view of the special finding of the jury that Colley was, at the time the injury to the automobile occurred, driving it for his own pleasure, and not in the course of his employment as respondent's employé, which finding we think the evidence fully supports, it seems plain that the relation then existing between him and respondent with reference to the automobile was merely that of bailor and bailee. Van Zile, Bailments (2d Ed.) §§ 3 and 4; 6 C. J. 1101; 3 R. C. L. 72. Whether the automobile was in legal effect hired to Colley or gratuitously loaned to him we think is of no moment here, since Colley would be no more the agent of respondent in one case than in the other.

In Gibson v. Bessemer & L. E. R. Co., 226 Pa. 198, 75 Atl. 194, 27 L. R. A. (N. S.) 689, 18 Ann. Cas. 535, there was involved the hiring of a horse from a livery stable keeper and the killing of the horse by the railroad company while being driven by the bailee. The railroad company resisted the claim of damage made by the owner for the killing of the horse upon the ground of the bailee's contributory negligence in driving upon the track. Holding that the negligence of the bailee was not attributable to the bailor, the owner of the horse, preventing his recovery, Justice Potter, speaking for the court, observed:

"And in Edwards on Bailments (3d Ed., 1893) § 392, it is said: 'The hirer of wagons, or carriages and horses, receiving them into his custody to be used by him at his pleasure, becomes a bailee, and is in no sense a servant of the owner. He is responsible to the owner for the reasonable care of them, and to third persons for any negligence of his servants in the use of them. He is liable to third persons to the same extent as if he were the actual owner of the vehicles and teams used by him.' And again, in 1 Thompson on Negligence (1901) § 512, it is said: 'Unless the principles upon which the courts have at last settled have been grossly misconceived, the negligence of a bailee or his servants is not imputable to his bailor.' As far back as the case of Bard v. Yohn, 26 Pa. 482, Justice Knox stated the law as follows (page 489): 'If one lets or hires to another a horse to be used exclusively for the purposes of the latter, the owner of the horse is in no wise responsible for the negligent manner in which the horse may be used.'

"There is a difference where the owner sends a driver to manage and control the team and vehicle; for in so doing the owner retains the control, and may well be held accountable for the action of the driver, his servant and agent. But in the present case no driver was furnished, and the hirer assumed the care and control of the horse. There was no relation of master and servant or of principal and agent between the hirer and the liveryman, and the latter cannot be held responsible for the negligence of the former. Each must recover in his own right, if at all, and each must stand upon his own ground. Had Lantz, the hirer, brought suit and shown negligence by the defendant, and no negligence upon his own part, he could have recovered for damage to himself, but not for damage to the horse or vehicle. His right of action depended in no way upon that of the present plaintiff, nor does the right of recovery in the present action depend upon the right of the bailee to recover."

In New York, L. E. & W. R. Co. v. New Jersey Elec. R. Co., 60 N. J. Law, 338, 38 Atl. 828, 43 L. R. A. 849, there was involved a bailment arising out of the hiring of cars which were injured in a collision resulting from the concurring negligence of the bailee and the defendant company. It was sought by the defendant company to escape liability to the bailor, the owner of the cars, upon the ground of the bailee's contributory negligence being in law imputed to the bailor. In concluding an exhaustive and well-considered opinion, Justice Lippincott, speaking for the New Jersey Court of Appeals, said:

"I cannot perceive that whether, in respect to this action, the duty of the defendant and the bailee were joint or separate, can make any difference. If the same duty of care was due and owing to the plaintiff, then a common neglect of that duty would render them both liable as joint tort-feasors. If the duty to plaintiff was a separate one which was neglected to be performed by each of them, although the duties were diverse and disconnected, and the negligence of each was without concert, if such neglects concurred and united in causing the injury, the tort still is equally joint, and the tort-feasors are subject to a like liability. Matthews v. Delaware., L. & W. R. Co., 27 Vroom [56 N. J. Law] 34 [27 Atl. 919, 22 L. R. A. 261]. The bailee was bound to use reasonable care and diligence in the preservation of the property from injury. The defendant, in the operation of the electric car, was bound to exercise reasonable care in avoiding injury to the property of which the plaintiff was the owner. It would seem that the intervention of the negligence of the bailee could not shield the defendant from injury caused by its own negligence. Both might have been selected as joint tort-feasors, or the action could be maintained against either. The conclusion reached is that the plaintiff had the right to sue either or both of these companies for the injuries arising from their negligence to the locomotive and cars of the plaintiff, and it is not a defense to the action that the accident was contributed to by the negligence of the other. Each is liable upon its own negligence, and the negligence of the bailee is not imputable to the plaintiff as a shield to the defendant against recovery."

In Sea Ins. Co. v. Vicksburg, S. & P. R. Co., 159 Fed. 676, 86 C. C. A. 544, 17 L. R. A. (N. S.) 925, the Federal Circuit Court of Appeals for the Fifth Circuit had under consideration a bailment consisting of the leaving of cotton with a compress company to be bailed. In holding that the loss of the cotton by fire resulting from the negligence of the railway company contributed to by the negligence of the bailee would not prevent recovery by the insurance company as as-

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signee of the bailor. Judge Shelby, speaking for the court, said in part:

"A plaintiff cannot recover damages for an injury to which he has directly contributed by his own negligence. If the plaintiff's own fault, whether of commission or omission, has materially contributed to the injury, the plaintiff is without remedy against one also in the wrong. The converse of this doctrine ought to follow as a necessary corollary—that when one has been injured by the wrongful act of another, to which he has in no way contributed, he should be entitled to compensation from the wrongdoer, unless the negligence of some one towards whom he stands in the relation of principal or master has materially contributed to the injury. The bailor, we hold, is not the principal or master of the bailee."

In Spelman v. Delano, 177 Mo. App. 28, 163 S. W. 300, the court had under consideration a bailment in substance the same as that which is here involved; that is, it was the case of a farm hand having the use for his own pleasure of a horse belonging to his employer. While he was riding the horse it was killed by the railway company of which the defendant was receiver; the death of the horse being the result of the negligence of the railway servants and the contributory negligence of the farm hand, the bailee. Holding that his contributory negligence was not imputable to the bailor, his employer, Judge Trimble, speaking for the court, made the following pertinent observations:

"It must be remembered that the question in the case at bar does not involve a bailment in which the bailee is the agent or servant of the bailor, nor is there any privity of contract between them, unless, indeed, it can be said that the bailor, merely by lending the horse, makes the bailee his agent to care for the horse, and thereby creates such a relation as will make the bailor responsible for the acts of the bailee. Now, it cannot be said that, if the bailee had, after borrowing the animal for his own purpose, negligently ridden against another and injured him, the injured person could have any right of recovery against the bailor. If it be said that the bailor, by lending the horse, makes the bailee an agent for the care thereof, and is thereby impliedly responsible for the latter's conduct in reference thereto, and also makes it possible for the injury to occur, the answer is that the bailee is not the bailor's agent in caring for the horse, else the bailor would be responsible for a negligent injury committed by the bailee in using the horse, and this has never been held to be so. If the bailee failed to exercise the proper care, the bailor would have a right of action against him; and he would also have a right of action against a third party for negligently injuring him. And, when the negligence of the two concurs, he can sue both jointly or sue either one as he chooses. And if lending the horse can be said to render it possible for the injury to occur, the act of lending was not such as to render plaintiff blameworthy in any degree. So that we have a case where a plaintiff, without fault or negligence of his own, is suing for a loss occasioned by the concurrent negligence of two others. In such case can one of the persons in fault set up in defense the fault of the other, as against the owner who is wholly without fault? We think not, and, while at first blush the rule that the contributory negligence of a bailee cannot be imputed to a bailor when suing a third person for injuries to property may seem unjust, yet, when the rule is confined to those bailments which do not involve any privity of contract or agency between the bailor and bailee, it will not appear to be so harsh and unreasonable as might be supposed."

That decision contains one of the best reviews of the cases upon this subject to be found in the books. The following decisions are also in harmony with and support this view of the law: Alabama Great Southern R. Co. v. Clarke, 145 Ala. 459, 39 South. 816; Currie v. Consolidated R. Co., 81 Conn. 383, 71 Atl. 356; Henderson v. Chicago Rys. Co., 170 Ill. App. 616; Goldsmith v. Chicago, Milwaukee & St. Paul R. Co., 176 Ill. App. 336.

Our own decisions are quite in harmony with this view of the law, though they deal only with the question of the contributory negligence of the drivers of vehicles resulting in injuries to passengers therein, both for hire and as an accommodation. See Allen v. Walla Walla Valley R. Co., 96 Wash. 397, 165 Pac. 99, and our previous decisions therein cited. All of the decisions above noticed were rendered since the year 1897. In the late work of Van Zile, Bailments, § 128, that learned author states the law to be as above indicated.

The only decisions called to our attention which may be considered as lending support to the contrary view are the following: Puterbaugh v. Reasor, 9 Ohio St. 484, decided in 1859; Forks Township v. King, 84 Pa. 230, decided in 1876, which decision, in so far as it may be regarded as authority upon this question is, in effect, overruled by the later decision of that court in Gibson v. Bessemer, etc., R. Co., supra; Welty v. Indianapolis & V. R. Co., 105 Ind. 55, 4 N. E. 410, decided in 1886, a critical reading of which case we think will show that it is in at least some measure distinguishable from the one before us; and Illinois Cent. R. Co. v. Sims, 77 Miss. 325, 27 South. 527, 49 L. R. A. 322, decided in the year 1900.

We are quite convinced that the decided weight of authority at the present time, and also the better reason, supports the view that the contributory negligence of Colley was not imputable to respondent, under the facts of this case as found by the jury.

The judgment is affirmed.

HOLCOMB, MOUNT, and FULLERTON, JJ., concur.

CHADWICK, C. J. I do not agree with my esteemed Associates. They have, as I be-

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lieve, reasoned from a false premise. It is that Colley was a mere borrower or a gratuitous bailee and was not engaged in his employer's (respondent's) business, and although there be some authority holding that the negligence of a gratuitous bailee may be imputed to the bailor, the later and better authority is to the contrary. I am willing to admit for the purpose of this argument that the holding of the court is sound, and that the conclusion reached by the majority is sustained by later authority (3 R. C. L. p. 147), although the rule is otherwise laid down in 29 Cyc. 546, and the annotator of the L. R. A. Reports says of Sea Insurance Co. v. Vicksburg, S. & P. R. Co., cited in 17 L. R. A. (N. S.) 925, that—

"The only case found supporting the conclusion reached * * * is New York, L. E. & W. R. Co. v. New Jersey Electric R. Co., 60 N. J. Law, 338, 38 Atl. 828, 43 L. R. A. 849."

In the later annotation of Gibson v. Bessemer & L. E. R. Co., 27 L. R. A. (N. S.) 689, it is said:

"Perhaps Gibson v. Bessemer & L. E. R. Co., which is in harmony with the Sea Ins. Co. Case and New York, L. E. & W. R. Co. v. New Jersey Electric R. Co., * * * may be regarded as sufficient to turn the scale in favor of the other side of the proposition."

But the law relied on does not reach or control the undisputed facts in this case, nor do any of the cases cited deny the principle for which I shall contend; it is, where property is not merely loaned to the user, but is turned over to him under a contract of use and as a part consideration for services rendered, the owner may not recover if the party to whom he has given the use of his property has been guilty of contributory negligence. It must be borne in mind that Colley did not hire the machine nor was he using it as a mere gratuity. He had the use of it as part payment of a debt due from the owner, and as to third persons he was in legal effect and to all intents and purposes the owner of the machine. The machine had been bought by respondent and Colley, and was owned jointly by them for a time. Respondent, after two or three months, bought Colley's interest. Respondent testifies that Colley, who had worked for him for about three years, continued in his employment after the purchase of the machine under an arrangement whereby Colley was to get "so much a month and had the use of the car," and that this arrangement had been in effect from November, 1916, up until the time of the accident. He further testifies that from the time of the purchase of his interest Colley "was to have the use of the car and so much per month," and:

"Q. When you bought back the half interest, it was the understanding that he at all times should have the use of the car in addition to his wages, and whenever he wanted to go anywhere he could take the car? A. Yes, sir.

"Q. In other words, the car was furnished you as part payment for your employment there? A. Yes, sir.

"Q. And you had been using the car that way for several months before the accident? A. Yes, sir; I had."

It is unnecessary to review the authorities cited by the majority. A brief reference to the case of Spelman v. Delano, 177 Mo. App. 28, 42, 163 S. W. 300, so strongly relied on by the writer of the opinion, will sufficiently illustrate my thought. The proper distinction is noted:

"The weight of authority seems to be clearly in favor of the rule that in a case where the circumstances show that the relation between the owner of the property and the one in possession of it at the time of its destruction is simply that of bailor and bailee, and does not involve any element of partnership, principal and agent, or master and servant existing between them, then the contributory negligence of the bailee is not imputable to the bailor in an action by the bailor against a third party for negligently destroying the bailor's property."

In Sea Insurance Co. v. Vicksburg, S. & P. R. Co., 159 Fed. 696, 86 C. C. A. 544, 17 L. R. A. (N. S.) 925, the court qualifies the rule:

"When one has been injured by the wrongful act of another, to which he has in no way contributed, he should be entitled to compensation from the wrongdoer, unless the negligence of some one towards whom he stands in the relation of principal or master has materially contributed to the injury."

The case of Spelman v. Delano was one of gratuitous bailment. The party in whose hand the property was at the time of the injury was a mere borrower.

"Plaintiff was under no obligation to transport Cook to and from his place of labor. His lending the horse to Cook was no part of the contract between them."

The case is distinguished from a case such as we have at bar upon that ground. Here the use of the automobile was a part of the contract of employment, and when respondent gave Colley the use of his machine in payment of his wages instead of money he vouched for and became a guarantor of his competency to handle the machine and answerable for his due care in driving it just as much as if he had employed him to drive the machine as a stage or as a delivery wagon. If Colley had negligently injured a third party, a court or jury would have surely held respondent to answer in damages upon the theory of agency or master and servant. He would not in such case be heard to repudiate his contract; then why in this? The falsity of the premise of the majority is therefore disclosed in the first line of the quotation from the Spelman Case:

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"It must be remembered that the question in the case at bar does not involve a bailment in which the bailee is the agent or servant of the bailor, nor is there any privity of contract between them." 177 Mo. App. 38, 163 S. W. 304.

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If there be not privity of contract between the respondent and Colley, I would be at a loss to contrive a state of facts out of which such relation might arise. Had the quotation begun in the preceding paragraph, the majority would have sounded the bottom upon which this case should be made to rest.

"Of course if by reason of the circumstances of the bailment, there is a privity of contract between the bailor and the bailee so that the bailee can be regarded as the agent of the bailor, then the negligence of the former should be and is imputed to the latter, the same as when the relation of master and servant exists between them." 177 Mo. App. 38, 163 S. W. 304.

Now in the case at bar it will not be disputed that the relation of master and servant existed at the time the contract was entered into and that the right to use the automobile as part remuneration for services rested in that relation. So, if the parties were master and servant at the time the contract was made, they must of necessity remain in that relation so long as the property was used under the terms and in the manner provided in the contract; that is to say, if they are master and servant as between themselves, they must, under all authority, remain master and servant as to third parties.

The harshness of the rule asserted by the majority even in cases where it might be held to apply is apologized for by the writer of the opinion in the Spelman Case:

"* * * While at first blush the rule that the contributory negligence of a bailee cannot be imputed to a bailor when suing a third person for injuries to property may seem unjust, yet when the rule is confined to those bailments which do not involve any privity of contract or agency between the bailor and bailee, it will not appear to be so harsh and unreasonable as might be supposed. 177 Mo. App. 39, 163 S. W. 304.

So much for the law of the case as it arises out of the contract made by the parties and under which the machine was used at the time of the accident.

As I read the record, the facts will not sustain the holding of the majority or the verdict of the jury that Colley was not engaged in the prosecution of respondent's business, or that he was not his agent or his servant, and that he was using the car merely for his own pleasure, and was therefore a gratuitous bailee.

Colley, having the use of the machine as against any right to interfere on the part of the respondent, drove out on a Sunday afternoon in company with a young lady whom he intended to take to her home. While traveling over the country it occurred to him that a shipment of liquor which, as the law then was, must be obtained on a permit, and then only at stated intervals, was about due. The liquor had been ordered by the respondent and was shipped in his name. Colley went out of his way, out of the path of pleasure, to go to the station. He had on other occasions gone to the same place to receive like shipments for respondent. He inquired of the agent whether a package had been received for respondent. Being notified that the package was at the depot, he receipted for it in respondent's name and undertook to carry it home. There was no express direction on the part of respondent to Colley to bring this particular shipment, but it was Colley's habit and his custom to go to the depot without specific direction and receive such shipments for respondent from time to time. Respondent himself testifies:

"Q. He had on other occasions stopped at the station and got packages of this character for you? So it was understood that there was no objection on your part to his getting it out and bringing it home? A. No, sir; I didn't object.

"Q. It was perfectly agreeable with you that he stop and bring the package home, if he happened to be there? A. It was all right.

"Q. In fact, it would save you the trip if it was there, and he could bring it out for you? Is that the idea? A. Not necessarily the trip; no, sir.

"Q. What distance is it from your place to the station? A. About two miles.

"Q. He had to go for it if you didn't bring it out? Somebody has to get it? A. Yes, sir.

"Q. And after you had found out on this particular day he had received this package for you and signed for it in your name you made no objection at all? A. No, sir.

"Q. It was perfectly satisfactory to you? A. Yes, sir.

"Q. When you found out that he received your package and was taking it out, you made no objection, and it was perfectly satisfactory to you that he might bring it out? A. Yes.

"Q. While you had not instructed Mr. Colley to get any packages for you, he had from time to time brought packages out for you, and it was agreeable to you that he should do that? A. I had no objection to anybody bringing them out to me.

"Q. And he had done it before? A. He had probably, but I don't remember it.

"Q. And it was perfectly agreeable that he should get this particular package and bring it out? A. I had no objection.

"Q. You made no objection after you found out that he had the package on that particular day? That was perfectly satisfactory to you that he should bring it out? A. I didn't make any objection."

This testimony clearly discloses that, aside from all other questions in the case, Colley was engaged in his master's business, and, whether under an implied or express authority, his act was ratified so as to put it be-

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yond the power of the respondent to disaffirm his negligence and recover in this case. The liquor was received by Colley, who signed the name of respondent, and respondent says that his act was "perfectly satisfactory" to him. The testimony of the respondent is corroborated by that of Colley, the driver of the machine.

For these reasons, I believe that the judgment should be reversed, and the cause dismissed.

(106 Wash. 593)

BRANDT v. ORROCK. (No. 15141.)

(Supreme Court of Washington. May 1, 1919.)

HIGHWAYS ⟸7(1)—PRESCRIPTION—VACANT LANDS.

There must be something more than mere travel over uninclosed lands by the public in order to establish a public highway over the same by prescription; the use of the land must be adverse.

Department 2.

Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Action by Julius Brandt against James R. Orrock. Judgment for plaintiff, and defendant appeals. Affirmed.

Mark F. Mendenhall and Arthur H. Steake, both of Spokane, for appellant.

Carl Ultes, Jr., of Spokane, for respondent.

HOLCOMB, J. Brandt, plaintiff below, brought this action to restrain defendant from using a road across Brandt's land, alleging in his complaint that defendant, Orrock, was the tenant of land lying north and east of Brandt's land, and that prior to May 1, 1916, Orrock used the land of plaintiff as a road for ingress and egress to Orrock's land; and that Orrock had another roadway equally as convenient to the public highway. The evidence indicates that the other roadway here referred to was what is known as the "Stevens Creek road." The complaint further alleges that on May 1, 1916, Brandt's tenant, Hagemann, planted his land, including the roadway in dispute, and put a fence across the road; that on June 5, 1917, Orrock drove across plaintiff's land and threatened to continue to cross the land; and further alleged irreparable injury, praying for damages and a temporary and permanent injunction. The lower court issued a temporary restraining order, and thereafter, the respondent deeming the restraining order insufficient, a second temporary injunction was issued on June 14, 1917.

Appellant (defendant below) in his answer alleged that the road sought to be closed had been used as a road, and that the general public had been in notorious, adverse, and undisturbed possession and use of such road for more than 10 years prior to the time plaintiff Brandt acquired title to his land; and it had been so used by the general public for more than 25 years; and up to within 3 years of the beginning of this action was the only outlet for the local residents to the public school, post office, etc., at Kiesling, and was their direct road to the city of Spokane, and always used as such; and that the road is a connecting link between roads both to the east and west of Brandt's land and had been worked by himself and the public for more than 25 years; that large quantities of wood and timber had been hauled over the road from their lands and sold in Spokane; that Hagemann, the tenant of Brandt, had put in some crop and sought to prevent the defendant and his son from passing back and forth from their lands. Appellant further alleged in his answer that, in the year 1917, one Coller and wife were living with Orrock and farming his land, and Coller was also working his own land lying between 3 and 4 miles west of Orrock's land, near Willow Springs, and that the only direct and feasible road was the road in dispute across Brandt's land, and that to be barred from traveling across Brandt's land would compel them to go south down the mountain and then return almost due north along a hilly and steep ridge to get back upon the Big Rock road, thus compelling a needless additional travel along a laborious, roundabout route of 5 miles in each round trip between the Orrock lands and the Coller land, to their great delay and damage. By way of cross-complaint, there were further allegations that appellant and the public had for many years been accustomed to cross the Brandt land (though not then owned by Brandt) to reach various objectives, and that there is no other feasible or direct road for the general public traveling from Spokane to Moran Prairie or Kiesling and living along the Big Rock road to Orrock's land and lands to the east of him. Appellant's cross-complaint further alleged that this road is absolutely necessary for himself and the general public, and to close the same would work irreparable damage. The prayer of the cross-complaint was that respondent be perpetually enjoined from closing the road, and that the road be decreed a public highway.

At the trial, the evidence supported mainly the contention of long user. Numerous witnesses appeared who testified to the unimpeded use of the road for longer or shorter periods of time, as their experience warranted. Respondent concedes substantially all of this testimony pertaining to the use of his land up to the time of its cultivation

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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by Hagemann, claiming only that the route used was not one definite roadway, but was variable and deviating from one road to another according to the best ground therefor at different times. Essentially, the question that emerges for determination is one of law rather than one of fact.

Appellant urges: (1) That the public by long-continued user of a way may acquire prescriptive rights in a road and thus establish it as a legal highway, citing Smith v. Mitchell, 21 Wash. 536, 58 Pac. 667, 75 Am. St. Rep. 858; State v. Horlacher, 16 Wash. 325, 47 Pac. 748; State ex rel. Mountain Timber Co. v. Superior Court, 77 Wash. 585–590, 137 Pac. 994; Mason v. McReavy, 84 Wash. 9, 145 Pac. 993. (2) When a highway has been accepted either by the action of public officers or by prescription through user for a period of seven years, it will require an equal period of seven years' continuous abandonment to oust the public of its rights in the road, citing Seattle v. Smithers, 37 Wash. 119, 79 Pac. 615; Wasmund v. Harm, 36 Wash. 170, 78 Pac. 777; McWhorter v. Forney, 69 Wash. 414, 125 Pac. 164. (3) Continued adverse user for ten years or more raises a presumption of grant and owner closing way has burden of proof. (4) Open and adverse user through gates gives prescriptive rights in a road. (5) Owner cannot shut old way and give new way and put gates in new way. The burden of proof is on the plaintiff asserting that the use was permissive.

Against this, the respondent contends that the instant case falls within that class of cases in which a private easement cannot be created over the lands of another at the time when they are open and uninclosed, the use of which was permitted prior to the cultivation thereof. Nor does the prescriptive period begin to run until the land is cultivated and the use thereof denied. He also contends that this court has held in effect, in the cases of Schulenbarger v. Johnstone, 64 Wash. 202, 116 Pac. 843, and Watson v. County Com'rs, 38 Wash. 662, 80 Pac. 201, that the rule is that to create a highway by prescription the use or possession must be open, notorious, continuous, and "adverse." The public, however, cannot acquire a public highway over such lands where it appears the use was permissive during the period that the land was vacant and unoccupied, notwithstanding the fact that a period of 20 years had elapsed; nor does the prescriptive right begin to run until the owner does some act, or suffers some act to be done, by way of asserting his ownership over the land thus used.

The solution of two propositions in the affirmative or negative would be determinative of this controversy: First, did the prescriptive period begin to run until the land was cultivated and the use thereof denied; and, second, did it devolve upon the defendant to prove that the highway had been used openly, notoriously, continuously, and "adversely" for the prescriptive period? If the prescriptive period did begin to run long before the time of the cultivation of the land, then, on respondent's own concession, the public must be held to have acquired that right.

Upon the main question presented as to whether prescriptive title in the public was established, appellants cite three Washington cases, above noted. We will briefly examine them.

The first, State v. Horlacher, supra, was an action by the state for obstructing a public highway with a fence. This case establishes certain rules of evidence in a prosecution for obstructing a public highway as to the fact of the establishment of such highway; only doubtfully and inferentially could any rule of prescription be arrived at from this decision, the declaration of such rule not being the object of the decision.

The second, Smith v. Mitchell, supra, establishes the rule that where the only means of ingress to, and egress from, the lands of a private person in order to reach a market for the products of his farm and nursery is a public highway, the obstruction of such highway is of such special injury to him as to authorize his maintaining an action to enjoin it as a public nuisance, under Bal. Code, § 3093.

The third case, State ex rel. Mountain Timber Co. v. Superior Court, supra, involved simply the constitutionality of section 5857—1, 3 Rem. & Bal.; Judge Gose, the writer of the opinion, observing:

"The constitutionality of the act is the only question presented in the briefs or argued at the bar."

We do not regard any of these cases as other than incidentally relevant to the controversy.

On the other hand, this court has clearly and comprehensively stated the rule of prescription as it applies to facts similar to those presented by the instant case.

In Watson v. County Com'rs, supra, this court stated:

"The rule of law governing prescriptive rights of way over such lands is thus stated by the Supreme Court of Illinois, in O'Connell v. Chicago, etc., Ry. Co., 184 Ill. 308, 56 N. E. 355; 'The land in question, being uninclosed prairie land, the rule applies, which has been held by this court in a number of cases, that, where land is vacant and unoccupied and remains free to public use and travel until circumstances induce the owners to inclose it, the mere travel across it, without objection from the owners, does not enable the public to acquire a public road or highway over the same. Such use by the public of vacant and unoccupied land by travel over it, even after the period of 20 years, is regarded merely as a permissive use. Such user continues to be regarded as being by per-

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mission of the owner until he does some act, or suffers some act to be done, by way of his asserting his ownership over the land thus used. In other words, there must be something more than mere travel over uninclosed lands by the public, in order to establish a public highway over the same by prescription.'"

Schulenbarger v. Johnstone, supra, amplifies this rule. This case presents a striking similarity to the instant case, although a subordinate question was one of a private way of necessity which the court dismisses as not properly at issue. After stating the undoubted rule that a right of way may be acquired by prescription in this state, the court observes:

"We understand the rule to be that a hostile or adverse intent must mark the inception of the use upon which title is made to depend, or if the original use be permissive, a changed intent on the part of the user, or the mere lapse of time, although the term of the original permission is agreed upon, will not initiate or ripen a title. * * * It can hardly be contended that it was ever the intent of the law to hold that a private easement could be created over the lands of another at a time when they were open and uninclosed. It has never been so held, although the right be asserted by the public. * * * It was held in Watson v. County Com'rs, supra: * * * 'If there are any acts which indicate the intention of the owner of the soil to preserve the control to himself, like the erection of a fence and gate, it cannot be said that the intention is established, and the road does not become a highway, however long it may have been used, even beyond the period of 20 years. Such permissive use, in the absence of any intention to dedicate, is but a mere license, which may be revoked at the pleasure of the owner.' Monographic note (Whitesides v. Green, 13 Utah, 341, 44 Pac. 1032), 57 Am. St. Rep. 758. In the case at bar, we see no more than the usual accommodation between neighbors that marked the settlement of the public domain. * * * To charge the owner with acquiescence, or to credit the user with an adverse intent, would put a penalty upon generosity. * * *"

The two foregoing cases, with the cases therein cited and harmonized, we regard as definitive of the rights of the parties in this matter, and that, although there was the enjoyment of a somewhat devious passway for a long period of years over the open, uninclosed land of the respondent, no prescriptive rights were acquired by the appellants or the public generally which would estop the assertion of respondent's private ownership in the manner in which this case indicates it was made. Holding, as we must, that the prescriptive right did not begin to run till the act of Brandt and his tenant here complained of, it devolved upon appellants to prove that the highway was used during the prescriptive period openly, notoriously, continuously, and "adversely." This, manifestly, they could not do, for the alleged prescriptive period would have begun to run in 1916, when Brandt asserted his right to obstruct the highway.

Judgment affirmed.

CHADWICK, C. J., and MOUNT, PARKER, and FULLERTON, JJ., concur.

(106 Wash. 542)

STATE ex rel. ANDERSON v. HOWELL, Secretary of State. (No. 15292.)

(Supreme Court of Washington. April 26, 1919.)

1. STATUTES ⟸109 — VALIDITY — TITLE — EMERGENCY CLAUSE—"INDEPENDENT SUBJECT."

An emergency clause in a law is not an independent subject within the meaning of Const. art. 2, § 19, providing that no bill shall embrace more than one subject, and that shall be embraced in its title, since it simply relates to the time when the act becomes effective, and it need not be included in the title of the act.

2. STATUTES ⟸16(1)—AMENDMENT OF BILL—EMERGENCY CLAUSE—CHANGING SCOPE OR OBJECT—"CHANGE ITS SCOPE OR OBJECT."

An amendment in form of an emergency clause, which states the time when a bill shall take effect, does not "change its scope or object" within the meaning of Const. art. 2, § 38, providing no amendment or bill shall be allowed which shall change its scope or object.

3. STATUTES ⟸35½—EMERGENCY ACT—MOTOR VEHICLE — APPROPRIATION — REFERENDUM.

Laws 1919, c. 46, § 1, increasing the annual license fees from motor vehicles over that provided by Laws 1917, c. 155, and Laws 1915, c. 142, regulating the use of highways where the money to be raised thereby was appropriated by Laws 1919, c. 92, needed to take effect immediately that the appropriations might be available, and the Legislature was justified in making the act emergent, and it could not be referred to the voters under Const. Amend. 7.

Department 2.

Proceeding by the State, on the relation of C. O. E. Anderson, against I. M. Howell, Secretary of the State of Washington, for writ of mandamus to compel submission of Laws 1919, c. 46, § 1, to a referendum. Application denied.

W. R. Crawford and Morris B. Sachs, both of Seattle, for appellant.

L. L. Thompson, of Olympia, and R. M. Burgunder, of Colfax, for respondent.

MOUNT, J. This is an application for a writ of mandamus to compel the secretary of state to accept and file certain documents offered by the relator for the purpose of subjecting section 1, c. 46, of the Laws of 1919

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to a referendum. The secretary of state refused to file the documents offered by the relator, for the reason that the chapter mentioned contained an emergency clause and was therefore not subject to a referendum.

It appears that in 1915 the Legislature of this state enacted chapter 142 of the Laws of that year. This act is commonly known as the "Motor Vehicle Code." It was enacted for the purpose of regulating the operation of automobiles and other vehicles on the streets and highways of the state and for raising revenue for the maintenance and repair of permanent highways. This law required all operators of motorcycles, automobiles, and trucks to pay a certain annual license fee based upon the horse power of the engine, except in case of trucks, which was based upon the per ton capacity. The money collected from these fees was required to be deposited in the state treasury to the credit of the general fund, and, after paying the expense of issuing the licenses, the surplus was credited to the permanent highway fund for the maintenance and repair of permanent highways. In 1917, by chapter 155 of the Laws of that year, the annual license fees were increased, and the law of 1915 was amended so as to provide that the moneys received from motor vehicle license fees should be distributed to the counties for the maintenance of primary highways on the basis of $100 per mile for each mile of such primary highways constructed therein. The balance of the money was paid to the counties for the maintenance of permanent highways. The Legislature of 1919, by chapter 46, amended sections 15, 17, and 18 of the act of 1915 by a law which provides as follows:

Section 1 changes the basis for the collection of fees from horse power to weight and materially increases the fees. This section also adds to the existing law by providing that trucks shall carry only a certain sized load.

Section 2 of the act exempts certain motortrucks and automobiles from a license fee.

Section 3 creates a state fund to be known as the "Motor Vehicle Fund," and requires that all fees collected by the secretary of state be credited to this fund, from which shall be paid annually:

First. One-half of the amount appropriated for the biennium for the motor vehicle department in the secretary of state's office.

Second. One million dollars to be distributed to the counties and cities for the maintenance of primary highways on the basis of $200 per mile for each mile of primary highway constructed in the counties, and of such streets as are a part of such highways, and the balance of the money to be credited to the permanent highway maintenance fund of the respective counties.

Third. The balance put into such fund is applied to general road construction or paving, as provided for by appropriation.

Section 5 of the act provides:

"This act is necessary for the immediate preservation of the public safety and the support of the existing institutions of the state and shall take effect immediately."

After this chapter was passed by the Legislature the relator offered to file five printed copies of the act and a statement giving the name and post office address of the relator and his affidavit that he is a legal voter in the state, and requested the secretary of state to submit the act to a referendum under the Constitution. The secretary of state refused to file these documents, and this application was made for a writ of mandamus.

[1] The relator argues that the emergency clause is not effective for the reason that the title to the act does not contain a statement to the effect that the act is emergent. The title of the act is as follows:

"An act relating to the use of public highways, providing for the licensing of motor vehicles and the collection and disbursement of fees therefor, and amending sections 15, 17 and 18 of chapter 142 of the Laws of 1915."

Relator argues that it was necessary under the Constitution that the title of the act should have contained a statement to the effect that it was emergent. No provision of the Constitution is pointed out to us which requires that an emergency must be stated in the title of an act. Section 31 of article 2 was stricken from the Constitution by the act of 1911 (Laws of 1911, p. 136), ratified at the election in 1912. Section 19 of article 2 provides that:

"No bill shall embrace more than one subject, and that shall be expressed in the title."

An emergency is not an independent subject. It is simply a provision relating to the time when the act becomes effective.

[2] Relator also argues that when the bill was originally introduced in the Legislature it contained no emergency clause; that afterwards the emergency clause was introduced as an amendment to the act. The relator contends that this changes the scope of the bill and is in violation of section 38 of article 2 of the Constitution, which provides:

"No amendment to any bill shall be allowed which shall change the scope and object of the bill."

It is plain, we think, that an amendment which states the time when a bill shall take effect does not change the scope or object of the bill. It simply changes the time when the act shall take effect. It has no reference to the scope or object of the bill. We are satisfied, therefore, that even though the emergency clause was attached to the bill

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by amendment it did not affect either the object or scope of the bill.

[3] Relator strenuously argues that this bill is not emergent as a matter of law, notwithstanding the legislative declaration that it is emergent. A number of cases from this court are cited to the effect that the question of emergency is a judicial question. We said, in State ex rel. Case v. Howell, 85 Wash. 281, 147 Pac. 1162, quoting from State ex rel. Brislawn v. Meath, 84 Wash. 302, 147 Pac. 11:

"The said legislative declaration has no greater effect, and is no more binding upon the court, than if the Legislature had declared that a certain measure is or is not constitutional. In such contingency that question would still remain for the courts to determine. The question before us is simply one of construction or interpretation of an act of the Legislature and of a provision of the Constitution, and that is a judicial question."

We also said in the Brislawn Case:

"The true rule is: The referendum cannot be withheld by the Legislature in any case except it be where the act touches the immediate preservation of the public peace, health, or safety, or the act is for the financial support of the government and the public institutions of the state, that is, appropriation bills. If the act be doubtful, the question of emergency will be treated as a legislative question, and the doubt resolved in favor of the declaration of emergency made by the legislative body."

See, also, State ex rel. Blakeslee v. Clausen, 85 Wash. 260, 148 Pac. 28, Ann. Cas. 1916B, 810.

The Constitution provides, in the Seventh Amendment:

"The second power reserved by the people is the referendum, and it may be ordered on any act, bill, law, or any part thereof passed by the Legislature, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions. * * *"

This court has held, in the cases of State ex rel. Blakeslee v. Clausen and State ex rel. Case v. Howell, supra, that highways are existing institutions. In the Blakeslee Case we said:

"Upon any theory, a public highway is a public institution. A road is not only a physical institution built by the state in the exercise of its sovereign duty to promote the convenience and necessities of the citizen as well as the common welfare, but the department to which the Legislature has delegated that function is an institution as much so as is its creator, the Legislature."

Chapter 46 of the Laws of 1919 is an act for the support of the highways of the state. It regulates the use of such highways. It authorizes certain motor vehicles to be operated upon the highways upon the payment of certain license fees. These license fees are to go into a fund known as the "Motor Vehicle Fund." The fund is to be distributed in a certain way to be paid out by appropriations. The same Legislature, by an act known as chapter 92, appropriated the money to be raised from these license fees. Chapter 46 is to be construed in pari materia with other chapters appropriating moneys from these funds. In fact chapter 46, amending the act of 1915, is in effect a revenue measure. It provides the revenue by which the public highways in the state are to be built and maintained. It is therefore plainly an act relating to the support of the state institutions. We can readily understand why there was an emergency for this chapter. Under the provisions of the act of 1915, as amended by the Laws of 1917, collections from motor vehicle license fees began on March 1st, and were to be paid into the secretary of state's office prior to June 1st. If chapter 46, now under consideration, did not take effect until 90 days after the adjournment of the Legislature, it would not take effect until after June 1st, so that the increased license fees from motor vehicles operating upon the highways of the state could not be collected under the act until the year 1920. Large appropriations for maintenance and construction of highways were made out of the fees to be collected from motor vehicles. It was necessary, therefore, in order that these appropriations might become available to support the public highways, that this act should take effect immediately. But even if this were a doubtful question, then, under the rule in State ex rel. Blakeslee v. Clausen, supra, the legislative declaration would control. We think the question is not doubtful, and that the Legislature was justified in making the act emergent. Being an emergent act, it is not subject to a referendum under the Constitution.

The application is therefore denied.

MITCHELL, TOLMAN, and HOLCOMB, JJ., concur.

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(107 Wash. 99)

ÆTNA CASUALTY & SURETY CO. v. MOORE, State Bank Examiner.
(No. 15183.)

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(Supreme Court of Washington. May 14, 1919.)

1. STATES ⟸110—PRIORITY OF STATE AS CREDITOR—EFFECT OF RECEIVERSHIP.

Assuming that the state, by reason of its sovereignty and its qualified adoption of the common law, succeeded to and possesses a right corresponding to the prerogative of the crown of England to be first paid as a creditor of a corporation, such right is lost where a receiver is appointed for the debtor, or an assignment is made for benefit of creditors.

2. STATES ⟸110—PRIORITY OF STATE AS CREDITOR—EFFECT OF BANK EXAMINER TAKING CHARGE OF BANK AFFAIRS.

Assuming that the state of Washington, by reason of its sovereignty and its qualified adoption of the common law, succeeded to and possesses a right corresponding to the prerogative of the crown of England to be first paid when a creditor, such right was lost as against an insolvent bank, where the bank examiner took charge of the affairs and property of the bank under Laws 1915, p. 279 (Rem. Code 1915, §§ 3303—1 to 3303—19).

3. BANKS AND BANKING ⟸63½—INSOLVENCY—POWERS OF BANK EXAMINER.

Under Laws 1915, p. 279 (Rem. Code 1915, §§ 3303—1 to 3303—19), the bank examiner, when he has taken charge of the affairs and property of an insolvent bank, can, without the aid of any judicial inquiry, determine both the necessity for and the amount of assessments on account of the superadded liability of the stockholders, and to enforce collections of the same.

4. BANKS AND BANKING ⟸63½—CONSTRUCTION OF STATUTES.

Laws 1915, p. 279 (Rem. Code 1915, §§ 3303—1 to 3303—19), relating to the administration of banks and trust companies by the state bank examiner and the act of the bank examiner in taking charge of the affairs and property of the bank thereunder, ought to receive a fair and reasonable interpretation according to the just import of their terms.

Department 1.

Appeal from Superior Court, King County; Clay Allen, Judge.

Action by the Ætna Casualty & Surety Company, formerly the Ætna Accident & Liability Company, against Louis H. Moore, State Bank Examiner. Judgment for defendant, and plaintiff appeals. Affirmed.

J. Speed Smith, Henry Elliott, Jr., and James B. Murphy, all of Seattle, for appellant.

M. M. Richardson, Hugh C. Todd, and F. C Reagan, all of Seattle. for respondent.

MITCHELL, J. By the complaint two alleged causes of action are set up. The first, in substance, is that the plaintiff was and is still engaged in carrying on, in this state, a general surety business; that the Northern Bank & Trust Company was, on and prior to January 30, 1917, conducting in the city of Seattle a general banking business; that the bank was a regularly designated depositary for the funds of the state of Washington; that the plaintiff became surety on the statutory bond of the bank as such depositary in the sum of $5,000; that the bond was duly approved by the state board of finance and in force on January 30, 1917; that on January 30, 1917, the bank became insolvent, and the defendant as state bank examiner took charge of the affairs of the bank, and proceeded to close up its business as required by law; that when it failed there was on deposit with the bank state funds amounting to the sum of $30,000; that after the insolvency of the bank was established and it was found to be unable to pay the state, the state made demand upon the plaintiff for its proportionate share of said deposits (there being other bonds given to protect the state), and the plaintiff upon demand of the state paid to it on February 24, 1917, in fulfillment of its surety obligation, the sum of $4,202.86; that the state thereupon assigned to the plaintiff its claim against the bank; that plaintiff thereafter filed with the state bank examiner having charge of the affairs of said bank a claim, in which it claimed and demanded a prior right of payment over the general creditors of the bank, upon the theory that the state, by reason of its sovereignty, possessed a prior right of payment, and that the plaintiff, upon reimbursing the state, became subrogated and succeeded to the right of the state to be first paid out of the funds of the bank before the general creditors received any dividend; and that the state bank examiner rejected the claim of plaintiff as a preferred claim and allowed it only as a common one.

The second cause of action was in substantially the same form as the first, differing in that the plaintiff alleged that it became surety for the bank upon certain bonds executed and delivered to the treasurer of the city of Seattle, indemnifying the city against loss on account of deposits made by it with said bank; and that, after the bank was unable to repay the city moneys deposited with it, upon demand of the city the plaintiff paid to the city, as surety upon said bond and not otherwise, the sum of $25,441.81, and that it filed a similar preferred claim with the defendant, which claim was rejected as such and allowed only as a common claim. The prayer of the complaint is that the claims be established as preferred claims.

The defendant interposed a general demurrer to each alleged cause of action. The court sustained the demurrer. Plaintiff elect-

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ed to stand upon its complaint, and the court thereupon entered a judgment dismissing the complaint, with costs, from which this appeal has been taken.

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The questions of law involved are whether or not the state of Washington, by reason of its sovereignty and its qualified adoption of the common law, succeeded to and possesses a right corresponding to the prerogative of the crown of England to be first paid, that was enforceable in this case, and, if so, was the appellant subrogated to this preference right of payment upon satisfying the debts owing to, and taking assignments from, the state and the city? Of course it is admitted by appellant that the office of king and all prerogatives purely personal to him as such, being repugnant to our form of government, have been abrogated. But it is insisted that his sovereignty, powers, functions, and duties, in so far as they relate to the maintenance of civil government, are substituted by and devolve upon the people of the state, that they are not in conflict with any of our written law nor incompatible with our institutions of society, and that, inasmuch as claims or moneys due the king for the support and maintenance of the government, from whatever sources derived, were preferred over the claims of others, therefore it follows such preference became and continues to be the law of this state, because of an act of the Territorial Legislature of 1863, now Rem. Code, § 143, which provides:

"The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington, nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state."

One of the prerogatives of sovereignty of the crown of England was the right to have its debts paid as against its subjects. Many of the American states have held that this attribute of sovereignty exists and is applicable here by virtue of constitutional law or legislative enactments adopting the common law, while other states have expressed and hold the opposite view. Among those declaring or favoring the rule, and collecting the cases, English and American, on both sides of the question, are State v. Bank of Maryland, 6 Gill & J. (Md.) 205, 26 Am. Dec. 561; In re Carnegie Trust Co., 206 N. Y. 390, 99 N. E. 1096, 46 L. R. A. (N. S.) 260; United States Fidelity & Guaranty Co. v. Borough Bank of Brooklyn, 213 N. Y. 628, 107 N. E. 1086; Hoke v. Henderson, 14 N. C. (3 Dev.) 12; and the recent case of Ætna Accident & Liability Co. v. Miller, 54 Mont. 377, 170 Pac. 760, L. R. A. 1918C, 954. Among those to the contrary, and collecting authorities on both sides, are Freeholders of Middlesex County v. State Bank at New Brunswick, 29 N. J. Eq. 268, affirmed by the Court of Errors and Appeals, 30 N. J. Eq. 311; Potter v. Fidelity & Deposit Co. of Maryland, 101 Miss. 823, 58 South. 713; Brown v. American Bonding Co., 210 Fed. 844, 127 C. C. A. 406, by the Circuit Court of Appeals for Montana prior to the case of Ætna Accident & Liability Co. v. Miller, supra; and the recent case of Commissioner of Banking v. Chelsea Savings Bank, 161 Mich. 691, 125 N. W. 424, affirmed on rehearing 161 Mich. 704, 127 N. W. 351.

[1-4] We may and shall assume, without deciding, that the common law in this respect is in force in this state, and yet we think the state or its assignee is not entitled to the preference claimed in this action, for the reason it was lost prior to the state or appellant, its assignee, making any attempt to assert it, as we shall later see.

In the case of State v. Bank of Maryland, 6 Gill & J. (Md.) 205, 227 (26 Am. Dec. 561), an assignment case, in which the court confessed and declared the common-law rule of priority of payment to the sovereign, it was said:

"That right in England is enforced by the process in the writ of extent in chief, or in aid, according to circumstances, and may be here, by proceedings known to our courts. But in either case, to make it available, the proceeding must be resorted to, before other vested rights to the property sought to be subjected to the claim are acquired."

Then, after discussing the English cases showing how the right may be lost, the court said (6 Gill & J. 229, 26 Am. Dec. 561):

"We have endeavored to show that this is a fair and bona fide assignment for a valuable consideration, and passed the property from the bank, and beyond its power or control. If so, and a similar assignment in England has the effect to protect the property against the king's extent, and to defeat his priority (as we have seen it does), it has equally the effect here to protect the property in the hands of the trustees against the common-law priority of the state."

In the case of Freeholders of Middlesex County v. State Bank at New Brunswick, 29 N. J. Eq. 268, a receivership case, it was said:

"My judgment is, the state does not possess the prerogative claimed. But if my examination of the question had led me to a different conclusion, still, I think, the claim could not be sustained. The authorities of both countries unanimously agree that the right dies the moment the debtor's title is divested. No claim was made by the state in this case until after a receiver had been appointed. That appointment invested him with full power to sell, assign, and convey all the property of the corporation. * * * No act by the corporation is necessary to complete either the title of the receiver or that of his purchaser. Unlike proceedings under bankrupt laws, no assignment by the debtor or commissioners is required. Title is divested by force of law, and such divestiture is perfect and absolute."

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The case of State v. First State Bank of Las Cruces, 22 N. M. 661, 167 Pac. 3, L. R. A. 1918A, 394, was a case in which the state claimed a preference right to moneys in the hands of a receiver appointed to wind up the affairs of an insolvent bank in which the state had money on deposit. The court, assuming without deciding that the common-law right of preference in favor of sovereignty existed, held that upon the appointment of the receiver for an insolvent corporation title to its property is divested and goes to the receiver, and that therefore, when a receiver has been appointed for an insolvent state bank, the state is not entitled to a preference over the creditors.

In State v. Foster, 5 Wyo. 199, 211, 38 Pac. 926, 929 (29 L. R. A. 226, 63 Am. St. Rep. 47), the Supreme Court of Wyoming, in speaking of this prerogative, said:

"We do not care to decide this point, as it is unnecessary to do so. The assignment of the insolvent's property, both under common law and under our statute, passed the title, and no process could thereafter run against the property, either that of the state or the citizen, and the preference or prior right, if any existed, is thereby defeated."

The case of Commissioner of Banking v. Chelsea Savings Bank, 161 Mich. 691, 125 N. W. 424, 127 N. W. 351, was one wherein the state, through its commissioner of banking, claimed a preference because of a deposit on hand at the time of the failure of the bank. The commissioner of banking, after discovering the insolvency of the bank, had procured the appointment of a receiver under a law of Michigan which was similar, in this respect, to the law of this state as it existed prior to the act of 1915. In the opinion the court said:

"Without treating the action of the banking commissioner in closing the Chelsea bank as the precise legal equivalent of a fair and bona fide assignment by the bank of its assets for a valuable consideration, it is nevertheless true that the proceedings taken passed all the property of the bank beyond its power or control. This, being the result of enforcement of the state law, should have an effect equal to an assignment for benefit of all creditors. Such an assignment could not be avoided by the crown nor could it lay claim to goods seized by the sheriff on fieri facias and sold. King v. Lee, 6 Price, 369; Giles v. Grover, 1 Cl. & Fin. 72; King v. Watson, 3 Price, 6; 2 Tidd's, Practice, pp. 1098, 1099; Chitty's Prerogative of the Crown, 281, 284, 285; State v. Bank of Maryland, 6 Gill & J. (Md.) 205 (26 Am. Dec. 561). The principle proceeded upon seems to be that the right of priority of the sovereign attaches, as does the right of any lienor, only upon seizure under or enforcement of the proper writ. We do not hesitate to say that, assuming the right of priority contended for to exist in this state, the courts, in the absence of any assertion of the right by the state, and after the debtor has been divested of all control of its property in proceedings authorized by and following the statutes of the state, should not, sua sponte, assert the right in favor of a guarantor of the debtor."

However, as appellant rightly contends, this case does not arise upon receivership proceedings, nor upon an assignment by the bank, but upon the law of 1915 (Laws 1915, p. 279; sections 3303—1 to 3303—19, Rem. Code), relating to the administration of banks and trust companies by the state bank examiner and the act of the bank examiner in taking charge of the affairs and property of the bank thereunder. The act of 1915 is a comprehensive one, and provides in detail for the powers and duties of the bank examiner. By section 10 (Rem. Code, § 3303—10), it abolishes the power of the courts to appoint receivers (authorized and directed by the former law), and prohibits the making of any deed of assignment for the benefit of creditors, except upon notice to the state bank examiner, unless in case of urgent necessity it becomes in the judgment of the court necessary to do so, in which cases the bank examiner may, within five days after service of such notice upon him, take possession of such bank or trust company, whereupon no further proceedings shall be had as to the appointment of a receiver or under the deed of assignment; and, in the event a receiver has already been appointed or the assignee commenced to discharge his duties, the appointment shall be vacated or the assignee removed, and the state bank examiner proceed to administer the assets of the bank or trust company. The bank examiner is given power, without the aid of any judicial inquiry, to determine both the necessity for and the amount of assessments on account of the superadded liability of the stockholders and to enforce collections of the same. Hanson v. Soderberg, 177 Pac. 827.

By section 3 of the act he is given dominion over all the property and business of the bank, with power to liquidate its affairs; and under the supervision of the superior court he may compound bad or doubtful debts due, and with the approval of the court sell all real and personal property—

"and the state bank examiner, upon the terms of sale or compromise directed by the court, shall execute and deliver to the purchaser of such real or personal property such deeds or instruments as shall be necessary to evidence the passing of the title. * * *" Rem. Code, § 3303—3.

Keeping in mind the rule that all statutes of this nature ought to receive a fair and reasonable interpretation, according to the just import of their terms, we necessarily reach the same conclusion as that expressed in the case of Commissioner of Banking v. Chelsea Savings Bank, supra, at page 703 of 161 Mich., at page 429 of 125 N. W., viz.:

"Without treating the action of the banking commissioner in closing the Chelsea bank as the

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precise legal equivalent of a fair and bona fide assignment by the bank of its assets for a valuable consideration, it is nevertheless true that the proceedings taken passed all the property of the bank beyond its power or control. This, being the result of enforcement of the state law, should have an effect equal to an assignment for benefit of all creditors. Such an assignment could not be avoided by the crown. * * *"

There is this additional consideration which deserves notice: That the statute authorizing the deposit of state funds in banks was enacted prior to the Bank Examiner Act of 1915 which contains no provision for retaining out of the funds of the insolvent bank moneys due the state in preference to other creditors of the bank. Our views concerning the relations of the bank examiner to the property and the loss of dominion over it by the bank is further strengthened by subsequent sections of the act of 1915, to the effect that after the bank examiner shall have paid the claims of creditors and depositors and the expenses of administration, as provided for in section 11 (Rem. Code, § 3303—11), of the law, he shall call a meeting of the stockholders, who shall determine if the bank examiner shall continue to wind up the affairs of the bank or if an agent, to be selected by them, shall complete the liquidation. In the event the latter plan is chosen, section 12 of the act provides:

"The state bank examiner shall transfer to such agent or agents all the undivided or uncollected or other assets of such bank or trust company then remaining in his hands; and upon such transfer and delivery the said state bank examiner shall be discharged. * * *" Rem. Code, § 3303–12.

Again, the statute provides that whether the further liquidation be completed by the bank examiner or an agent the proceeds shall be delivered to the stockholders in proportion to their several holdings, under directions of the court, thus presenting a situation, as shown by the whole act, by which the title to the property taken by the bank examiner, or the proceeds thereof, by force of the law never becomes revested in the bank, the former debtor of the sovereign. Thus it appears we must of necessity reach a different conclusion in this case than that arrived at, on this point, in the receivership case of Ætna Accident & Liability Company v. Miller, supra, so much relied on by appellant, the doctrine of which, in declining to interrupt enforcement of the preference admitted to exist in favor of the state, was expressly declared to rest in part upon the theoretical possibility that the insolvent debtor might regain control of the property.

Certainly, if there is no cause of action stated as to the deposit by the state, there is none on account of that made by the city of Seattle.

For the reasons stated, the judgment is affirmed.

CHADWICK, C. J., and TOLMAN, MACKINTOSH, and MAIN, JJ., concur.

(106 Wash. 608)

TITUS v. CITY OF MONTESANO.
(No. 15186.)

(Supreme Court of Washington. May 1, 1919.)

1. DAMAGES ⇐206(1)—PHYSICAL EXAMINATION—PERSONAL INJURY ACTION—"MAY ORDER AND DIRECT."

Rem. Code 1915, § 1230—1, providing that court "may * * * order and direct" a physical examination, is not mandatory, but makes it discretionary with court as to whether such examination shall be ordered.

2. DAMAGES ⇐206(1)—PHYSICAL EXAMINATION—REFUSAL TO REQUIRE.

Court's refusal to require defendant in personal injury action to submit to physical examination under Rem. Code 1915, § 1230—1, was not abuse of discretion, where at time of motion therefor no issue had been framed as to extent of defendant's injury.

3. DAMAGES ⇐206(2) — PHYSICAL EXAMINATION—CONSTRUCTION OF STATUTE.

Unless it can be shown that some necessity exists for physical examination of defendant in personal injury action at time application is made, court's action in denying application will not be held abuse of discretion.

4. MUNICIPAL CORPORATIONS ⇐812(7)—DEFECTIVE SIDEWALK—CLAIM FOR DAMAGES—SUFFICIENCY OF CLAIM.

Claim for damages for injuries from defective sidewalk filed with city clerk under Rem. Code 1915, § 7998, locating place of injury as the east side of River street, Montesano, between Broad street and Spruce street, near the corner of Broad and River streets, *held* to sufficiently locate place of injury.

5. MUNICIPAL CORPORATIONS ⇐812(7)—DEFECTIVE SIDEWALK—CLAIM FOR DAMAGES—SUFFICIENCY OF CLAIM.

Claim for damages against city for injury from defective sidewalk, describing defect of sidewalk as "loose board * * * on sidewalk," *held* a sufficiently definite description of the defect.

6. MUNICIPAL CORPORATIONS ⇐812(1) — CLAIM FOR DAMAGES—PURPOSE.

Rem. Code 1915, § 7998, requiring claims for damages against city to be filed with city clerk, has a legitimate and not a meretricious purpose; the purpose being to protect the municipality from fraudulent claims enabling its officers, not only to examine the locus in quo to see if city has been negligent, but to obtain witnesses and procure testimony and generally to investigate the demand while evidence is obtainable.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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7. MUNICIPAL CORPORATIONS ⟸812(7) — CLAIMS FOR DAMAGES — SUFFICIENCY OF CLAIM—EXCLUSION OF INJURY.

Claim against city for damages filed with city clerk under Rem. Code 1915, § 7998, sufficiently described injury by stating injury to be "fracture of arch of foot"; description being reasonable, although it may not be technically accurate from a surgeon's point of view.

8. MUNICIPAL CORPORATIONS ⟸812(6) — CLAIM FOR DAMAGES—RESIDENCE OF CLAIMANT.

Claim against city for damages filed with clerk under Rem. Code 1915, § 7998, stating that claimant had resided in Montesano for 5 months and 20 days and in Seattle "15 years prior thereto," *held* to give claimant's residence for the past 6 months.

9. MUNICIPAL CORPORATIONS ⟸812(9) — CLAIMS FOR DAMAGES—FILING.

The filing of a claim for damages with city clerk *held* sufficient compliance with Rem. Code 1915, § 7998, requiring such claims to be "presented to the city or town council and filed with the city or town clerk within 30 days after the time such claim for damages accrued."

10. MUNICIPAL CORPORATIONS ⟸812(9) — CLAIM FOR DAMAGES—"PRESENT."

The word "present," within Rem. Code 1915, § 7998, providing that claims for damages against the city must be "presented" to the city or town council and filed with the city or town clerk, means to hand to and leave with, so that when claimant presents his claim he parts with its possession.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Present.]

11. MUNICIPAL CORPORATIONS ⟸821(23) — DEFECTIVE SIDEWALK—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.

Person injured by a defective sidewalk is not as a matter of law guilty of contributory negligence because of a general knowledge of the sidewalk's defective condition, if he had no knowledge of the particular defect by which he was injured.

12. MUNICIPAL CORPORATIONS ⟸821(23) — DEFECTIVE SIDEWALK — ACTION FOR DAMAGES—JURY QUESTION—CONTRIBUTORY NEGLIGENCE.

Whether person injured by defective sidewalk with general knowledge of the sidewalk's defective condition was negligent is generally for the jury, to be determined from matter of knowledge as a fact or circumstances along with other circumstances of the case.

13. MUNICIPAL CORPORATIONS ⟸816(11) — CLAIM FOR DAMAGES—VARIANCE—DATE OF INJURY.

In action against city for damages for personal injuries, discrepancy between notice of claim, stating injury to have taken place on October 16th, and the evidence showing it had occurred on October 18th or 19th, is not fatal where city was not prejudiced thereby.

14. MUNICIPAL CORPORATIONS ⟸812(1) — CLAIM FOR DAMAGES—CONSTRUCTION OF STATUTE.

Rem. Code 1915, § 7998, requiring claims for damages against city to be filed with city clerk within 30 days after accruing of claim, is in derogation of common right and ought not to be given a literal construction, when such a construction will operate to deny such rights, and when the city will in no manner be injured thereby.

15. APPEAL AND ERROR ⟸1004(1)—REVIEW—AMOUNT OF RECOVERY.

In personal injury action, the amount of damages is a matter of discretion for the jury, and the court will not interfere unless it plainly appears that the discretion has been abused.

16. DAMAGES ⟸130(2) — PERSONAL INJURY ACTION—EXCESSIVE VERDICT.

Verdict of $975 for fracture of arch of foot is not excessive.

Department 2.

Appeal from Superior Court, Grays Harbor County; W. O. Chapman, Judge.

Action by Dora C. Titus against the City of Montesano. Judgment for plaintiff, and defendant appeals. Affirmed.

O. M. Nelson, of Montesano, for appellant.
W. H. Abel, of Montesano, for respondent.

FULLERTON, J. The respondent was injured by a fall upon the sidewalk of the appellant city. Within 30 days after receiving the injury, she prepared and filed with the city clerk a written claim for damages. No action having been taken thereon by the city council within 60 days following the presentation of the claim, the respondent brought the present action to recover for the damages suffered. After the service of the summons and complaint upon the city, it appeared, through its attorney, and moved the court to require the complaint to be made more definite and certain by setting forth therein whether the respondent had been permanently injured by the accident for which she sued, and "for an order directing the plaintiff to submit to a medical examination for the purpose of determining the extent of her alleged injury and for the purpose of qualifying the witnesses of defendant to give testimony in said cause." The motion was denied by the court, whereupon the city demurred generally to the complaint, which being overruled it answered putting in issue the material allegations of the complaint, and setting up affirmatively contributory negligence on the part of the respondent. Issue was joined on the affirmative plea in the answer, and a trial had to a jury, which resulted in a verdict and judgment in favor of the respondent for the sum of $975.

[1-3] The appellant first assigns error on

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the ruling of the court denying its motion for a physical examination of the respondent. The statute relating to such examinations is found at section 1230—1 of the Code (Remington's). It provides that, on or before the trial of any action brought to recover damages for injury to the person, the court before whom such action is pending may from time to time, on application of any party therein, order and direct an examination of the person injured as to the injury complained of by a competent physician or physicians, surgeon or surgeons, in order to qualify the person or persons making the examination to testify in such cause as to the extent, nature, and probable duration of the injury complained of. This statute is not mandatory. It provides that the court "may * * * order and direct" a physical examination, and leaves something to the discretion of the court. When the motion was made in this instance, no issue had been framed as to the extent of the respondent's injuries, and no showing as to the necessity for such an examination accompanied the motion. It was not the purpose of the statute to needlessly harass a litigant, and, unless it is shown that some necessity exists for the examination at the time the application is made, the appellate court cannot say it is an abuse of discretion to deny it.

[4] The second assignment is that the court erred in overruling the demurrer to the complaint. The objection is to the claim which was referred to in the complaint and attached thereto as an exhibit. It is objected, first, that the claim does not accurately locate and describe the defect that caused the injury, or reasonably describe the injury. The notice locates the place of the injury as the east side of River street, Montesano, between Broad street and Spruce street, near the corner of Broad and River streets. It describes the defect as, "Loose board * * * on sidewalk;" and the injury as, "fracture of arch of foot." We think this sufficiently definite. It would be hard to locate the place of the injury more definitely, unless actual measurements were taken, and we can hardly think the statute requires this.

[5, 6] As to the description of the defect, it is objected that a loose board on the sidewalk, forming no part of it, would answer the description, and it is asserted that such a defect would not create liability against the city. We cannot think this a proper interpretation of the language of the claim. The natural inference arising from the language used is that the defect was a loose board forming a part of the surface of the sidewalk, rather than a board in the condition supposed. But the statute requiring the presentation of claims for personal injuries as a condition precedent to a right of action, as we have said on other occasions, was not intended as a snare. It has a legitimate, not a meretricious, purpose. The purpose of the law, as we said in Born v. Spokane, 27 Wash. 719, 68 Pac. 386, "is to protect the municipality from fraudulent claims, by enabling its officers not only to examine the locus in quo, to see if the city had been negligent, but to obtain witnesses and procure testimony, * * * and generally to investigate the demand while it is fresh and while evidence is obtainable, * * *" and further that "a reasonable compliance with its terms is all that can be demanded." The city could not have been misled by the description given in the notice before us. Had its officers examined the sidewalk at the place described, they could have ascertained whether the injury complained of was the result of a neglect for which the city was liable; they could have found out whether it was a loose board forming a part of the surface of the sidewalk, or some other matter that caused the injury. The notice therefore gave them the information the statute intended they should have, and thus reasonably complied with the requirements of the statute. In saying this, however, we do not wish to be held as subscribing to the doctrine that no liability would arise against the city even though the injury was caused by a loose board lying on and not forming a part of the sidewalk. Liability or nonliability, in such a case, would depend on circumstances, not necessary to discuss here.

[7] The statute requires the notice to "reasonably describe the injury." To say that the injury was a fracture of the arch of the foot is such a reasonable description, although it may not be technically accurate from a surgeon's point of view.

[8] A further objection to the notice is that it does not give the residence of the claimant for 6 months last past. The notice stated that the claimant had resided in Montesano for 5 months and 20 days and in Seattle "15 years prior thereto." It is said that this "amounts to saying that she lived in Montesano 5 months and 20 days and in Seattle 15 years prior to her injury," and that "we are not concerned where she lived 15 years ago." Manifestly, this interpretation of the language used is strained. Clearly, its natural interpretation is that the claimant lived in Montesano for 5 months and 20 days prior to her injury and in Seattle for the 15 years prior to her residence in the first-named place.

[9] The statute (section 7998, Rem.) provides:

"All claims for damages against any city or town of the second, third or fourth class must be presented to the city or town council and filed with the city or town clerk within thirty days after the time such claim for damages accrued. * * *"

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The city of Montesano is a city of the third class and is thus one of the cities to which the statute is applicable. The respondent simply filed her claim with the city clerk within the thirty days, and the appellant contends this was not a compliance with the statute. The statute is so worded as to lead to the inference that the presentation of the claim to the city council and its filing with the clerk are separate and distinct acts, each to be performed by the claimant; yet we cannot think this its meaning. To so construe it is to make other of its provisions inapplicable. By the terms of the statute relating to the government of cities of the third class the city council is not required to meet oftener than once in each month. Manifestly, therefore, the council may meet as often as the statute requires, and at a regular appointed time in each month; yet there be more than 30 days between some certain of such meetings. In such instances a claim for damages could accrue to a person with no opportunity to present it to the city council within the statutory period. Again, the statute fixes no time in the month at which the council shall meet, but leaves this time to be appointed by the council itself. For the council to appoint its time of meeting for the first Monday in the first month, the third Monday in the second month, and so on, alternating throughout the year, would be within its powers; yet, manifestly, in such a case there would be a period in every other month in which a claim for damages might accrue and no opportunity afforded to present it to the council within the 30 days. It will not do to say that the claim might be presented to the individual councilmen while not in session. The council is a body composed of the individual councilmen sitting together as a council; the individuals apart from each other and away from the meeting place do not constitute the council. Again the statute regulating the meetings of the council provides that regular meetings shall not be held oftener than once in each week. In view of this regulation, to say that the statute means that a claim must be presented to the council while sitting, is to deny the claimant the benefit of the 30-day period in which to present a claim, since it would be by the merest chance that a meeting of the council would be held precisely at the termination of that period. Moreover, the clerk is the channel of approach to the city council. By the statute he is the keeper of their records, and the recorder of their proceedings, and through him ordinary claims against the city are usually presented for audit and allowance. It would seem, too, that, if the suggested meaning is the true meaning of the statute, it would be difficult of compliance with literally.

[10] Claims for personal injuries must be in writing and verified by the claimant, and it is the verified writing that must be presented. While the word "present," used has other meanings, in this instance it means to hand to and leave with; that is, when the claimant presents his claim he parts with its possession. It is difficult to see how a claimant, after thus presenting his claim to the city council, could reclaim it for filing with the city clerk. For these and for other reasons that might be suggested, we think the Legislature meant nothing more by the somewhat peculiar phraseology used than that the claimant must present his claim for filing with the city clerk within the 30 days.

We are not without authority for the foregoing view of the statute. The city of Spokane at one time contained a provision in language similar to the language of the statute. We held in Durham v. Spokane, 27 Wash. 615, 68 Pac. 383, that presentation to the city clerk was a compliance with the charter. See, also, Roberts v. Village of St. James, 76 Minn. 456, 79 N. W. 519; Nicol v. City of St. Paul, 80 Minn. 415, 83 N. W. 375; Tiggerman v. City of Butte, 44 Mont. 138, 119 Pac. 477; 8 Thompson on Negligence, § 6350; 28 Cyc. 1459.

[11, 12] The appellant, at the close of respondent's evidence, moved for a nonsuit. The motion was renewed at the close of all of the evidence, and after verdict the appellant moved for judgment notwithstanding the verdict. The denial of these motions is assigned as error. The motions for nonsuit were based on a claim of contributory negligence. It is said that the respondent's testimony showed the condition of the walk to be so dangerous that no prudent person was justified in using it. Certain of the respondent's witnesses did testify to facts, it is true, tending to show that the sidewalk was unsafe for travel; but we do not find that the evidence shows the respondent had knowledge of these conditions. While she knew the walk was defective, she did not testify, and it was not shown that she had knowledge that she was liable to meet with an accident of the character that caused her injury. She did say that the board over which she tripped was "rotten and badly rotted," and from appearances she thought it had been in that condition for a long time. But we gather from the record that she learned these facts from an examination made after, not before, the accident, and that prior thereto she had only a general knowledge of the defective condition, not that it was unsafe for use. The law does not in all cases hold a person injured by a defect in a walk guilty of contributory negligence, but generally treats the matter of knowledge as a fact or circumstance bearing on the question, to be submitted to the jury

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along with the other circumstances of the case. Tait v. King County, 85 Wash. 491, 148 Pac. 586. It is only where the injured party knows of a particular defect and is injured by the particular defect that the question can become one of law. Here, the evidence does not show such a state of facts, and the question of her contributory negligence was properly submitted to the jury. It is needless to add, perhaps, that the question of respondent's contributory negligence must be determined from her own knowledge of the condition of the sidewalk, not what her witnesses knew of its condition.

[13, 14] In support of its motion for judgment notwithstanding the verdict, the appellant called attention to a discrepancy between the notice of claim and the evidence introduced at the trial as to the time the injury occurred, making the contention that this was fatal to the respondent's right of recovery, and the same contention is made in this court. The time of the occurrence of the injury is stated in the notice of claim as October 16, 1917, while the proofs showed that it occurred on either the 18th or 19th of that month. But we cannot conclude that the mistake was fatal to the cause of action. Had the notice been postdated with reference to the time, so as to make it appear that it was filed within the 30-day period when in fact it was not, a different question would be presented. Here the time stated in the notice as the time of the occurrence of the injury was prior to the actual time of its occurrence, and, unless it was shown to have actually misled the city officers, it would be a harsh rule to declare it fatal. There was no such showing. It was made to appear conclusively that no investigation of the accident at all was made by the city officers, or by any one on the city's behalf; in fact, the city clerk locked the notice in his vault and did not even present it to the city council. We have hereinbefore stated the purpose of the statute. It is enough to add that it is in derogation of common right, and ought not to be given a literal construction when such a construction will operate to deny such rights, and when the city will in no manner be injured thereby.

The authorities on the question are not uniform. Our own cases, in so far as we have touched upon the question, tend to support the conclusion we now reach. King v. Spokane, 52 Wash. 601, 100 Pac. 997; Murray v. Seattle, 96 Wash. 646, 165 Pac. 895.

In Sullivan v. City of Syracuse, 77 Hun, 440, 29 N. Y. Supp. 105, the time of the injury was stated in the notice and alleged in the complaint as occurring on the 5th day of August, 1891, while the proofs showed that it occurred on the 4th day of August, 1891. This was held sufficient to comply with the statute requiring the time of the injury to be stated. To the same effect is Connor v. Salt Lake City, 28 Utah, 248, 78 Pac. 479. It would seem, also, that if the phrase "time when the same occurred," used in the statute, required the precise day to be stated it would require the statement of the precise time of the day down to the hour, minute, and second; yet the courts seem unanimously to hold, where no special reason exists for greater particularity, that to state the day is sufficient. Donnelly v. Fall River, 132 Mass. 299; Lilly v. Town of Woodstock, 59 Conn. 219, 22 Atl. 40; Sherry v. Rochester, 62 N. H. 346.

[15, 16] By its remaining assignment of error the appellant contends that the award of damages made by the jury is excessive. But the amount of such an award is so far a matter of discretion with the jury the courts will not interfere unless it plainly appears that the discretion has been abused. Here we cannot so find. The amount of the award we have stated. It is much less than this court permitted to be awarded in the case of Magnuson v. MacAdam, 77 Wash. 289, 137 Pac. 485, for a very similar injury.

The judgment is affirmed.

CHADWICK, C. J., and PARKER, MOUNT, and HOLCOMB, JJ., concur.

(106 Wash. 649)

BROWN v. WASHINGTON WATER POWER CO. (No. 15156.)

(Supreme Court of Washington. May 9, 1919.)

1. JUDGMENT ⇐199(3) — JUDGMENT NON OBSTANTE VEREDICTO.

If there is evidence or reasonable inference from evidence sufficient to sustain verdict, a motion for judgment non obstante will not be granted.

2. STREET RAILROADS ⇐98(5) — INJURIES ON TRACK—CONTRIBUTORY NEGLIGENCE.

A girl of 17, who, in the middle of a long city block, walked along the street railway track ahead of an approaching car, and looked back and continued on, the motorman gradually slowing down and constantly ringing the gong, so that she was struck, was guilty of contributory negligence, and cannot recover; the motorman not being guilty of any negligence in view of the facts.

Department 1.

Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by Loretta Brown against the Washington Water Power Company. From judgment of dismissal, plaintiff appeals. Affirmed.

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Thomas A. Scott and Robertson & Miller, all of Spokane, for appellant.

Post, Russell, Carey & Higgins, of Spokane, for respondent.

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MITCHELL, J. This is a personal injury case. Plaintiff, Loretta Brown, claimed she was injured through the negligence of defendant. Defendant denied negligence on its part, and alleged her injuries were caused by her own fault. The cause was tried by a jury. At the close of plaintiff's case an unsuccessful challenge to the sufficiency of the evidence to entitle plaintiff to any judgment was made by defendant. The jury returned a general verdict in favor of plaintiff, and answers to five special interrogatories as follows:

"Q. State whether or not the motorman sounded his gong when approaching the plaintiff, and, if so, for how great a distance. A. One and a half blocks, or 450 feet.

"Q. State whether or not the plaintiff looked or listened for an approaching car at any point east of Magnolia street. A. Yes.

"Q. State whether the plaintiff when crossing Napa street was walking in the north track or in the space between the two tracks. A. Between the two tracks.

"Q. Did plaintiff at any point east of Magnolia street take any precaution to avoid a collision with the car on the south track? A. Yes.

"Q. If you answer the last question in the affirmative, state what precaution she so took. A. By looking back."

Thereupon defendant moved for a judgment non obstante on the law, evidence, and answers to the special interrogatories. The motion was granted, a judgment of dismissal entered, and plaintiff has appealed.

Appellant was a high school girl between 17 and 18 years of age, and was injured about 2 o'clock in the afternoon, on Illinois avenue, in Spokane, by a moving car operated by respondent. The avenue runs in an easterly and westerly direction along the top of a bluff above the river to the south. The Great Northern Railway track parallels the avenue; its track being along the side of the bluff 15 to 20 feet below the surface of the avenue. Streets running from the north down into the avenue near the place where the collision occurred, in their order going from west to east, are Madelia, Pittsburg, Magnolia, Napa, and Crestline. The blocks between these last-named streets front 300 feet on the avenue, except the one between Napa and Crestline streets, which has a front of 500 or 600 feet. The car line is a double-track system, the tracks being 5 feet or more apart, running along the avenue, which is straight and level from a point several blocks west of Madelia street, thence eastward to Crestline street, where it turns north. Ordinarily on the north side of the avenue where the accident occurred, next to the property line, there was a well-beaten path which disputed testimony showed to be difficult of travel on the day in question because of gravel, earth, lumber, and débris thrown about in the construction of a city sewer just north of and paralleling the north track of the car line. There was no sidewalk or pathway along the south side of the avenue on the edge of the bluff. There were no obstructions on either of the car tracks or the space between them from a point several blocks west of Madelia street to Crestline street. Appellant had been living on Madelia street, near the avenue, for some time, and was accustomed to taking the avenue street cars to her school. She had frequently walked along this portion of the avenue and was familiar with the location of the car tracks and the fact that street cars were operated thereon—the south track being used by cars going east; the other track by cars going west. At the time in question she came south from her home on Madelia street to the north sidewalk line of the avenue, turned east, walked in a beaten pathway nearly two blocks, crossed Pittsburg street to a point near Magnolia street, then dropped down into the space between the two car tracks. She testified that at this place she looked in each direction, saw no car, and that afterwards she paid no more attention to the street cars and saw or heard none. She walked rapidly towards the east between the car tracks, crossed Magnolia street, and on to a point about 100 feet beyond Napa street, when she was struck on the right side of her head and hip by the left front of the street car going in the same direction on the south car track. On the other hand, the motorman testified that in approaching her he continuously sounded the gong of the car, commencing at a distance of a block and a half before striking her. The jury so found. He further testified that when his car was about a block from where the collision occurred, while he was ringing the gong, "she turned around and looked down the street, and she turned back and kept on walking." This evidence satisfied the jury, notwithstanding her testimony to the contrary; for by answers to special interrogatories the jury found she looked back when she was at a point east of Magnolia street. All the witnesses on both sides who testified on the subject agreed that 25 to 30 feet before striking appellant the motorman reversed the car by its emergency appliance and stopped it about 25 feet after striking the girl, who fell to the side and just in front of the rear trucks of the street car. At the time of the accident a train of freight cars was running alongside on the Great Northern Railway track in the same direction the street car was going. By the traffic ordinance of the city the maximum speed at which street cars were allowed to be run in the residence portion of the city was 15

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miles per hour. Concerning the speed of the car one of appellant's witnesses, a passenger, on being asked if he could tell the rate of speed at which the car was going when the girl was struck, answered:

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"Well, I would say at least 20 miles an hour; possibly a little more."

But on cross-examination he said:

"I did not state to the agent that I was unable to state at what rate of speed the car was running. I cannot state accurately. I am not an expert on rate of speed, although I have ridden on trains, street cars, and automobiles. I never ran an automobile, I was never a street car conductor or motorman. I never timed a street car."

The other witnesses estimated the speed of the car at from 5 to 14 miles per hour until the reverse was thrown on. Several of the witnesses testified that the speed of the car was gradually reduced after commencing to sound the gong. During all of the time appellant was on the avenue prior to the accident there was no street car upon the north track.

The different situations, one shading into something unlike the others, presented by the cases on the subject of personal injuries, with their resultant rules and determinations, suggest at once that the chief concern in deciding the average case of this sort is not so much to discover some well-established rule or principle, but to keep well in mind the facts in the case at hand, so as to properly apply such rules. This is not a street-crossing case where the motorman must have in mind those already in view and expect others to come into danger of his car at any moment, but a situation in front of a long city block with a single pedestrian in view, both going in the same direction, their lines not crossing nor even converging, each cognizant of the other's movements.

In the law each of the parties had a right to the use of the street, and each knew that the other was aware of such right; each knew the street car, in its operation, was confined to a track, and that appellant, a girl about grown, in a moment of time and with a trifle of effort, could get out of danger, and each knew the other was aware of such conditions. There was available to her the less dangerous way on the north track on which she would be instantly and constantly aware of danger from a car on that track and positively free from any harm by a car on the south track. The motorman was held to the duty of having seen her, and he did see her, in sufficient time to have avoided any danger of injury. With the car tracks before her and her familiarity with the street car operations, she was held to the obligation of seeing the approaching street car in sufficient time to have saved herself, and, although she denied having seen it, since the jury found upon sufficient evidence that she looked back at a place and time when the car, under a sounding gong, was within the distance of a block approaching her, she is held responsible in the law to the same extent as if she had admitted seeing it at that time. In such situation the motorman, continuing to sound the gong, had the right to assume that she would take care of herself, as obviously he did assume, until, getting within 25 to 30 feet of her, when she yet had time to protect herself, upon noticing her inattention to her own duty of self-preservation, he promptly did all within his power to avoid injuring her by throwing his car into reverse. Counsel for appellant contends, however, with considerable earnestness, that because of the noise made by the moving freight train there was a greater duty imposed upon the motorman to look after the welfare of the appellant. The argument is faulty in this case because, notwithstanding such noise, he knew her vision was unimpaired and had just been employed in observing his car approaching near by, which knowledge, with the continued use of the gong, properly shaped his conduct until an emergency arose, when he acted with all the promptness and means at his command.

The case of Mey v. Seattle Electric Co., 47 Wash. 497, 92 Pac. 283, was a case where a pedestrian, traveling in the same direction the car was going, walked along a street car track in Seattle at a point where the sidewalk and part of the street were fenced off or taken up with building operations, but where there was room every few feet to step out of the way to allow cars to pass, and he failed to keep a lookout and was struck and injured by a car. The trial court granted a motion for a nonsuit on the grounds of failure of proof of any negligence on the part of the defendant and because it appeared that the plaintiff was guilty of contributory negligence. This court affirmed the judgment, and in the opinion, written by Judge Dunbar, said:

"We think the court did not commit error in sustaining this motion. While this court, in common with all other courts, has held that the right to use the street was a joint right with the ordinary traveler, whether equestrian or pedestrian, yet it has always recognized the patent fact that the cars traveling on fixed tracks must of necessity be accorded the right of way under ordinary circumstances. If this were not true, the management and running of street cars in a city would be rendered impracticable, if not impossible."

Again the court said:

"There being room for the passenger to step out of danger every few steps all along the route which he traveled, the motorman, we think, might well be justified in concluding that a pedestrian would step out of the way of the car instead of remaining on the track or so close to the track that he would be run down by

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it. This case, we think, falls squarely under the rule heretofore announced by this court in Duteau v. Seattle Electric Co., 45 Wash. 418, 88 Pac. 755; Coats v. Seattle Electric Co., 39 Wash. 386, 81 Pac. 830; Criss v. Seattle Electric Co., 38 Wash. 320, 80 Pac. 525; and Skinner v. Tacoma R. & Power Co., 46 Wash. 122, 89 Pac. 488."

In Kiely v. Seattle Electric Co., 78 Wash. 396, 139 Pac. 197, the plaintiff, while working at a manhole between the tracks of the street railway, was injured by a passing car. It was denied that he had any right to recover because of his contributory negligence. This court, citing and relying upon cases from this and other courts, said:

"Although respondent was rightfully in the street, it was his duty to exercise reasonable care to learn of the approach of cars; a turn of the head and a glance of the eye would have been sufficient, especially when a signal was given by the ringing of a repeating gong. The manhole at which respondent was standing was between appellant's east and west tracks. Respondent was required to take only one or two steps towards the easterly track upon which no car was approaching; an act requiring but an instant of time. It is impossible to see how he could have failed to remove himself from the zone of danger in the face of the approaching car, even though it was running at an excessive speed, without being guilty of contributory negligence as a matter of law."

[1, 2] Our conclusion in this case, sustaining the lower court, does no violence to the rule that, if there is evidence or reasonable inference from evidence sufficient to sustain the verdict, a motion non obstante will not be granted. Here the special findings of the jury and the undisputed evidence on the other essential and controlling facts, in the light of the applicable decisions of this court, negative any negligence on the part of the respondent, and show that the proximate cause of appellant's injury was her own carelessness.

Judgment affirmed.

CHADWICK, C. J., and TOLMAN, MACKINTOSH, and MAIN, JJ., concur.

(106 Wash. 569)

STATE ex rel. CONLEY v. SUPERIOR COURT FOR KING COUNTY et al.

(No. 15289.)

(Supreme Court of Washington. April 28, 1919.)

1. VENUE ⇐42—MOTION FOR CHANGE—RESIDENCE—RIGHT OF DEFENDANT.

If the facts as to place of residence contended for by defendant on his motion for change of venue were admitted, and no other facts were involved, the discretion of the trial court would not be invoked, and plaintiff would be entitled to have the case transferred to the county of his residence for trial as a matter of right.

2. VENUE ⇐42—RESIDENCE AND CONVENIENCE OF WITNESSES—DISCRETION OF COURT.

Where defendant, moving for change of venue, presented facts as to the county of his residence which were denied by resisting affidavits, which also raised the question of convenience of witnesses, such question of convenience was one of fact invoking the discretion of the trial court, whose finding the Supreme Court would not be disposed to overrule, however presented.

Department 1.

Prohibition by the State of Washington, on the relation of M. C. Conley, against the Superior Court for King County and others. Writ denied.

Coleman & Gable, of Sedro Woolley, for appellant.

James A. Dougan, of Seattle, for respondents.

TOLMAN, J. The plaintiff herein was made a party defendant in a suit brought against himself and the community of which he is a member in the superior court for King county. Process was served upon him in Skagit county. In due time he appeared in that action by serving and filing a motion to make the complaint more definite and certain, and also a motion for a change of venue to Spokane county, supported by his affidavit that he then was, and for many years had been, at all times a resident of the county last named. The plaintiffs in the original action, for the purpose of resisting the motion for change of venue, filed affidavits tending to show that the defendant in that action plaintiff here, had been engaged in contracting in Skagit and King counties and elsewhere for some time, alleging that he had not resided permanently or continuously in Spokane county for at least a year prior to that time, and also alleging that the pending action grew out of a contract entered into and to be performed in King county, that all of the witnesses, both for the plaintiffs and the defendants, excepting only the defendant, who is plaintiff here, resided in King county, and that the public records of King county would bear materially upon the issues and would be required in evidence. Other facts were alleged for the purpose of indicating that the claim of residence in Spokane county was not well founded. A reply affidavit was filed by the plaintiff here, explaining or denying these last-mentioned allegations, and giving in more detail the facts regarding his residence in Spokane county, but in no wise denying the allegations as to the residence of the witnesses, or controverting the allegations that the convenience of witnesses and the

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ends of justice would be forwarded by the case remaining for trial in King county. The trial court made no finding as to the place of residence of the plaintiff here, but entered an order denying the change of venue, upon the ground that the cause of action arose in King county, and the convenience of witnesses required that the case be there tried. Plaintiff herein seeks a writ of prohibition, prohibiting and restraining the superior court for King county from further proceeding in said cause, other than to transfer the same to Spokane county for trial.

[1, 2] We have recently had occasion to reexamine the questions here involved, and to restate the law with reference to changes of venue, in State ex rel. Schlosberg v. Superior Court, filed April 2, 1919, 179 Pac. 865, and no further discussion of the principles involved seems necessary. Were the facts contended for by the plaintiff herein as to his place of residence admitted, and were there no other facts involved, then the discretion of the trial court would not be invoked, and plaintiff would be entitled to have the case transferred to the county of his residence for trial, as a matter of right. State ex rel. Martin v. Superior Court, 97 Wash. 358, 166 Pac. 630, L. R. A. 1917F, 905.

But here, not only are the facts as to residence denied, but the question of the convenience of witnesses was a fact upon which the trial court was called upon to pass, and one which appeals peculiarly to the discretion of the court. We said in State ex rel. Schlosberg v. Superior Court, supra:

"If the case did present such question of fact, then it invoked discretion which could be exercised either way, and if the superior court for Spokane county erroneously exercised it, it did no more than commit error in the exercise of a vested jurisdiction. And so with the superior court for Skagit county, when it had the motions for change of venue before it; it had conflicting facts as to the convenience of witnesses and whether the ends of justice would be best subserved in that county or in another, which invoked the discretion of the superior court for Skagit county, and if it erred in the exercise of that discretion, it did no more than commit error, which could not affect its jurisdiction; in other words, if the lower courts erroneously exercise their discretion, not arbitrarily or capriciously, but merely as an error of judgment, denying no inherent justice to any of the parties in the case, then we cannot control that discretion by peremptory writ in advance of appeal, where the question may be finally litigated on a final appeal."

The showing as to residence before the trial court, when it passed upon the motion, was exceedingly meager, based wholly upon affidavits of the defendant seeking the change; and the traversing affidavits contained statements which raised an issue of fact which, it is true, was not directly decided. The question of the convenience of witnesses, upon which the ruling was based, is clearly one of the fact, and while the facts set forth in the affidavits presented on behalf of the plaintiffs below were not directly denied by the reply affidavit, yet their force and effect were challenged in the argument here, and were, no doubt, so challenged in the argument below, thus presenting a question of fact which invoked the discretion of the trial court, whose finding thereon we would not be disposed to overrule, however presented. Under such conditions, the writ sought cannot issue.

Writ denied.

CHADWICK, C. J., and MOUNT, MITCHELL, and HOLCOMB, JJ., concur.

(106 Wash. 632)

SIEGLOCH et al. v. IROQUOIS MINING CO. et al. (No. 15039.)

(Supreme Court of Washington. May 9, 1919.)

1. MINES AND MINERALS ⟸54(2) — "IMPROVEMENT"—FIXTURES.

Property such as a drill press, rails laid in place, and machinery of a permanent nature which tended to increase the value of the property as a mine, would be included in the term "improvements" in contract for sale of mining claims providing that in case of default purchaser should deliver possession of mining claims, together with all "improvements" placed thereon by him; the quoted term being broader than the term "fixtures."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Improvement.]

2. MINES AND MINERALS ⟸54(2)—CONTRACT FOR SALE — CONSTRUCTION — "IMPROVEMENT."

A quantity of sundry loose mining tools, equipment, and supplies, useful in the operation of the mine in question and its subsidiary activities, but in no sense improvements of the realty, were not "improvements," within contract for sale of mining claims providing that in case of default purchaser should deliver possession of claims together with all improvements placed thereon by him.

3. MINES AND MINERALS ⟸54(2)—CONTRACT FOR SALE—CONSTRUCTION.

Contention, that clause in contract for sale of mining claims with reference to delivery of possession of mining claims together with all improvements thereon in case of default by purchaser must be considered as a penalty to be awarded to the owners only in so far as they may show actual damages from breach, is untenable.

4. MINES AND MINERALS ⟸54(1)—CONTRACT FOR SALE—FORFEITURE CLAUSE — ENFORCEMENT.

Provision in contract for sale of mining claims that, in case of default, purchaser should

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deliver possession to vendor together with all improvements placed thereon, is not unreasonable, viewed as a consideration for the privilege of extracting ore, and will be enforced according to its terms; there being no showing of fraud or anything indicating that it is in any way inequitable.

Department 2.

Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Action by J. A. Siegloch and others against the Iroquois Mining Company, in which C. E. Bisbee was appointed receiver for the company, and in which Elizabeth B. Slocum and others appeared and set up a claim to certain property. From the judgment adjudicating the question of title to the property, both the receiver and those setting up said claim appeal. Affirmed.

Danson, Williams & Danson, of Spokane, for appellants.

Wentz & Bailey, of Colville, and Burcham & Blair, of Spokane, for respondents.

FULLERTON, J. On September 1, 1916, the respondents, Slocum, Wulff, Watland, Owen, and Wells, being then the owners of certain mining claims situated in Stevens county, contracted to sell the same to one Van Horne. The purchase price of the property was $20,000, and was to be paid in installments running over a period of two years. Van Horne, shortly after the execution of the contract, assigned his interests therein to the Iroquois Mining Company, a corporation. The mining company immediately entered into possession of the property and proceeded to operate the same, running tunnels and sinking shafts therein, and placing thereon the various kinds of machinery and appliances usual and customary in the operation of mining property. Neither Van Horne nor the mining company paid the installments becoming due on the purchase price, and an oral extension of time was given the purchaser at the end of the contract period during which time the owners of the property, with the consent of Van Horne, negotiated with and entered into a contract for the sale of the property to the Iroquois Mining Company. This contract bore date of April 11, 1918. The purchase price agreed to be paid for the property in this contract was $30,000; it was likewise payable in installments, the first of which became due on April 30, 1918, and the last on September 1, 1919. The contract, together with deeds conveying the property executed by the owners, to the Iroquois Mining Company were placed in escrow to be delivered to the mining company if it complied with the terms of the contract and to be returned to the owners in the case of a noncompliance by it. The contract, among other conditions, contained the following:

"And the parties hereto do expressly agree that time is the essence of this contract, and in case of default by the party of the second part, its successors or assigns, in any of the conditions or covenants herein stipulated to be performed by it, in case said second party shall fail to make any of the payments above agreed to be made at the time and in the manner specified, or in case said second party shall make default in any of the covenants and agreements above stipulated to be performed by it, then and in that case this contract shall become void and of no further force and effect and the party of the second part shall have forfeited all rights hereunder and any and all payments that have been made shall become forfeited to the parties of the first part, which said payments it is hereby agreed specially shall in that case be deemed as damages hereby liquidated for the nonperformance of this contract by said second party; and upon default of the party of the second part shall immediately deliver up possession of said mining claims to said first parties together with all improvements placed thereon by said second party."

Shortly after the execution of the contract, the Iroquois Mining Company became involved in financial difficulties; a large judgment was obtained against it; and an action, entitled as of the present proceedings, was begun against it, in which a receiver of the property was appointed. The mining company did not pay the installments of the purchase price as they fell due, and the owners elected to forfeit the contract. They notified the mining company to that effect, and re-entered into the possession of the property.

After his appointment, the receiver mentioned entered upon the mining property and proceeded to remove therefrom the fixtures and improvements placed thereon by the mining company, whereupon the owners, appearing in the receiver action, set up a claim of ownership to the property and moved the court to stay the action of the receiver until their claim could be determined. The receiver in opposition to the motion took issue on the claim of ownership made by the owners and set up ownership of the Iroquois Mining Company. The parties thereupon stipulated to try out the question of title, and a trial was entered upon, resulting in a judgment from which both parties appeal.

[1, 2] The evidence disclosed that the property in dispute consisted of a drill press, a pressure tank, a Sullivan drill sharpener, a Delco light plant, four galvanized iron water tanks, about 1,800 feet of rails (railway) laid in place, about 600 feet of 3-inch pipe, about 500 feet of 1½-inch pipe, about 500 feet of ¾-inch pipe, which were more or less attached to the freehold, and a quantity of sundry loose mining tools, equipment, and supplies, useful in the operation of the mine and its subsidiary activities, but in no sense improvements on the realty. The court found

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that the property specifically described was attached and annexed to the freehold; that it was placed thereon by the mining company with the intent of making it a permanent accession thereto; and, in consequence, passed to the owners of the property on the forfeiture of the contract; the remaining property was awarded to the receiver.

Noticing first the appeal of the receiver: His learned counsel contend that the law relating to the doctrine of fixtures is applicable and controlling, and they argue with much force that the property here awarded to the owners are not fixtures as this court has heretofore applied and defined the term. But it will be observed that, by the clause of the contract of purchase we have quoted, it is provided that upon default in the terms of the contract by the purchaser it will deliver up possession of the mining claims to the owners, "together with all improvements placed thereon by" the purchaser. We think the term "improvements," as here used, must have a somewhat broader signification than that which is usually accorded to the term "fixtures," and that the rights of the parties are to be determined by the meaning of this term rather than by the meaning of the word "fixtures." By the term "improvements," however, not everything placed upon the property will pass to the owner on a retaking of possession after default. The term must mean improvements of the realty; that is to say, such things as are placed thereon by the way of betterments which are of a permanent nature and which add to the value of the property as real property. This would include buildings and structures of every kind, and also such machinery as was placed thereon of a permanent nature and which tended to increase the value of the property for the purposes for which it was used; in this instance those things of a permanent nature which tended to increase the value of the property as a mine. Much can pass thereunder which, strictly speaking, cannot be denominated fixtures, and which in the absence of such a condition might be taken away.

Turning to the evidence, we find nothing which the court awarded the owners which cannot be said to be an improvement of the property. It must be borne in mind that this is a mining property, having no value over and above the surrounding property unless the ores it contains can be extracted from it. To extract these ores profitably and successfully, machinery of the sort here in question is an essential. It is all attached to the realty; is fixed in place, and permanent in the sense that it can remain so attached and fixed until destroyed by the elements or worn out by use. Plainly, we think, these articles are improvements of a permanent nature, which enhance the value of the realty for the uses for which it is intended.

The authorities clearly distinguish between the word "improvements" and the word "fixtures," holding that under the former term much will pass which would be excluded under the latter. In French v. New York, 16 How. Prac. (N. Y.) 220, it is said:

> The term "improvements" "is a more comprehensive word than 'fixtures' and necessarily includes it, and such additions as the law might not regard as fixtures. It would be difficult to select a more comprehensive word; and when the parties say that all improvements which may be placed on the premises shall belong to the lessors, it is difficult to say what, if anything, would be excluded."

In Smith v. Detroit & D. Gold Min. Co. et al., 17 S. D. 413, 97 N. W. 17, the owner of a mining claim contracted to sell the same to a purchaser under an option agreement which, among other things, provided that in the case the purchaser should fail to carry out the terms of the agreement the improvements placed thereon by the purchaser should become the property of the seller. The purchaser defaulted in the terms of the contract and removed from the premises certain machinery and tools which it had placed thereon described in the complaint in the following language:

> "Two boilers; * * * one hoisting engine; * * * one air compressor; * * * two air drills; * * * piping and fittings for said drills; * * * one electric light plant, fittings and machinery; * * * one station pump and fittings; * * * one sinking pump and fittings; * * * one air drum; * * * one hoisting cage; * * * thirteen hundred feet of iron track; * * * miscellaneous lot of drills, tools, and other personal property belonging to the Ground Hog claim, and used at the hoist thereon."

The owner's action was to recover the property removed. Holding that he was entitled to recover, the court said:

> "There is no merit in the contention that the shaft and drifts are the improvements which it was stipulated should be retained by respondent as rent for the occupation of the property during the time appellants might continue in possession, and as damages arising from a breach of the contract to purchase. At the termination of appellants' estate by their failure to perform the conditions of the option, such holes in the ground would of necessity revert with the land to respondent, and it was never the intention to regard anything of that character as an improvement. The parties had reference to removable betterments, which, in the absence of an agreement to the contrary, might be taken away. At page 66 of 16 Am. & Eng. Encyc. of Law, the author appends the following note to his definition of the term 'improvements': 'It would be difficult to select a more comprehensive word, and, where the parties say that all improvements which may be placed on the premises shall belong to the lessor, it is difficult to say what, if anything, would be excluded.'"

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In Parker v. Wulstein, 48 N. J. Eq. 94, 21 Atl. 623, a lessee of a building covenanted that "all improvements of the building shall belong to the landlord at the expiration of the term." In a controversy as to the things included in the word "improvements" there was involved shelves, a furnace and flues, iron hooks for holding awnings with iron frames, and awning material attached to the hooks, all of which could be removed without special injury to the building. Holding that these articles were embraced in the term improvements, the court said:

"Wulstein insisted that none of the articles mentioned can properly be regarded as an improvement to the building. I think a little reflection will satisfy every candid inquirer that the complainant is entitled to what he prays for in this respect. The word 'improvement' may be said to comprehend everything that tends to add to the value or convenience of a building or a place of business, whether it be a store, manufacturing establishment, warehouse, or farming premises. It certainly includes repairs of every description. It necessarily includes much more than the term 'fixtures.' Indeed, so far as I am able to understand, it is difficult to conceive any additions made to a building by a tenant for his own convenience in the conduct of the business which may not properly be included in the term 'improvements.'"

See, further, Peaceable Creek Coal Co. v. Jackson, 26 Okl. 1, 108 Pac. 409, Ann. Cas. 1912B, 1; In re Howard Laundry Co., 203 Fed. 445, 121 C. C. A. 555; Ames v. Trenton Brewing Co., 56 N. J. Eq. 309, 38 Atl. 858.

[3, 4] The receiver calls attention to the somewhat peculiar phraseology of the contract, and contends that it is only the installment payments which are deemed liquidated damages in case of a forfeiture of the contract, and that the clause following relating to the improvements must be considered as a penalty to be awarded to the owners only in so far as they may show that they have suffered actual damages from the breach of the contract. But we cannot think this construction of the contract tenable. It may be seriously questioned, we think, whether the rules applicable to forfeiture and penalties are applicable to provisions of a contract of this nature; but, if they are, there is nothing in this record requiring their application. The purchaser had the right to extract ores from the mine and apply the proceeds therefrom to its own use; hence the clause is not unreasonable viewed as a consideration for this privilege. Moreover, the parties were sui juris, the agreement is one within their power to make, there is no showing of fraud or overreaching, or anything that indicates that it is in any way inequitable. In such a case, the courts have no duty but to enforce it.

What we have said concerning the appeal of the receiver meets in the main the question suggested by the appeal of the owners. They claim that the court should have awarded them, in addition to the articles actually awarded, the tools and implements which we have described as useful in the operation of the mine, but in no manner improvements of the realty. We think the court rightly adjudged that these did not pass to the owners. While some of the cases cited use language broad enough to include them, the precise question was not there presented. The language was used with reference to things which were properly improvements of the realty. The correct rule, as we view it, is stated by the New Jersey court in Ames v. Trenton, supra, where this language is used:

"The improvements, to be within the provision, must, when made, savor of the realty. The association of the words in the clause of the covenant shows this to be the true meaning. It was 'alterations, repairs or improvements made upon the premises' which should be left. That is, if the premises should be altered, as by opening the wall and placing a window, the window should remain. If they should be repaired, as by hanging a new door in place of a broken one, the new door should be left. I think the improvements must also have been improvements of the demised premises, so that the condition and value of the premises as realty were improved, and that the word did not include articles which were in their nature chattels which had not been subjected by the parties to any action which converted them into realty. The covenant did not refer to improvements brought upon or placed in the demised premises. It was improvements made of the premises themselves which were agreed to be left. The complainant's counsel asked several witnesses whether the disputed articles were not improvements of the premises, and whether if they were taken away the premises would not be less valuable, and has advanced some argument upon the theory indicated by these questions. The true inquiry is not whether the presence of these things is an improvement of the place, in the general sense of the questions asked. The presence in the saloon of the bars and their equipment is an improvement in the same sense that the room is improved by the presence of the chairs, tables and carpets, etc., which are in the chattel mortgage but are not claimed under the covenant. Such things are improvements to the appearance of the place, but none of them can properly be deemed to be of that fixed character which is necessary in order to make them improvements of the real estate or its appurtenances. I think it must be held that the essence of the covenant is that the improvements shall be of the demised premises. Whether they were or were not improvements in the sense that they were betterings of the realty must depend upon their essential nature and the action and intention of the lessee in relating them to the demised premises; the opinions of the witnesses as to the result are of little weight in the matter."

The judgment will stand affirmed.

CHADWICK, C. J., and MOUNT, PARKER, and HOLCOMB, JJ., concur.

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(180 Cal. 335)

THROOP et al. v. WEAVER. (L. A. 4887.)

(Supreme Court of California. May 7, 1919.)

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1. JUDGMENT ⟸248 — VARIANCE FROM PLEADING—ACTION ON NOTE.

Where a cross-complaint does not mention by name the payee or payees described in the note, which plaintiffs are seeking to cancel, and which defendant is cross-complaining to recover on, there is no variance between such cross-complaint and the judgment, which describes payees of the note as "defendant W. C. W. and M. B. W.," whereas there is only one defendant.

2. APPEAL AND ERROR ⟸934(2)—PRESUMPTION—FINDING OF COURT BELOW—IDENTITY OF NOTE.

The appellate court must assume, in favor of the regularity of the judgment, that the note therein described is the one in regard to which the parties litigated.

3. APPEAL AND ERROR ⟸194(4)—RESERVATION OF GROUNDS OF REVIEW—WAIVER OF OBJECTION.

Where plaintiffs joined issue on the cross-complaint, and went to trial without demurrer or objection, they cannot raise the point that the cross-complaint does not state a cause of action, in that the cause of action pleaded is not a proper matter for a cross-complaint.

4. APPEAL AND ERROR ⟸1154—JUDGMENT AGAINST ONE NOT A PARTY—MODIFICATION.

Where a plaintiff was not made a party to the cross-complaint, but judgment thereon was entered against her, trial court will be directed to modify the judgment by eliminating her from its effect.

Department 2.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by Mary E. Throop and others against W. C. Weaver. From judgment for defendant on his cross-complaint, plaintiffs appeal. Amended and affirmed.

Fleming, Graham & Graham, John L. Fleming, and W. S. Knott, all of Los Angeles, for appellants.

Sheldon Borden and George H. Moore, both of Los Angeles, for respondent.

MELVIN, J. Appeal by plaintiffs from the judgment.

Plaintiffs sued in equity to cancel a certain note which they alleged in their complaint they executed and delivered to the defendant on or about the 21st day of April, 1915. They averred that the principal amount was $1,060, bearing interest at 7 per cent. per annum, and becoming due on or before July 1, 1916. They alleged that the note was in negotiable form and, upon information and belief, averred that at the time of beginning of the action it was still in the possession and under the control of defendant. They also averred that said note and interest had been paid in full by plaintiffs; that defendant refused to surrender possession thereof; and they prayed for judgment that the note be canceled and surrendered to them.

Defendant answered, admitting the execution and delivery of the note, but denying that any part of it had been paid. Defendant also set up by way of cross-complaint a claim against the plaintiffs for a certain merchandise alleged to have been converted by them, and prayed judgment against the plaintiffs for $600. Plaintiffs did not demur to the cross-complaint, but answered, putting in issue the allegations thereof, and the cause was thereupon tried.

The court found that the promissory note described in paragraph 1 of the complaint, and not denied by the defendant, had not been paid in full or otherwise by the plaintiffs or any other person, and that no part of the interest had been paid. Upon the cross-complaint judgment was given in favor of the cross-complainant for the sum of $64, with interest thereon at the legal rate, and the equitable relief demanded in plaintiffs' bill was denied.

[1, 2] In the judgment the description of the note agrees in every particular with that given in the complaint, except that the payees are described as defendant, W. C. Weaver and Mary B. Weaver. Upon this supposed variance appellants argue that the promissory note described in the judgment is not the one referred to in any of the pleadings or in the findings of the court. This is an unworthy and frivolous contention. In the first place the complaint does not mention by name the payee or payees described in the note. Therefore, there is no necessary variance between the pleading and the judgment. Secondly, none of the testimony appears in the transcript, and it is elementary that this court must assume in favor of the regularity of the judgment that the note therein described is the one in regard to which the parties litigated.

[3] Appellants also make the point that the cross-complaint does not state a cause of action; their criticism really being that the cause of action pleaded is not a proper matter for cross-complaint. Conceding this to be true, they cannot here raise the point as they joined issue upon said cross-complaint and went to trial without demurrer or objection.

[4] Appellants also assert that the findings are outside of the issues in this respect, that while Mary E. Throop was not made a party to the cross-complaint, judgment thereon was entered against her. This contention is correct, but the objection to the judgment may

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be obviated by adding the words "except Mary E. Throop" after the word "plaintiffs," in the fourth line from the end of the said judgment, and by inserting the words "against plaintiffs" after the word "taxed," in the second line from the end of said judgment. The trial court is therefore directed to amend the judgment so that the closing paragraph will be as follows:

"It is further ordered, adjudged, and decreed that the said plaintiffs take nothing from the defendant, W. C. Weaver, and that the defendant, W. C. Weaver, have and recover of and from said plaintiffs, except Mary E. Throop, the sum of $68.73, together with said defendant's costs of suit herein incurred and expended, hereby taxed against plaintiffs at the sum of $44."

As so amended, the judgment is affirmed, with the costs of this appeal taxed against the plaintiffs Charles B. Throop and Richard A. Throop.

We concur: WILBUR, J.; LENNON, J.

(180 Cal. 309)

BAKER v. SMITH-BOOTH-USHER CO.
(L. A. 4926.)

(Supreme Court of California. May 6, 1919.)

1. SALES ⟸441(3)—BREACH OF WARRANTY—EVIDENCE.

In action by purchaser of pump for breach of warranty, *held*, under the evidence, that the pump failed because the well in which it was installed supplied large quantities of substances other than water, so that defendant seller was not liable for damages.

2. APPEAL AND ERROR ⟸761—SPECIFICATION OF ERROR—SUFFICIENCY.

In the absence of a more specific argument, in the brief than that the rulings of the court assigned as error at law, commencing with folio 930, are clearly erroneous, but, as exceptions are numerous and testimony of witnesses must necessarily be read, further discussion will be refrained from, the court on appeal will not pass upon appellant's contention.

3. APPEAL AND ERROR ⟸1032(1)—PREJUDICIAL ERROR—WHO MUST SHOW.

The burden is upon appellant to show prejudicial error.

Department 2.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Emma G. Baker against the Smith-Booth-Usher Company. Judgment for defendants on their cross-complaint, and plaintiff, who was denied all relief, appeals. Affirmed.

E. B. Coll, of Los Angeles, for appellant.

Hiatt & Selby and Edward M. Selby, all of Los Angeles, for respondent.

WILBUR, J. Plaintiff purchased a pump from the defendant for $2,865, and paid $500 on account of the purchase price. The pump was installed by the defendant in a well dug by the plaintiff. Plaintiff claims that the pump failed to comply with both express and implied warranties, and brought this suit to recover from the defendant the amount of $500 theretofore paid by her on account of the purchase price and $700 expended by her in connection with the installation of the pump. The defendant, after denying the breach of warranty and by way of cross-complaint, sought to recover the balance of the purchase price of the pump. Judgment was rendered for the defendant for the balance of the purchase price and certain additional sums expended by the defendant in connection with the erection of the pump, and plaintiff was denied all relief. Plaintiff appeals from the judgment.

[1] The main question in the case is whether the pump failed because of imperfections in the well and in the water supply or in the pump. It was expressly agreed in the written contract for the purchase and installation of the pump:

That the respondent should not "be held liable for damage or any trouble caused by reason of well not being straight, caving in, giving up sand, gravel, chips, or any substance other than clear water, or should the purchaser fail to develop from the well or wells the quantity of water required by the above-specified plant within suction distance from the location of the pump."

The trial court found as a fact:

That the well furnished by the plaintiff "did not give or furnish any supply of clear water whatever; that said well furnished by plaintiff did supply and give up large and excessive quantities of sand, gravel, clay, and substances other than clear water; that all damage to said machinery and trouble with or in the operation of said machinery was due to the large and extensive quantities of sand, gravel, clay, and substances other than clear water furnished and given up by said well; * * * that said defendant did replace all parts of said machinery claimed by said plaintiff to be defective and which were returned to defendant; that it is not true that any trouble in the operation of said plant was due to any fault in said machinery."

Appellant apparently contends that there was no substantial evidence to support this finding. There was a great deal of testimony as to the amount of sand in the water, and one of the respondent's witnesses testified that, while the load which the pump was designed to carry was 8,924 pounds, the actual load imposed upon it because of the presence of sand in large quantities in the water was 24,669 pounds. There was ample evidence to support this finding. There was also a find-

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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ing that part of the trouble resulted from the fact that the well furnished by the plaintiff was not straight. This is supported by evidence that the couplings of the pump rod were worn almost through on one side and that a light lowered into the well disappeared after passing a point about 70 feet from the surface. It is claimed, however, that by reason of the fact that the respondent tested the well for straightness by lowering the three joints of pipe into said well before the machinery and pump was installed respondent waived the requirement that the well should be straight. Even if this be true, in view of the evidence and the finding of the court upon the issue concerning sand in the well and the finding that the difficulty with the pump arose from such facts, such waiver would be without avail to the appellant.

[2] Appellant stated in her brief:

"We feel that the several rulings of the court assigned as errors at law complained of, commencing with folio 930, are clearly erroneous, in view of the testimony offered in connection therewith. But, as these objections are numerous and cannot well be specifically pointed out without repeating at too great length the testimony of the several witnesses, which, as we have said before, must necessarily be carefully read, we have refrained from further discussion, but insist upon the consideration of same. Particular attention is directed to errors of the court in sustaining objections to questions asked of plaintiff's witness W. H. Robinson, who qualified as an expert."

[3] These specifications relate to rulings of the court upon the introduction of testimony. In the absence of more specific argument in the brief, we are not called upon to pass upon the appellant's contention. The burden is upon appellant to show prejudicial error. Kyle v. Craig, 125 Cal. 107, 57 Pac. 791; Gavin v. Gavin, 92 Cal. 292, 28 Pac. 567; Thomas v. Hacker, 178 Pac. 855.

The judgment is affirmed.

We concur: MELVIN, J.; LENNON, J.

(180 Cal. 307)

In re YOUNGBLOOD et al.

Appeal of LOMONACO.

(L. A. 5578.)

(Supreme Court of California. May 6, 1919.)

COSTS ⊂=260(4)—APPOINTMENT OF GUARDIAN FOR MINORS—FRIVOLOUS APPEAL.

Where a father, divorced from his deceased wife on the ground of extreme cruelty toward her and his children, was denied guardianship of such children after his wife's decease on the ground of his unfitness, the brother of the children's deceased mother being appointed guardian, and after appointment of the uncle the father assaulted him with a knife in court, such father's appeal from order appointing uncle and denying letters of guardianship to himself is frivolous, and the uncle will have judgment therefor.

Department 2.

Appeal from Superior Court, Los Angeles County; Frederick W. Hauser, Judge.

In the matter of the estate and guardianship of Joseph Youngblood, Eileen Lomonaco, and Francis Lomonaco, minors. From an order appointing J. A. Suraco, a brother of the deceased mother of the children, their guardian, and denying a petition by Frank Lomonaco, father of Eileen and Francis, for letters of guardianship, he appeals. Affirmed.

Fred W. Morrison and W. W. Butler, both of Los Angeles, for appellant.

Ingall W. Bull and Harold Larson, both of Los Angeles, for respondent.

WILBUR, J. This is an appeal by Frank Lomonaco, the father of Eileen Lomonaco and Francis Lomonaco, from an order appointing J. A. Suraco, a brother of the deceased mother of said children, their guardian, and denying appellant's petition for letters of guardianship. It appears from the evidence that Frank Lomonaco and the mother of said children were divorced by final decree June 20, 1913, upon the ground of extreme cruelty of the appellant toward his wife and toward his children. It was therein adjudicated that the appellant was not a fit and proper person to have the custody of his children. Their custody was awarded to the wife, with the privilege on the part of the appellant to visit his children once a week on Sunday; he being ordered to pay $25 a month for the support of said children. Appellant only visited his children once, and, although able so to do, failed and refused to pay the $25 a month for their support, paying altogether only $117 for their support. The mother of the children married Joseph Youngblood, and in March, 1917, died leaving an estate which, under the terms of the will, goes to Eileen and Francis Lomonaco and Joseph A. Youngblood, a child born to her by her second husband. In said will she appointed Joseph Youngblood, her second husband, guardian of her children.

Upon the trial of the guardianship proceedings, at which time the petition of the father appellant herein, and also of the stepfather, Joseph Youngblood, were considered, the court orally announced its conclusion that the father was not a fit and proper person to have the custody of his children, and announced that letters of guardianship would issue to the uncle, Joseph Suraco, who had not formally applied for such letters. The court thereupon adjourned, and immediately

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upon the judge leaving the courtroom appellant made an assault upon Joseph Suraco with a fruit knife; one cut extending almost the entire length of the left side of Suraco's face, another cut across his forehead, and another through the right side of his nose. He also attempted to stab Mrs. Suraco, the wife of Joseph Suraco, in the back. The court thereupon reopened the case and took testimony showing the nature and character of this assault.

We are at a loss to understand why the appellant seeks to have this court reverse the finding of the trial court that he is not a fit and proper custodian of his children, when he has himself so amply confirmed that decision by his own conduct immediately after the conclusion of the court had been announced. There is no merit in the appeal. The effect of this appeal has been to cause the guardian to become unnecessarily liable for attorney's fees.

The judgment is affirmed; respondent to have judgment for $100 for frivolous appeal.

We concur: LENNON, J.; MELVIN, J.

(180 Cal. 304)

In re SEAY'S ESTATE.

MARSH et al. v. SEAY et al.

(L. A. 6017.)

(Supreme Court of California. May 6, 1919.)

1. WILLS ⟸865(4)—CONSTRUCTION—DISPOSITION OF RESIDUE.

Under will specifying that when all devisees and legatees were fully paid, residue should be divided among certain nephews and nieces, and if there were not enough assets to pay bequests, payment should be pro rata, the next clause declaring that all nephews and nieces were worthy, and that testator was mindful of all, where there was an excess of the estate over amounts bequeathed, the nephews and nieces mentioned by name did not take the whole of the residuary estate, which went to heirs at law, in view of testator's intention to divide equally.

2. WILLS ⟸491 — INTERPRETATION — QUESTION OF LAW.

The interpretation of a will is a matter of law, to be determined from the language used and the facts and circumstances in proof.

3. WILLS ⟸384—PROBATE—APPEAL—HARMLESS ERROR.

Error in admitting the rough draft of a will found in the same envelope with that offered for probate *held* harmless, the language used in the will and the facts and circumstances in proof being sufficient to make possible a proper interpretation of the will offered.

Department 2.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

Petition to probate the will of A. J. Seay by James A. Marsh and another, wherein Ralph M. Seay and Ida Thurman objected to a judgment of partial distribution, and appeal. Affirmed.

Neighbours, Hoag & Burke, of Los Angeles, for appellants.

W. I. Gilbert, of Los Angeles, for respondents.

WILBUR, J. The controversy in this case arises upon partial distribution and involves a determination of the meaning of the following clause in the will, dated November 28, 1902:

"When all the devisees and legatees are fully paid what has been bequeathed to them the residue of my estate, if any, shall be divided as follows: To Ida Dowler $2,500.00, to Nannie Marsh, Jas. A. Marsh, $2,000.00, five hundred of which to be used to pay for dress, expenses and dues to the Military Order of the Loyal Legion of the U. S. Mo. Commandery. To Maud Woodruff if married $100, if single $500—Minnie Carhart $100 (one hundred dollars). Sue E. Sanders $1,000.00 G. E. Marsh, $500.00 Ralph M. Seay upon the sole condition that he has entirely quit drinking for at least one year, $2,500.00, otherwise nothing except what has heretofore been given. Earl Seay if married $2,000, if single $1,000—W. J. Seay if he shall be married $1,000, Lulu V. Sigler $2,500.00. If there are not enough assets to pay the above bequests, and yield funds to carry out and pay the trusts herein created, then they shall be paid pro rata."

Appellants claim that by this clause of the will it was intended to dispose of the remainder of the estate, and that inasmuch as the estate is worth $300,000 more than is otherwise disposed of by the will, this excess amount should be distributed among those mentioned in the above clause in proportion to the respective amounts they were to receive by said clause. The testator declared in the next clauses in his will:

"I will make my gifts without regard to the disposition of my property here made, which shall not be considered as advancements. I expect also to make some charitable and public donations which will consume more or less of my estate. I intend to do something for poor children in the way of an industrial school or orphans' home, and to contribute to a public library. But the town and the public must take hold and contribute."

The opening clause of the will contains the following recital:

"Having seventeen nieces and nephews all of whom are worthy—all of whom have heretofore received financial help from me in proportion to their needs the prodigal and unfortunate receiving more than the rest, and many of them being more or less needy. In making

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the following disposition of my property I am yet mindful of what I have done for them and they for me, and of their present and prospective needs."

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[1] The trial court held that the remainder of the estate, after paying all legacies specified in the will, consisted of $300,000, and that as to such excess the will made no disposition, and distributed said amount equally to the 16 surviving nieces and nephews of the deceased. Any other construction would lead to a vast disproportion in the amounts received by the nieces and nephews, although the deceased declared that "all of whom are worthy." The construction contended for by appellants would increase the total legacies mentioned to the nieces and nephews in the clause under consideration from $11,700 to $311,700, while the remaining nieces and nephews get amounts ranging from $1,000 to $2,500. Two facts are patent from the will: First, the intention of the testator during his lifetime to dispose of all property, not devised or bequeathed in the will by gift and advancements; second, that the testator regarded his nephews and nieces with equal affection, and considered them equally entitled to his bounty, but not equally needy. There is no indication that these nieces and nephews in the clause under consideration were to be specially favored. On the contrary the amounts bequeathed them were to be abated pro rata if the estate was insufficient to pay the same in full, while the other legacies were to be paid in full. It is plain that the testator failed to make any provision for the contingency of there being an excess over the amounts therein bequeathed, and that such excess must be distributed to the heirs at law.

[2, 3] It is claimed that the trial court erred in admitting in evidence a so-called rough draft of a will which was found in the same envelope with the will that was offered for probate and some oral evidence in connection therewith. This will was received over the objections of appellants, but with the understanding that the court would reconsider its admissibility on a motion to strike out, the court expressing a doubt as to its admissibility. Subsequently all the oral evidence was stricken out. It does not appear from the briefs whether or not a motion was made to strike out this draft of a will. However that may be, the interpretation of the will is a matter of law, to be determined from the language used in the will, and the facts and circumstances in proof in the case, and upon the record we can determine the proper interpretation without reference to such rough draft of a will. Hence the error in admitting the rough draft was harmless.

The judgment is affirmed.

We concur: MELVIN, J.; LENNON, J.

(180 Cal. 331)

STRONG v. SULLIVAN. (L. A. 4903.)

(Supreme Court of California. May 7, 1919.)

1. NUISANCE ⟸80—OBSTRUCTION IN FRONT OF PROPERTY—INJUNCTION—LICENSING BY CITY.

The owner of premises leased to a restaurant keeper was entitled to injunctive relief against defendant, who, at night, under license from the city, maintained a portable lunch wagon directly in front of the owner's premises so as to obstruct and interfere with ingress and egress; such wagon despite the license by the city constituted a public nuisance which might be enjoined.

2. NUISANCE ⟸73—ENJOINING—LACHES—CONTINUING CHARACTER OF NUISANCE.

Where the proprietor of a portable lunch wagon under license from the city obstructed at night the street in front of leased restaurant premises for more than four years, thus committing a public nuisance, the owner of the premises was not barred from injunctive relief either by the statute of limitations or by laches; the nuisance having been continuing and committed daily, and no right arising from prescription.

Department 2.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Frank R. Strong against J. Sullivan. From judgment for defendant, plaintiff appeals. Reversed.

Fredericks & Hanna, of Los Angeles, for appellant.

Francis P. Harrington, of Los Angeles, for respondent.

MELVIN, J. Plaintiff appeals from a judgment whereby he was denied injunctive relief against defendant, who each night between the hours of 6 p. m. and 2 a. m. (approximately) maintains and transacts a restaurant business upon a public street of the city of Los Angeles, in the vicinity of plaintiff's building.

The findings clearly disclose the facts, while the findings, conclusions of law, and judgment set forth the theory upon which the learned chancellor acted. Plaintiff has owned for many years the property at the southwest corner of Seventh street and Central avenue, two public streets of the city of Los Angeles. Upon this property is a two-story building occupied by tenants, the upper floors being devoted to hotel purposes and the lower to business pursuits of various kinds. One of the tenants on the ground floor, occupying a room facing on Seventh street, conducts a restaurant.

Among the findings are the following:

"That for a period of more than 4 years last past, defendant, J. Sullivan, and his predeces-

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sor, have on every evening, at about the hour of 6 o'clock p. m., brought a portable lunch wagon and lunch counter to that portion of Seventh street directly in front of the premises of the plaintiff, and a few feet east of that portion of the building occupied by a restaurant and café; that said defendant has kept and maintained said portable lunch wagon and lunch counter at said point until about the hour of 2 o'clock a. m. the next morning; * * * that it is true that said lunch counter and lunch wagon obstructs the free use of the public street in front of the plaintiff's premises; that it is true that it interferes with the right of ingress and egress of plaintiff and of his tenants to and from his premises; that it is true that said lunch wagon and lunch counter occupies a portion of the public street, and it occupies the same under a license from the city of Los Angeles held by defendant J. Sullivan; that it is true that it does not pay any rent for the space so occupied; that it is true that said lunch wagon and lunch counter does enter into direct competition with a tenant of the plaintiff engaged in the restaurant business, who is compelled to pay rent to the plaintiff."

At the trial the defendant introduced in evidence a certain license of the city of Los Angeles granting him permission to transact "the business of Lunch Wagon" in conformity with the provisions of ordinance No. 20000 (New Series). He also presented a permit issued by the health commissioner of the city to conduct a lunch wagon at No. 1244 East Seventh street. This purports to be under the provisions of "Ordinance No. 25035 (New Series)"; but, as the terms of that by-law are not set forth in the record, we shall assume that the permit merely indicates that the place described and the manner of conducting the business are not dangerous to public health.

Ordinance No. 20000 (New Series) is a license ordinance of the usual type providing for licensing, regulating, and carrying on certain professions, trades, callings, and occupations. Section 76 of said ordinance fixes the amount of license which must be paid by those engaged in the business of selling certain enumerated articles "or edibles of any description from wagons, hand carts, stands, trays or baskets, upon the public streets."

[1] Obviously, the court refused relief to plaintiff under the belief that a license under the ordinance above cited was a permission from the city to defendant to establish a nightly "stand" or place of business in any public street without regard to the surrounding conditions. This view was erroneous, and we are of the opinion that the ordinance and the license introduced in evidence failed to sustain the finding that the business was conducted at that place under license and the conclusion that plaintiff was therefore not entitled to the relief for which he prayed. The finding that defendant's wagon obstructed the ingress and egress of plaintiff and his tenants to and from his property and interfered with the free use of the public street in front of his building was equivalent to a holding that defendant was maintaining a public nuisance which was especially injurious to plaintiff and which, therefore, might be enjoined at his suit, because any injury to the use of the street which impairs plaintiff's private easements in the street in front of and adjacent to his lot amounts to an injury giving plaintiff, as an abutting owner, the right to maintain an action for damages or for an injunction. The rights of such an owner and his remedies are learnedly discussed by Mr. Justice Shaw in the opinion in Williams v. Los Angeles Ry. Co 150 Cal. 592, 89 Pac. 330. It is true that in the case cited it was held that the refusal to grant an injunction pendente lite must be upheld, because the court was charged with discretion to determine preliminarily whether or not the detriment to plaintiff came within the rule de minimis. In the case at bar, however, there was no holding of negligible damage, but the court's action was based entirely upon the supposed efficacy of the license from the city. Therefore the Williams Case is authority which sustains plaintiff's theory. Essentially the same doctrine is declared in McLean v. Llewellyn Iron Works, 2 Cal. App. 346, 83 Pac. 1082, 1085; 28 Cyc. 902; 20 Ruling Case Law, 460 (Nuisances, § 77).

The power of municipalities to grant privileges for the use of streets is discussed in 28 Cyc. at page 870 et seq. After discussing the general rule, the text contains illustrations, some of which are stated on pages 872, 873, as follows:

"And a municipality has no power to grant to an abutting owner the right to so construct this building as to encroach on the street, nor to use the streets for stands or booths for business purposes, nor to use a street for the erection of private scales; nor has the municipality the power to grant the right to use a part of a street for hack stands, or to authorize awnings obstructing the public use of the way."

It is clear that upon the principles announced above the plaintiff was entitled to the relief demanded.

[2] Nor does the finding that the street in front of plaintiff's property had been used every night by defendant and his predecessor for more than four years amount either to a finding of laches or of the operation of the statute of limitations against plaintiff. This nuisance was not of a permanent character, but was a continuing one. It involved no permanent structure, but was committed daily by the bringing of defendant's ambulatory café in front of plaintiff's building. No lapse of time can legalize a public nuisance and a prescriptive right cannot be maintained against a public nuisance where the action is brought by a citizen who has suffered special injury in consequence there-

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of. Bowen v. Wendt, 103 Cal. 236, 37 Pac. 149. No right by prescription may be acquired to obstruct a sidewalk. Ex parte Taylor, 87 Cal. 91, 25 Pac. 258. Nor to maintain any other sort of nuisance. Cloverdale v. Smith, 128 Cal. 230, 60 Pac. 851. In 29 Cyc. p. 1261, the rule with reference to an action for damages for nuisance is thus correctly stated:

"Where the nuisance is of a permanent character, the period runs from the time when the injury was done or the structure complained of erected; but, where the nuisance is a continuing one, an action for injuries from the continuance may be brought after the lapse of more than the statutory period since the creation of the nuisance."

We are convinced that plaintiff was not prevented, either by the statute of limitations or by laches, under the probative facts found, from maintaining his action.

The judgment is reversed.

We concur: WILBUR, J.; LENNON, J.

(180 Cal. 326)

KELLNER v. TRAVELERS' INS. CO., HARTFORD, CONN. (L. A. 4953.)

(Supreme Court of California. May 7, 1919.)

1. APPEAL AND ERROR ⟸1056(1)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In an action on an accident policy, plaintiff claiming death was caused by fall from tripping over a rug, a ruling of the court denying formal admission of the rug and a place on the files of the court could not have been prejudicial, where the whole theory of the defense was that the fall was a fact, but that other causes existing at the time contributed to the death.

2. TRIAL ⟸232(4) — ARGUMENT — INSTRUCTIONS.

In an action on an accident policy for death, where doctor testified, "They said he stumbled over a rug," court did not err in instructing the jury to pay no attention to plaintiff's counsel's understanding that members of deceased's family had said to the doctor in the presence of the deceased that the latter had stumbled over a rug, where there was no other evidence to show that the statement made to the doctor was in the presence of deceased.

3. INSURANCE ⟸665(5) — ACCIDENT INSURANCE—CAUSE OF DEATH—EVIDENCE.

In an action on an accident policy for death, evidence *held* to warrant a finding that death resulted wholly or partly from pathological condition of deceased.

4. INSURANCE ⟸454—ACCIDENT INSURANCE.

In an action on an accident policy, under which insurer was not responsible for the result of injuries resulting wholly or partly from disease in any form, the court properly refused to instruct that, if the jury believed a fall was the "sole and only direct cause" of death, they must find for plaintiff, notwithstanding a further belief that deceased had a hernia, provided they should further find that deceased "would not have died at the time, under the circumstances, and in the manner he did die had it not been for said accident and fall," as under such a policy it is not true that every accident which shortens an insured's life may be the basis for recovery.

5. INSURANCE ⟸646(6) — ACCIDENT INSURANCE—CAUSE OF DEATH—BURDEN OF PROOF.

In an action on an accident policy under which insurer was not responsible for the result of injuries resulting wholly or partly from disease in any form, the absence of disease contributing to death was as much a part of the plaintiff's case as an affirmative showing of the occurrence of an accident producing injury and of death following such injury, although insurer alleged in its answer that deceased was at the time of the accident in a diseased condition, and that disease proximately contributed to his death.

Department 2.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Mary W. Kellner against the Travelers' Insurance Company, Hartford, Conn. Judgment for defendant, and plaintiff appeals. Affirmed.

W. W. Hindman, of Los Angeles, for appellant.

O'Melveny, Stevens & Millikin, and Walter K. Tuller, all of Los Angeles, for respondent.

MELVIN, J. Plaintiff sued to recover for the death of her husband under a policy of accident insurance issued by defendant. Trial by jury resulted in a judgment for defendant, and plaintiff appeals therefrom.

The policy contained a provision that defendant would pay $10,000 for death of the assured "resulting from bodily injuries, effected directly and independently of all other causes, through external, violent, and accidental means." There was a further stipulation that, if any loss should be caused by hernia, the company would pay one-half of the amount. There was another provision in the policy as follows:

"This insurance shall not cover injuries, fatal or nonfatal, resulting wholly or partly from * * * disease in any form."

The complaint contained an averment that on a specified day Mr. Kellner's feet accidentally slipped from under him, causing him to fall violently to the floor of a room in his home, and that the accident and fall, "independent of all other causes," produced the death of Ernest F. Kellner.

Regarding the fall, Mrs. Kellner testified, in part, as follows:

"I was writing letters that Mr. Kellner dictated to me, and he said he wanted to do a

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little writing for himself, and he took the ink bottle and writing materials and went into another room, where the light was better for him, to do some writing for himself, and as he went in there he fell, stumbled on the rug and fell. I was in the room that he left, but when I heard the fall I started; when I got into the other room he was just getting up. I found the things on the floor, and the ink on the floor, and of course I first wanted to see his clothes, and wipe the ink from his clothes, but there was none on his clothes, but it was all over the floor and on the rug."

[1] The rug was offered in evidence and refused a place on the files of the court, but counsel was permitted to exhibit it to the jury and to ask Mrs. Kellner questions about it. As respondent offered no testimony regarding the fall, we cannot say that the ruling of the court denying formal admission of the rug was prejudicially erroneous. The whole theory of the defense was that the fall was a fact, but that other causes existing at that time contributed to Mr. Kellner's death.

[2] Dr. Thomas, while on the stand, testified: "They said he stumbled over a rug." By the word "they" he doubtless meant members of the family of the patient. During the argument counsel for plaintiff sought to tell the jury that members of Mr. Kellner's family had said to Dr. Thomas in the presence of Mr. Kellner that the latter had stumbled over a rug and had fallen. The court, upon objection being made, checked counsel, said there was no such testimony, and instructed the jury to pay no attention to counsel's understanding upon the subject. This is denounced as erroneous, but we find nothing in the evidence to justify the conclusion that the statement made to the doctor was in his patient's presence. The record therefore justifies the court's action.

Medical witnesses testified regarding the cause of death. The history of the case as related by Mr. Kellner's physician was, in brief, that of a man who had suffered an operation for appendicitis, followed by the development of a hernia, for the relief of which another operation was performed, after which a third operation became necessary for the removal of threads which had been used in closing the former wound. Dr. Thomas testified that his patient did not have hernia after the last-mentioned operation. Shortly before his death, however, Mr. Kellner went to the doctor's office, and the latter found "a slight bulge of the wound," but not what he would call a hernia. It was the belief of the physician, however, that there was weakness of the abdominal wall at the site of the incisions, but not a distinct hernia. The day following Mr. Kellner's fall Dr. Thomas was called to see him. The medical man found the patient in bed, very ill, vomiting, and suffering great pain. On examination of the patient's abdomen there was found considerable discoloration and protrusion, and an operation was ordered. A cut was made at the site of the former incision, and it was found that five or six feet of intestines protruded through an opening in the abdominal wall. There was discoloration, the protruding part was surrounded by dark fluid, and there were evidences of the beginning of peritonitis. Mr. Kellner died that night. Concerning the cause of death the doctor said:

"My opinion is that the fall caused a large quantity of gut to be forced out through the weak spot in the abdominal wall, and become strangulated, and that he died as a result of that strangulation."

[3] Other medical experts gave it as their opinion that under the statement of Dr. Thomas there must have been a hernia sac existing before the time of the accident, and that the fall alone could not have produced the result observed at the time of the last operation without the previous existence of a pathological condition. We cannot say that upon such conflicting evidence the verdict and judgment were not properly based upon that part of the evidence favorable to the defendant.

[4] Appellant attacks certain rulings with reference to giving and refusing instructions. One offered by the plaintiff, if given, would have informed the jurors that, if they believed the fall was the "sole and only direct cause" of Mr. Kellner's death, they must find for the plaintiff, notwithstanding a further belief that in previous years deceased may have had a reducible hernia, provided they should further find that "said Ernest F. Kellner would not have died at the time, under the circumstances, and in the manner he did die had it not been for said accident and fall." The proposed instruction did not properly declare the law. Under the terms of the policy the defendant was not responsible for the result of injuries resulting wholly or partly from disease in any form. The last part of the offered instruction would ignore this part of the contract and make the criterion of recovery the shortening by the accident of the life of a person assured without any reference to the possible concurrence of disease in producing death.

The court correctly instructed the jury that there could be no recovery under the policy for death caused partly by disease and partly by accidental injury. The court also gave to the jury the following instruction:

"If, however, the plaintiff in this case has established by a preponderance of the evidence not only the fact of the accidental injury, but the sufficiency thereof to cause death, independently of other causes, and the testimony in reference to pre-existing disease failed to establish such disease as indirect or contributory cause of death, then the plaintiff can recover."

This instruction correctly states the law on the subject discussed. Opposition to it is

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based upon the theory that any accident which shortens an insured man's life may be the basis of recovery. This is not a tenable theory. Maryland Casualty Co. v. Morrow, 213 Fed. 599, 130 C. C. A. 179, 52 L. R. A. (N. S.) 1213. In the opinion in Clarke v. New Amsterdam Casualty Co., 179 Pac. 195, the Morrow Case is cited as typical of many authorities to the same effect and is approved.

[5] Plaintiff offered, and the court refused to give, an instruction the purport of which was that upon defendant rested the burden of proving that Mr. Kellner's diseased physical condition contributed to or caused his death. It is contended that, since defendant alleged in its answer that deceased was at the time of the accident in a diseased condition, and that disease proximately contributed to death, such allegation must be proven by defendant by a preponderance of evidence. Whatever may be the rule in other jurisdictions, the law is well settled in California adversely to plaintiff's contention. Rock v. Travelers' Insurance Co., 172 Cal. 462, 156 Pac. 1029, L. R. A. 1916E, 1196; Price v. Occidental Life Ins. Co., 169 Cal. 800, 147 Pac. 1175. The absence of disease contributing to death was as much a part of the plaintiff's case under the contract, as the affirmative showing of the occurrence of an accident producing injury and of death following such injury. Travelers' Insurance Co. v. Selden, 78 Fed. 285, 24 C. C. A. 92.

The judgment is affirmed.

We concur: LENNON, J.; WILBUR, J.

(180 Cal. 311)

HUBER v. SHEDOUDY et al. (L. A. 4908.)

(Supreme Court of California. May 6, 1919.)

1. MORTGAGES ⟸478—FORECLOSURE ACTION—FINDINGS—MARKET VALUE OF PROPERTY.

In mortgage foreclosure action, it was unnecessary to make findings as to market value of property, where allegations with reference thereto were directed toward appointment of a receiver, and where no receiver was appointed either pending the litigation or in foreclosure decree.

2. MORTGAGES ⟸478—FORECLOSURE ACTION—ATTORNEY'S FEES—MATERIALITY OF ISSUE.

In mortgage foreclosure action, finding on reasonableness of attorney's fees, was unnecessary, since the question as to what constitutes reasonable attorney's fees was not a material issue; the attorney's fee not being the cause of the action, but being, like costs, a mere incident to it to be fixed by chancellor in his discretion, not exceeding amount stipulated in mortgage.

3. COSTS ⟸260(4) — FRIVOLOUS APPEALS—WHAT CONSTITUTES.

Appeal by mortgagor's grantee from foreclosure decree upon ground that court failed to find upon market value of property, though no receiver was appointed, and upon reasonableness of attorney's fees, delaying foreclosure nearly three years, *held* frivolous.

4. COSTS ⟸260(1)—APPEAL—FRIVOLOUS APPEAL.

The object of imposing a penalty for frivolous appeals is two-fold—to discourage the same, as well as to compensate to some extent for the loss which results from the delay.

5. COSTS ⟸263 — FRIVOLOUS APPEAL — AMOUNT OF DAMAGES.

In determining amount of damages which should be awarded for a frivolous appeal, court should consider the facts with relation to the appeal and the effect of the delay.

6. COSTS ⟸263 — FRIVOLOUS APPEAL — AMOUNT.

Where mortgagor's grantee takes frivolous appeal from foreclosure decree, though no personal judgment was rendered against him, delaying foreclosure nearly three years, and where mortgage provides for interest at 8 per cent. and judgment at 7 per cent., a penalty for frivolous appeal of 10 per cent. of the judgment, where mortgagee's loss of interest during the three years would have amounted almost thereto, would have been just.

7. COSTS ⟸263 — FRIVOLOUS APPEAL — AMOUNT.

Where mortgagor's grantee takes frivolous appeal from foreclosure decree, delaying foreclosure nearly three years, and where mortgagee draws 8 per cent. and judgment merely 7 per cent. interest, court will award as penalty merely the difference between 7 and 8 per cent. on the judgment, where such is the penalty asked for by mortgagee, in view of nominal penalties imposed in recent years.

Department 2.

Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by S. V. Huber against Elias A. Shedoudy and wife, John Wollenshlager, and others. Judgment for plaintiff, and last-named defendant appeals. Affirmed, with directions.

William H. Fuller, of Los Angeles, for appellant.

Valentine & Newby, of Los Angeles, for respondent.

WILBUR, J. [1] This is an action for the foreclosure of a mortgage in the usual form. Plaintiff prayed for judgment of foreclosure, for a deficiency against the mortgagors Shedoudy, and for a receiver. No relief was asked against the appellant, save that his interest in the property be declared to be subject to the mortgage. He was a grantee of

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the mortgagor. Judgment was entered directing the sale of the property, the application of the proceeds to the payment of the plaintiff's claim, directing the balance, if any, to be paid to the appellant, and if there was a deficiency instead of a surplus, the deficiency be docketed against defendants Shedoudy. Appellant claims a reversal upon the ground that two material issues were not found upon, one relating to the value of the property, and the other relating to attorney's fees. The allegations of the complaint and of the answer with reference to the market value of the property were directed to the matter of the appointment of a receiver. As no receiver was appointed pending the litigation or in the decree of foreclosure, it was unnecessary to make findings on these issues, which thus became immaterial. With reference to the matter of attorney's fees, the complaint alleges:

"That it was necessary to employ attorneys to foreclose said mortgage, and he has employed the firm of Valentine & Newby as his said attorneys, and incurred a liability to pay to them a reasonable attorney's fee for the prosecution of this action, and plaintiff avers upon information and belief that the sum of $1,500 is a fair and reasonable fee to be paid for such legal services."

Respondents' denial on that subject was as follows:

"Said defendants have not sufficient information or belief to enable them to answer the allegations contained in paragraph 11 of plaintiff's complaint, and, basing their denial upon that ground, defendant denies that said plaintiff has incurred a liability to Valentine & Newby in the sum of $1,500, and denies that $1,500 is a reasonable attorney fee to be paid said Valentine & Newby for their legal services in the foreclosure of the mortgage mentioned and described in plaintiff's complaint, and denies that it was necessary to foreclose said mortgage in order for the plaintiff to receive the money alleged to be due upon the note and mortgage described in plaintiff's complaint."

Upon this subject the finding of the court was as follows:

"That, in order to foreclose said mortgage, it was necessary for plaintiff to employ attorneys, and he did employ the firm of Valentine & Newby as his said attorneys, and the court finds that the sum of $890 is a reasonable amount to be allowed to plaintiff as attorneys' fees in this action."

[2] Appellant contends that this finding is insufficient for the reason that it fails to find upon the proposition that plaintiff had "incurred a liability" to pay a reasonable attorney's fee. The complaint alleges the employment of Valentine & Newby to foreclose the mortgage, that it was necessary to so employ them, and that a reasonable fee for said services was $1,500. The answer admits the employment, and by the form of denial that $1,499.99 is a reasonable fee to be paid them for their services. The court, however, only allowed $890. However, the issue as to attorney's fees is not a material issue. As it was said in Carriere v. Minturn, 5 Cal. 435:

"The only difference between this case and that of Gronfier v. Minturn [5 Cal. 492], decided at this term, consists of the point made by appellants that there is no allegation in the declaration that 5 per cent. was reasonable counsel fees. Such an averment was unnecessary. The counsel fees stipulated to be paid were not the cause of the action, but, like the costs, a mere incident to it, and may be fixed by the chancellor, at his discretion, not exceeding the amount stipulated."

This case and various subsequent cases on the same subject were cited and the rule was again stated in McNamara v. Oakland Building & Loan Association, 131 Cal. 336, 63 Pac. 670, as follows:

"The mortgage in terms provides in case of foreclosure the mortgagor shall pay reasonable attorney's fees, 'and the payment of such costs and expenses and attorney's fees by the mortgagor is secured hereby.' The cross-complaint contains an averment setting forth the provisions of the mortgage and alleging that the attorney's fees therein provided for were secured thereby and the prayer asks for reasonable attorney's fees. There is no allegation that the sum claimed is reasonable, nor is there any finding of the fact, and therefore it is claimed defendant is not entitled to attorney's fees. It is found that plaintiff executed the mortgage, which is equivalent to a finding that he agreed to pay a reasonable attorney's fee for the mortgage so provided. The averment that the fee claimed was a reasonable amount is not necessary (Carriere v. Minturn, 5 Cal. 435); the attorney's fee was not the cause of action, but an incident to it (Mulcahy v. Buckley, 100 Cal. 484 [35 Pac. 144], affirming Carriere v. Minturn, supra.) See, also, Brooks v. Forington, 117 Cal. 219 [48 Pac. 1073]. Prescott v. Grady, 91 Cal. 518 [27 Pac. 755], does not overrule or conflict with Carriere v. Minturn, supra. As an averment was unnecessary, so also was a finding. The conclusion of law that defendant was entitled to recover attorney's fees rested upon the provisions of the mortgage, and the court could determine what amount would be reasonable without hearing any testimony thereon. Pacific Mut. L. Ins. Co. v. Fisher, 106 Cal. 234 [39 Pac. 758]; Clancy v. Plover, 107 Cal. 272 [40 Pac. 394]; Edwards v. Grand, 121 Cal. 254 [53 Pac. 796]."

See, also, Monroe v. Fohl, 72 Cal. 571, 14 Pac. 514; Bank v. Holt, 87 Cal. 158, 25 Pac. 272; White v. Allatt, 87 Cal. 245, 248, 25 Pac. 420; Bank v. Duncan, 133 Cal. 254, 256, 65 Pac. 469; Thrasher v. Moran, 146 Cal. 683, 684, 81 Pac. 32; Patton v. Pepper Hotel Co., 153 Cal. 460, 96 Pac. 296.

[3] We have cited the foregoing authorities to show how utterly frivolous appellant's contentions are in view of the previous decisions of this court. Owing to the crowded condition of the calendar of this court, a de-

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lay of nearly three years has resulted from this appeal. Section 957 of the Code of Civil Procedure provides that, "when it appears to the appellate court that the appeal was made for delay, it may add to the costs such damages as may be just." This language was adopted from Practice Act 1851 (St. 1851, p. 106) § 345, and that, in turn, from the New York Code, § 330. A similar provision was contained in the original Judiciary Act adopted by Congress September 24, 1789 (1 Stat. 73, c. 20), and subsequently continued in effect by the act of Congress March 3, 1803 (2 Stat. 244, c. 40), and by Revised Statutes U. S. § 1010 (U. S. Comp. St. § 1671). The federal statute in question, however, applied to all affirmances, in which it was provided:

"The court shall adjudge to the respondents in error just damages for his delay, and single or double costs, at its discretion."

The application of this rule is discussed in West Wisconsin Ry. Co. v. Foley, 94 U. S. 100, 24 L. Ed. 71, wherein it appeared that, after several revisions of the rules of the Supreme Court at the December term of 1870, the court adopted the following rule:

"In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at the rate of ten per cent., in addition to interest, shall be awarded upon the amount of the judgment."

In that case it was held that the court might award damages for a frivolous appeal in an amount less than 10 per cent. in addition to interest. It will thus be seen that the Supreme Court of the United States adopted as the ordinary measure of damages for a frivolous appeal, under a statute authorizing them to give just damages for delay, 10 per cent. upon the amount of the judgment. The practice in this court in imposing damages for a frivolous appeal has not been uniform. In Flynn v. Travers, 1 Cal. Unrep. 27, decided in 1857, 20 per cent. damages were awarded. This penalty was also imposed in Heney v. Alpers, 2 Cal. Unrep. 164; Nickerson v. Cal. Stage Co., 10 Cal. 520; Shain v. Belvin, 79 Cal. 262, 21 Pac. 747, by Department 1 in 1889, and Williams v. Hall, 79 Cal. 606, 21 Pac. 965; in bank. See, also, Cary v. Osio & Randall, referred to in McMillian v. Vischer, 14 Cal. 282, where a penalty of 20 per cent., amounting to $2,698.53, was imposed. In De Witt v. Porter, 13 Cal. 172, the penalty imposed was 15 per cent., and in the second California Report the penalty imposed was usually 10 per cent., although the delay was sometimes only a few months. Buckley v. Stebbins, 2 Cal. 149; Russell v. Williams, 2 Cal. 158; Bates v. Visher, 2 Cal. 355; Pacheco v. Bemal, 2 Cal. 150. The amount of 10 per cent. as damages for a frivolous appeal is fixed in some states by statute; in others by rule of court. Hawkins v. Jones, 21 Or. 502, 28 Pac. 548; Popp v. L. & N. R. R. Co., 101 Ky. 157, 40 S. W. 254; August Gast Bank Note & Lith. Co. v. Fennimore Ass'n, 84 Mo. App. 228; Lanclos v. Robertson, 5 La. 41; Limberger v. Engle (Tex. Civ. App.) 47 S. W. 1025. This same amount was allowed in Sirmans v. Folsom, etc., Co., 18 Ga. App. 586, 89 S. E. 1103. See, also, N. Y. Code Civ. Proc. §§ 3251, 3254. The later practice in this court has been to impose a nominal penalty of from $25 to $100 for a frivolous appeal. Henehan v. Hart, 127 Cal. 656, 60 Pac. 426; Estate of Snowball, 156 Cal. 235, 104 Pac. 446.

[4] The object of imposing a penalty for frivolous appeal is twofold—to discourage the same, as well as to compensate to some extent for the loss which results from delay. West Wis. Ry. Co. v. Foley, supra, 94 U. S. 103, 24 L. Ed. 71. In view of the crowded condition of our calendar and the fact that many novel constitutional and statutory questions have arisen in this state by reason of the great volume of legislative and constitutional amendments since 1911, it is important that appeals that are merely frivolous be discouraged. We may, perhaps, express our views by adopting the language of the Supreme Court of the United States on that subject in Whitney v. Cook, 99 U. S. 607, 25 L. Ed. 446:

"Our experience teaches that the only way to discourage frivolous appeals and writs of error is by the use of our power to award damages, and we think this a proper case in which to say that hereafter more attention will be given to that subject, and the rule enforced both according to its letter and spirit. Parties should not be subjected to the delay of proceedings for review in this court without reasonable cause, and our power to make compensation to some extent for the loss occasioned by an unwarranted delay ought not to be overlooked."

[5-7] In determining the amount of damages which should be awarded in this case for a frivolous appeal, we should consider the facts with relation thereto and the effect of the delay. Respondent claims, and we may assume, that the effect of this appeal has been to delay the foreclosure sale. The judgment was entered June 27, 1916. The appellant is not bound to pay the judgment or any part thereof. As to him the effect of the judgment was merely to subject his interest in the premises to the foreclosure. The mortgage provided for interest at the rate of 8 per cent., compounded quarterly. The judgment draws interest at the rate of 7 per cent. The difference between the amount of interest allowed by law and that by the mortgage for the three-year period of delay secured by this appeal is $2,173.76. The difference between simple interest at 7 and 8 per cent. will be $720. If the sale had occurred within the usual time after the decree, the appellant would have been re-

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quired to pay 1 per cent. a month during the redemption period of one year in order to redeem. In view of the fact that the amount of interest lost by the respondent by reason of this appeal would be nearly 10 per cent. of the amount of the judgment, and that respondent has been required to employ an attorney to represent him on this appeal, it obviously would not be unjust to assess damages amounting to 10 per cent. on the principal sum for this frivolous appeal, namely, $2,600. Respondent, however, in his brief and on oral argument has only asked for a penalty equivalent to the difference between 7 and 8 per cent. on the amount of the judgment, and in view of the further fact that in recent years purely nominal penalties have been imposed for frivolous appeals, the penalty fixed in this case will be $720. It is hoped, however, that before other frivolous appeals now pending, if any, are brought to the attention of the court, some disposition thereof will be made by the parties which will obviate the necessity of placing such cases upon the calendar, thus depriving meritorious appeals of their opportunity to be heard, and obviating the necessity of imposing penalties therein.

The judgment is affirmed, with directions to enter a judgment in favor of respondent and against appellant for the sum of $720, with costs of appeal.

We concur: LENNON, J.; MELVIN, J.

(180 Cal. 318)

ARCADE REALTY CO. v. BANK OF COMMERCE. (S. F. 8070.)

(Supreme Court of California. May 7, 1919.)

1. PRINCIPAL AND AGENT ⟸109(4) — AUTHORITY TO INDORSE NEGOTIABLE PAPER.

Authority to collect money does not imply authority to indorse negotiable paper received in payment.

2. PRINCIPAL AND AGENT ⟸109(4) — AUTHORITY TO INDORSE NEGOTIABLE PAPER—PRESUMPTION.

The authority of an agent to indorse negotiable paper is a very responsible power, and not lightly to be presumed or implied.

3. PRINCIPAL AND AGENT ⟸109(4) — AUTHORITY TO INDORSE NEGOTIABLE PAPER.

Where a principal gave agent making collections authority to deposit all rents collected by him in his personal account for the purpose of remitting the same by his personal check, the authority carried with it power to indorse for deposit checks made payable to principal, where such were collected.

4. PRINCIPAL AND AGENT ⟸123(9) — AUTHORITY OF AGENT TO INDORSE CHECKS—SUFFICIENCY OF EVIDENCE.

Evidence *held* sufficient to sustain a finding that an agent making collections was authorized to make indorsements upon checks collected by him.

Melvin, J., dissenting.

In Bank.

Appeal from Superior Court, Alameda County; Wm. H. Donahue, Judge.

Action by the Arcade Realty Company against the Bank of Commerce. Judgment for defendant, and the plaintiff appeals. Affirmed.

Ostrander, Clark & Carey, of Oakland, for appellant.

Gibson & Woolner, of Oakland, and Henshaw, Black & Goldberg, of San Francisco, for respondent.

WILBUR, J. [1, 2] This action was brought by the Arcade Realty Company against the defendant bank to recover $2,650 paid by defendant upon checks drawn in favor of the Arcade Realty Company by C. W. Phillips upon the defendant bank. Phillips assigned his claims thereon against the bank to the plaintiff. The question involved in the case is the authority of one A. W. Clement to indorse such checks on behalf of the plaintiff. Judgment was rendered in favor of the defendant, upholding the authority of Clement to make such indorsements, and plaintiff appeals. Clement was the appellant's agent for the collection of the rents from its tenants in appellant's business block in Oakland. Appellant relies upon the well-settled rule that authority to collect does not imply authority to indorse negotiable paper received in payment, and upon the further well-established rule that the authority of an agent to indorse negotiable paper is a very responsible power, not lightly to be presumed or implied. There is no doubt as to the correctness of these rules. See Daniel on Negotiable Instruments (6th Ed.) §§ 292, 293, 294, 296; Hamilton N. Bank v. Nye, 37 Ind. App. 464, 77 N. E. 295, 117 Am. St. Rep. 333; Lonier v. Ann Arbor Sav. Bank, 162 Mich. 541, 127 N. W. 685; National Fence Machine Co. v. Highleyman, 71 Kan. 347, 80 Pac. 568; Jackson v. Nat. Bank of McMinnville, 92 Tenn. 154, 20 S. W. 802, 18 L. R. A. 663, 36 Am. St. Rep. 81; Tiedeman on Commercial Paper, § 77; Jackson Paper Mfg. Co. v. Com. Nat. Bank, 199 Ill. 151, 65 N. E. 136, 59 L. R. A. 657, 93 Am. St. Rep. 113. As these rules are conceded to be correct, and as there is no evidence of an express authorization to Clement to indorse these checks, it will be necessary to state the facts more in detail for the purpose of disclosing the scope of

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Clement's agency. It will appear therefrom that the agent was given and exercised far more power than a mere collector. Clement, as the agent of appellant, for some years had collected the rents from the tenants of appellant's building, had deposited the moneys or checks received, in his own bank account, to his personal credit, and had remitted such rentals to appellant in San Francisco, by a check drawn against such personal account. The rents of the Hotel Arcade, however, were paid by Phillips direct to appellant by his personal check until February, 1912. Phillips' rental was $1,000 monthly under a ten-year lease. Phillips, however, failed to pay promptly under this arrangement, and in order to facilitate collection the appellant directed Clement to collect such rentals. Beginning February 26, 1912, Clement collected a check in favor of the Arcade Realty Company, and mailed the same to appellant. Thereafter Clement collected the 64 checks in issue at intervals until May 29, 1913. Each check was indorsed by him as follows: "Arcade Realty Company by A. W. Clement, Agent, A. W. Clement"—and deposited in his personal account either in the Union Savings Bank of Oakland, or the Oakland Bank of Savings, Oakland. The checks were paid by the respondent, the drawee bank, in due course through the clearing house. Clement remitted these rents and others collected by him for rent by his personal check as formerly, together with his accounts of rentals collected. In June, 1913, appellant discovered that Clement had remitted $2,650, the amount involved here, less than he had collected up to that date. Nevertheless the appellant did nothing more about the matter than to instruct Clement thereafter to remit the Phillips checks direct to it, a direction which Clement carried out. On Clement's death about seven months later, the appellant discovered that Clement, during the period when he was depositing the Phillips rent to his account, had been making the indorsements in question, for such purpose. In addition to Clement's authority to collect rents, the correspondence shows that he was authorized to act as the general agent of the appellant for leasing, care, and repair of the building. It should be observed that we are not dealing with a general authority to indorse negotiable paper, but rather with the power necessary to deposit checks on local banks in another local bank for collection through the clearing house, for the purpose of transmitting the proceeds to the principal in a nearby city. The appellant, on receiving from month to month the personal check of its agent in satisfaction of rentals collected, must have been aware of the fact that Clement was depositing all rents in his own personal account, and thus by implication must have approved such deposit. The conclusion cannot be escaped in this case that the authority of the agent included the power to deposit money or paper collected to his own account. That is exactly what was done with the checks here in question. They were deposited to his own account, and the indorsements were made solely for the purpose of accomplishing such deposit. It may well be that indorsements for any purpose would have been unauthorized. But when the principal permitted its agent to deposit the collections to his personal account, to be transmitted by his personal check, it is a fair, if not in fact a necessary, inference that he had the authority to make such indorsements as were necessary to do this. Rents in large amounts are not habitually paid in money, but by check. The principal could hardly have assumed that such paper was all drawn to the order of the agent. The tenants would not naturally so draw their checks, but to the order of the landlord. The appellant receiving all its rentals by the agent's personal check cannot claim that it did not know that its tenants were paying by checks to its order. It should have presumed that they were doing so in some instances at least, and, this being so, the appellant should have known that the agent was indorsing such checks for deposit. Furthermore, it was immaterial to appellant, as long as it permitted its agent to deposit the rents in his own account, whether the rents were paid by check to the appellant's order, as was the case with the checks in question, or by check to the agent's order, where no question of indorsement could have arisen. In fact checks to the order of the agent would have given him a far greater measure of control over the fund than checks to the order of the appellant, and yet the appellant either permitted the latter, or else assumed that the paper was drawn to its own order, and that the agent was indorsing it for deposit. The point is that the principal either tacitly or expressly authorized the agent to deposit his collections to his own account, and the conversion by Clement, discovered in June, 1913, was not accomplished by the indorsements in question by which the funds were deposited in the agent's personal account, but by the agent's failure to remit from his account moneys of his principal which he had so deposited by authority. The authority to indorse for deposit in a local bank may reasonably be inferred in such a case, where it would be wholly unreasonable to infer authority to indorse for sale or discount a foreign bill of exchange. There is a most substantial difference between the various kinds of paper and the various purposes of indorsement.

[3] The test for ascertaining the question of the agent's authority to indorse negotiable paper is stated in Jackson Paper Mfg. Co. v. Com. Bank, supra, to be this: Can the agent perform the duties of his agency without the exercise of such authority? "In other words," says the court, "the power of an

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agent to indorse commercial paper for his principal must be a necessary implication from an express authority conferred upon such agent." Conceding the correctness of this rule, we here have evidence justifying the conclusion that the agent had authority to deposit all rents collected by him in his personal account, for the purpose of remitting the same to his principal by his personal check. This authority carried with it the power essential to that course of business, namely, the indorsement for deposit of checks made payable to the principal where such were collected. Civ. Code, § 2319, subd. 1. The case of Dispatch Printing Co. v. National Bank of Commerce, 109 Minn. 440, 124 N. W. 236, 50 L. R. A. (N. S.) 74, cited by appellant, is somewhat similar in its facts, but differs in the essential particular that in that case the agent was expressly directed by the principal not to indorse or deposit checks payable to them, but to remit them direct to the principal.

[4] The evidence amply justified the finding of the trial court that the agent was authorized to make the indorsements made by him for the deposit of the checks to his account, including the checks in question.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; OLNEY, J.; SHAW, J.; LAWLOR, J.

MELVIN, J. I dissent. While there might be some force in a contention that after the discovery of the conversion of some of the rents by Clement, the plaintiff by retaining him as agent would be estopped to object to the method by which he obtained the money, I cannot bring myself to approve of the doctrine announced by the majority of the court that when a principal employs an agent to collect and transmit rentals he thereby clothes such agent with authority to indorse checks. Some of the statements in the prevailing opinion are so extraordinary that with all due respect to the learned author I must unwillingly review them and dissent from them. For example, this language is used:

"The appellant on receiving from month to month the personal check of its agent in satisfaction of rentals collected, must have been aware of the fact that Clement was depositing all rents in his own personal account, and thus by implication must have approved such deposit. The conclusion cannot be escaped in this case that the authority of the agent included the power to deposit money or paper collected to his own account."

Of course the principal supposed that Clement was depositing rents to his own credit, as he was transmitting the money by personal check. That had been the usual course of business; but how did such a supposition bind the principal to the further and extraordinary implication that the collector was clothed with the high authority to indorse his principal's name? There were three ordinary methods by which the tenant might pay the agent. These were: (1) By actual cash; (2) by check payable to the agent's order; and (3) by check payable to the landlord's order. If by either of the first two methods Clement had collected the money, undoubtedly he might have deposited the cash or the check to his own account, and any subsequent conversion of the funds would have caused loss to his principal. If by the third method the tenant had paid, under the terms of Clement's agency as a collector, he could honestly do but one thing. He could transmit the check itself to the payee. When he indorsed the first check he was guilty of a conversion, not of money, but of his principal's check. If he had left the country the next day can any one question the fact that the Arcade Realty Company could have compelled the tenant to pay the rent? Or could any one doubt that the bank which without any inquiry or investigation had recognized Clement's authority to indorse for the payee could be compelled to reimburse its depositor Phillips? How then did a persistence in wrongdoing sanctify Clement's acts into those of an agent clothed with the power to do those very acts? It is true that much of the money thus obtained was paid to the Arcade Realty Company, but such acts of restitution did not excuse the bank for its astounding lack of ordinary prudence. If the officers of the bank had made the slightest inquiry the plaintiff would have been warned, of course, that its collector was assuming the right to indorse checks made payable to its order.

Continuing the argument, the opinion contains the following language:

"But when the principal permitted its agent to deposit the collections to his personal account, to be transmitted by his personal check, it is a fair, if not in fact a necessary, inference that he had the authority to make such indorsements as were necessary to do this."

I fail to follow this reasoning. Because the principal permitted his agent to collect money and to transmit it, by no means does it follow that the agency went to the extent of allowing him to accept and to convert something else.

"Rents in large amounts are not habitually paid in money, but by check," says the learned author of the opinion. Undoubtedly that is true, but the next two sentences in my opinion declare an absolute non sequitur. They are as follows:

"The principal could hardly have assumed that such paper was all drawn to the order of the agent. The tenants would not naturally so draw their checks, but to the order of the landlord."

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Why could not the principal assume that the checks, if any, were all drawn to the order of the agent? The agent had authority to collect. Why should the principal think that the tenants would not take the convenient method of paying him directly in money or checks? In my opinion the power to indorse was no more involved in the power to collect than would have been an authorization to use a club in compelling Phillips to pay if Clement had employed that method of persuasion. Why would the tenants naturally draw their checks to the order of the landlord? There is no law of statutory origin or of commercial usage which justifies such reasoning. I venture to assert that a large proportion of the rentals of business and residence property in large cities is paid directly to real estate agents, and not to owners of the realty.

Continuing, the learned author of the opinion uses the following language:

"The appellant receiving all its rentals by the agent's personal check cannot claim that it did not know that its tenants were paying by checks to its order. It should have presumed that they were doing so in some instances at least; and, this being so, the appellant should have known that the agent was indorsing such checks for deposit."

Why should a principal be bound to assume that a trusted agent was going outside of his agency? I cannot, although I have tried, see the force of such reasoning. Again I assert that there is no such rule of law or commercial usage. Does the average tenant of an apartment house know the name of his landlord? I venture to say he does not. And even if he does, he deals entirely with the agent. True, Phillips knew who his landlord was, but he also knew that the Arcade Realty Company had empowered Clement to collect, and the landlord, having given him that notice, was thoroughly justified, it seems to me, in assuming that the payments were being made to the agent either in money or in checks which the latter might honestly indorse.

If Phillips, either because he did not trust Clement or for any other reason, chose to pay directly by check drawn in the landlord's favor, he was entitled to the protection afforded by the fact that his banker was bound to pay only the payee or an authorized agent, and it is to be remembered that plaintiff herein has succeeded to Phillips' rights. If the bank had done its duty Clement could never have been in a position to convert the checks and thereby injure either Phillips or the realty company. Concededly, if Clement had been getting the moneys in an authorized way he could have converted them more easily. But this does not prove that he was authorized to indorse the corporation's name. We are dealing with a matter of implied agency and I solemnly believe the rule announced in the prevailing opinion is illogical and will be productive of much harm. It will gladden the hearts of careless bankers and make them think that they are no longer held to a high degree of care in protecting their depositors from spoliation.

In the prevailing opinion the majority of the justices approve the test for ascertaining an agent's authority to indorse negotiable paper as set forth in Jackson Paper Manufacturing Co. v. Commercial National Bank, 199 Ill. 151–156, 65 N. E. 136, 138 (59 L. R. A. 657, 93 Am. St. Rep. 113), in which Mr. Chief Justice Magruder used the following language:

"The weight of authority seems to be in favor of the contention of appellant that authority to indorse commercial paper can only be implied where the agent is unable to perform the duties of his agency without the exercise of such authority. In other words, the power of an agent to indorse commercial paper for his principal must be a necessary implication from an express authority conferred upon such agent."

Applying this test to the case at bar, it seems to me that power of indorsement was not a necessary implication from the agency. All Clement needed to do, under the terms of his agency, was to mail each check of this sort, or carry it, or send it by messenger, to his principal. . . . .

(40 Cal. App. 598)

POZZI v. ALPINE EVAPORATED CREAM CO. (Civ. 2775.)

(District Court of Appeal, First District, Division 2, California. April 8, 1919. Rehearing Denied by Supreme Court June 5, 1919.)

APPEAL AND ERROR ⟸1002—ASSIGNMENTS—UNWARRANTED APPEAL.

Where the evidence was clearly conflicting, but ample to justify jury's verdict, appellate court cannot interfere.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Action by Angelo Pozzi against the Alpine Evaporated Cream Company. Judgment for plaintiff, and defendant appeals. Judgment affirmed.

Zabala & Sargent, of Salinas, for appellant.
C. F. Lacey, of Salinas, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment in favor of plaintiff for $3,577.60, alleged to be due as the purchase price of milk delivered by plaintiff and his assignors to the defendant company. There was no dispute about either the delivery or the value of the milk. As a defense, defendant contended that plaintiff and his

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assignors had entered into oral agreements to deliver to defendant all milk produced at their dairies for a period of one year in consideration of the payment of the highest market price therefor by the defendant to them; that the plaintiff and his assignors delivered milk for a period approximately three months only and then refused to deliver longer. Defendant alleged that, by reason of the failure of plaintiff and his assignors to deliver according to their alleged contracts, defendant has been damaged in the sum of $3,000, and defendant filed a counterclaim asking for that amount. Appellant admits that the only question in the case is: Did the plaintiff and his assignors agree to ship the milk produced on their several dairies to defendant for a period of one year? It then contends that the verdict is contrary to the evidence. From an examination of the evidence it appears that it was clearly conflicting, and that there was ample evidence to justify the verdict of the jury. Under such circumstances, and in the absence of a single assignment of error occurring at the trial, it would seem that the rule of law is sufficiently clear and well established to make an appeal to this court an unnecessary and unwarranted proceeding.

The judgment is affirmed.

We concur: HAVEN, J.; BRITTAIN, J.

(40 Cal. App. 600)

McGINN v. VAN NESS et al. (Civ. 2662.) *

(District Court of Appeal, First District, Division 1, California. April 8, 1919.)

1. APPEAL AND ERROR ⟸179(1)—ISSUES IN LOWER COURT—SUFFICIENCY OF ANSWER.

In action to foreclose lien for street work, contention that it was not shown that board of public works had properly apportioned street assessments as directed by ordinance cannot be sustained, where complaint alleged such fact and no issue was raised thereon; defendant's answer not containing a sufficient denial of the averment.

2. MUNICIPAL CORPORATIONS ⟸465—STREET ASSESSMENTS—DEFECTIVE APPORTIONMENT—VALIDITY.

That a street assessment was defective for lack of proper apportionment as directed by the ordinance would not render the assessment void upon its face, being at most an irregularity, which could have been corrected upon appeal to the proper board in the manner provided by the ordinance.

3. MUNICIPAL CORPORATIONS ⟸562(1) — STREET ASSESSMENTS—ERRORS NOT JUDICIAL —NECESSITY OF FIRST APPEALING TO BOARD.

It is only such errors in a street assessment as are jurisdictional, and which appear upon the face of the assessment, that may be taken advantage of upon trial of an action to enforce a street improvement lien, without an appeal having been first taken to the board.

4. MUNICIPAL CORPORATIONS ⟸485(3) — STREET ASSESSMENTS—RECORDING—COLLECTIVE INDORSEMENT.

In action to enforce a lien for street work, defendant's contention that the record shows that the warrant, assessment, and diagram were not properly recorded as required by the terms of the ordinance is not warranted, where the record shows they were indorsed as having been duly recorded on the day of their filing for record, the fair intendment from this showing being that indorsement was made upon the originals, where it should appear, and the fact that such indorsement was collective as to all three documents is too technical to deserve consideration.

5. MUNICIPAL CORPORATIONS ⟸485(3) — STREET IMPROVEMENTS — FORMALITIES—VALIDITY OF WARRANT.

In an action by a warrant holder to enforce a lien for street improvements, the insufficient authentication of the return of assessment and warrant, and failure of the secretary of the board to attach his signature to the record, does not render the lien invalid, or prejudice the holder of the warrant, in view of the ordinance provision that no assessment or proceedings prior to assessment shall be held invalid for informality or defect, where the resolution of intention was actually published, which ordinance provision was warranted by San Francisco City Charter, art. 6, c. 2, § 33.

Appeal from Superior Court, City and County of San Francisco; Geo. E. Crothers, Judge.

Action by George W. McGinn against T. C. Van Ness, Jr., and others. Judgment for plaintiff, and defendants, except D. L. Bienfield, appeal. Affirmed.

Wm. H. Chapman, of San Francisco (R. M. F. Soto, of San Francisco, of counsel), for appellants.

Fabius T. Finch, of San Francisco, for respondent.

RICHARDS, J. This is an action to foreclose a lien for street work under a public contract affecting the property of the defendants. The assessment was made under the procedure provided by Ordinance No. 2439, New Series, of the city and county of San Francisco, approved September 4, 1913, under and by virtue of the power given to the supervisors of that municipality by section 33, chapter 2, of article 6 of its charter. The trial court decreed a foreclosure of said lien, and from such decree the defendants have prosecuted this appeal.

The first point insisted upon by the appellants is that of the insufficiency of the complaint as tested by a general demurrer, but in view of the fact that the appellants concede

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⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied in Supreme Court 183 Pac. 950.

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in their opening brief that the complaint herein as amended is substantially in the same form as the complaint in the case of Bienfield v. Van Ness, 176 Cal. 585, 169 Pac. 225, and that the Supreme Court in that case disposed of practically every point herein urged as to the insufficiency of the complaint adversely to the appellants, it is not necessary to further consider this phase of the case.

[1] The next contention of the appellants requiring consideration is the claim that the board of public works is not shown to have properly apportioned the assessment as directed by the ordinance. The complaint in that behalf alleges that the board of public works "duly and regularly made an assessment to cover the sum due for the work performed and specified in conformity with the provisions of the charter of San Francisco and in accordance with the provisions of Ordinance No. 2439." We do not find any sufficient denial of this averment to raise an issue involving the point urged in the appellants' contention, and we regard the averment of the defendants' answer relied upon by them as ineffectual to present such issue. Beckett v. Morse, 4 Cal. App. 232, 87 Pac. 408.

[2, 3] But even if it were to be assumed that the assessment was defective in the respect claimed, it was not such a defect as, in our opinion, would render the assessment void upon its face, but was at most only an irregularity which could and doubtless would have been corrected upon an appeal to the proper board under section 21 of the ordinance in question. It is only such errors as are jurisdictional and which appear upon the face of the assessment that may be taken advantage of upon the trial without an appeal having been first made to the board. Chase v. Trout, 146 Cal. 357, 80 Pac. 81; Girvin v. Simon, 116 Cal. 604, 48 Pac. 720; McLaughlin v. Knobloch, 161 Cal. 676, 120 Pac. 27; Ramish v. Hartwell, 126 Cal. 443, 58 Pac. 920.

[4] The next contention of the appellants is that the record shows that the warrant, assessment, and diagram were not properly recorded as required by the terms of the ordinance. In thus stating the condition of the record, we think counsel for the appellants are in error. The record shows that the warrant, assessment and diagram were indorsed as having been duly recorded on the same day on which they were filed for record. The fair intendment from this showing is that this indorsement was made upon the originals where it should appear. The fact that such indorsement was collective as to all three of these documents, and not made upon each separately, is too technical to deserve consideration.

[5] The case of Bienfield v. Van Ness, supra, seems to dispose of the objections of the appellants as to the sufficient authentication of the return of the assessment and warrant, also to hold that the failure of the secretary of the board to attach his signature to the record does not render the lien invalid nor prejudice the holder of the warrant. In that case, also, practically all of the other objections which the appellants herein make to the sufficiency of this assessment and the lien sought to be foreclosed in this action are held to have been rendered unavailing by the following provision of the ordinance, namely:

"No assessment, warrant, diagram or affidavit of demand and nonpayment after issue of the same, and no proceedings prior to the assessment, shall be held invalid by any court for any error, informality or other defect in the same, where the resolution of intention of the board of public works to recommend to the supervisors the ordering of the improvement has been actually published and posted and the notices of improvement posted as in this ordinance provided." Bienfield v. Van Ness, supra; Chase v. Trout, supra.

This disposes of every material point urged by the appellants upon this appeal.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

(40 Cal. App. 524)

RAUER'S LAW & COLLECTION CO., Inc., v. SHERIDAN PROCTOR CO. et al.

(Civ. 2200.)

(District Court of Appeal, First District, Division 1, California. April 2, 1919.)

1. JUDGMENT ⟸882—TENDER OF AMOUNT—DEPOSIT IN COURT.

Depositing amount of judgment with clerk of court, and notifying judgment creditor that the same was there subject to his demand, did not constitute a legal tender.

2. TENDER ⟸12(2)—SUFFICIENCY OF TENDER.

Nothing short of the full amount due the creditor is sufficient to constitute a valid tender, and the debtor must at his peril offer the full amount.

3. JUDGMENT ⟸622(1)—RES JUDICATA—MATTERS OF COUNTERCLAIM.

A matter pleaded by way of counterclaim in a former action cannot be held to have been adjudicated, where it appears from the record that the counterclaim did not exist at the time, but that it matured some months later, and it is apparent that it was not pressed, for the reason that it was not an existing demand, under Code Civ. Proc. § 438, subd. 2.

4. JUDGMENT ⟸951(1)—RES JUDICATA—BURDEN OF PROOF.

In order to debar a defendant's right to recover on the ground that the matter was adjudicated in a former case, it was necessary for plaintiff to show that the matter had been theretofore adjudicated.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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Appeal from Superior Court of City and County of San Francisco; E. P. Shortall, Judge.

Action by the Rauer's Law & Collection Company, Incorporated, against the Sheridan Proctor Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

William Tomsky, of San Francisco, for appellant.

W. H. Barrows and Martin Uldall, both of San Francisco, for respondents.

KERRIGAN, J. This is an appeal by plaintiff from a judgment rendered in its favor for the sum of $49.32. The action was brought to recover $312.50 as the agreed price of certain personal property sold and delivered by the plaintiff's assignor, the Eastern Outfitting Company, to the defendant, Sheridan Proctor Company. In its answer, said defendant admitted the indebtedness pleaded in the complaint, but set up as a counterclaim a judgment in its favor against the plaintiff's assignor of $15, and a demand for $247, the price of storage of certain furniture.

[1, 2] The appeal presents but two questions. As to the first of these it appears that prior to the commencement of this action the plaintiff, in an attempt to satisfy a former judgment of $15 in favor of the defendant, deposited that sum with the clerk of the court, notifying the defendant that the same was there subject to its demand. Such a deposit and notice alone certainly did not constitute a legal tender, and, even if it had, it would have been unavailing, for the reason that a small sum for interest upon the judgment had accrued, which was not included in the amount deposited. Nothing short of the full amount due the creditor is sufficient to constitute a valid tender, and the debtor must at his peril offer the full amount. 38 Cyc. 137.

[3, 4] Respecting the other point, plaintiff asserts that the claim for storage constituting defendant's second cause of counterclaim had been adjudicated in a former action. It is true that this matter was pleaded by the defendant by way of a counterclaim in a former action between it and the plaintiff's assignor; but it also appears from the record that such counterclaim did not exist at the time that action was commenced, but that it matured some months later. It is apparent that it was not pressed in the first action for the simple reason that it was not an existing demand at the time the action was commenced (Code Civ.Proc. § 438, subd. 2; Wood v. Brush, 72 Cal. 224, 13 Pac. 627; McGuire v. Edsall, 14 Mont. 359, 36 Pac. 453), and therefore was not adjudicated in that case. Moreover, no evidence was introduced by the plaintiff in the present action that the subject of the defendant's counterclaim was res adjudicata; the only reference to it occurring in the cross-examination of a witness. In order to debar defendant's right to recover in this action on its counterclaim, it was necessary for the plaintiff to show that the matter had been theretofore adjudicated, which, as we have said, was not done.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

(40 Cal. App. 491)

THOMAS v. NEWMARK GRAIN CO. et al. (Civ. 2330.)

(District Court of Appeal, Second District, Division 1, California. March 28, 1919.)

CORPORATIONS ⟸513(4) — COMPLAINT ON DRAFT — SUFFICIENCY — AUTHORITY OF AGENT.

Complaint against a grain company and the agent in charge of its business in a county on a draft of the company executed by the agent stated no cause of action, where it embodied no allegation showing that the agent's authority as the person in charge of the company's business included authority to execute such a writing, despite allegations the agent was in charge of the business in the county and as such agent executed the draft.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by L. J. Thomas against the Newmark Grain Company and F. A. Wolz. From judgment for plaintiff, defendant Grain Company appeals. Reversed.

A. M. Norton, of Los Angeles, and Childers & Bruce, of El Centro, for appellant.

Galen Nichols and E. R. Simon, both of El Centro, for respondent.

JAMES, J. Appeal from a judgment entered in favor of the plaintiff, presented on the judgment roll alone.

We think that the appellant is right in its claim that the complaint in the case failed to state facts sufficient to constitute a cause of action. It was first alleged that the appellant is a corporation organized under the laws of California and having and maintaining a place of business in the city of El Centro, county of Imperial. These allegations followed:

"That defendant F. A. Wolz is, and was during all the times mentioned in this complaint, the duly authorized and accredited and acting agent of the defendant Newmark Grain Company. That said F. A. Wolz is, and was at all times mentioned in this complaint, in charge of the business of the defendant Newmark Grain Company, in the county of Imperial, and is, and was, in charge of the place of business of

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the said defendant in the city of El Centro, county of Imperial, state of California. That on the 9th day of June, 1915, for a valuable consideration, the said F. A. Wolz, as such agent at El Centro, said county and state, made and executed a certain draft in words and figures as follows: 'El Centro 6/9/15 A No. 197 Newmark Grain Co., Incorporated, 447 So. Los Angeles St., Los Angeles, Cal. Pay to the order of L. J. Thomas $600.00 six hundred & no/100 dollars. 18627 18627 F. A. Wolz'—and thereupon delivered said draft to the plaintiff herein."

The fourth paragraph of the complaint alleged that the "draft" was presented for payment to appellant, and payment refused, and that no part thereof had been paid. The written instrument set out in the complaint appears to have been executed by Wolz alone. Therefore it was both necessary, in order to charge appellant, that it be made to appear that the instrument was executed on its behalf, and that Wolz possessed authority to execute the same. While it is stated that Wolz was "in charge of the business of defendant Newmark Grain Company in the county of Imperial," and that "as such agent at El Centro" he made and executed the draft, there is no allegation showing that his authority as the person in charge of the defendant's business, whatever it might have been, included authority to execute a writing such as that sued upon. We think that such allegation was essential to show liability against this appellant. The instrument appears to be in form a bill of exchange, but in effect answering to a promissory note, as defined in section 3245, Civil Code.

The judgment appealed from is reversed.

We concur: CONREY, P. J.; SHAW, J.

(40 Cal. App. 469)

FARRISEE v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.
(Civ. 2944.)

(District Court of Appeal, Second District, Division 1, California. March 27, 1919.)

1. JUSTICES OF THE PEACE ⟸162(1)—APPEAL TO SUPERIOR COURT—STATUTES.

Appellant from justice court, in giving notice of appeal and filing undertaking, having fully complied with Code Civ. Proc. §§ 974, 978, the justice was divested of all jurisdiction, other than, as required by section 977, and subject to the payment of his fees, to transmit the record to the clerk of the superior court for further proceedings; the jurisdiction of the superior court attaching on perfecting of the appeal by filing of the undertaking, and being open to divestment only by order of dismissal, or some other order of the superior court itself.

2. JUSTICES OF THE PEACE ⟸139—APPEAL TO SUPERIOR COURT—SECOND APPEAL.

Where a first appeal from justice court to the superior court was perfected, it effected a transfer of the case to the superior court, and there was nothing in the justice court which could be made the subject of a second appeal, and the proceeding, since there was nothing on which it could operate, was a nullity.

3. JUSTICES OF THE PEACE ⟸159(6)—APPEAL TO SUPERIOR COURT — FAILURE OF SURETIES TO JUSTIFY—STATUTE.

Though Code Civ. Proc. § 978a, provides that, where exception to the sufficiency of the sureties on an undertaking on appeal from a justice court is interposed, they must justify within five days, otherwise the appeal must be regarded as if no undertaking had been given, the matter does not ipso facto affect the appeal, perfecting of which has vested jurisdiction of the case in the superior court, but merely gives respondent the right to move for its dismissal on the ground it has become ineffectual.

Petition for certiorari by Anna Farrisee against the Superior Court of the State of California in and for the County of Los Angeles, and Grant Jackson and Fred H. Taft, Judges thereof. Order of superior court annulled.

Louis N. Whealton, of Long Beach, for petitioner.

Charles M. Ackerman, of Los Angeles, for respondents.

SHAW, J. Certiorari. The question presented is the power of the superior court to proceed with the trial of an action pending therein on appeal from a judgment rendered by a justice's court, after denying a motion to dismiss the same made upon the ground that the superior court is without jurisdiction to try the case, for the reason that the sureties upon the undertaking failed to qualify within five days after exceptions interposed to their sufficiency, and that a second notice of appeal and undertaking thereon, filed before the expiration of the time within which the sureties might have qualified and while the first appeal was operative, was a nullity.

[1-3] An appeal from a justice's court is taken by filing a notice thereof with the justice and serving a copy thereof upon the adverse party (section 974, Code Civ. Proc.), but it "is not effectual for any purpose, unless an undertaking be filed" (section 978, Code Civ. Proc.). This implies that it is effectual if the undertaking required be filed. Appellant, in giving the notice and filing the undertaking, having fully complied with the provisions of the Code, the justice was divested of all jurisdiction in the matter, other than, as required by section 977, Code of Civil Procedure, and subject to the payment of his fees, to transmit the record to the clerk of the

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superior court for further proceedings. "The jurisdiction of the superior court attached upon the perfecting of the appeal by the filing of the undertaking, and having once attached could be divested only by an order of dismissal or some other act of that court." Moffat v. Greenwalt, 90 Cal. 368, 27 Pac. 296. The first appeal having been perfected, it ipso facto effected a transfer of the case to the superior court; hence there was nothing in the justice's court which could be made the subject of the second appeal (Brown v. Plummer, 70 Cal. 337, 11 Pac. 631; Tompkins v. Montgomery, 116 Cal. 120, 47 Pac. 1006), and the proceeding, since there was nothing upon which it could operate was, therefore, a nullity. While section 978a, Code of Civil Procedure, provides that, where an exception to the sufficiency of the sureties is interposed, they must justify within five days thereafter, otherwise the appeal must be regarded as if no such undertaking had been given, this does not, ipso facto, affect the appeal, the perfecting of which has vested jurisdiction of the case in the superior court; but, as said in Moffat v. Greenwalt, supra, the provision is to be construed "as giving to the respondent the right, if he shall choose to avail himself thereof, to move for its dismissal upon the ground that since it was taken it has become ineffectual." The purported appeal in the second proceeding, therefore, being a nullity, and the sureties upon the undertaking on the first appeal having, in response to exception to their sufficiency, failed to justify, it follows that, upon the conceded showing of such fact made, the court had no jurisdiction other than to make an order granting petitioner's motion.

The order denying petitioner's motion to dismiss the appeal in that certain action wherein Lewis E. Tucker is plaintiff and petitioner is defendant, now pending in the superior court of Los Angeles county, is annulled; and it is further ordered that respondent refrain and desist from any action or proceeding therein other than to make an order dismissing the appeal from the judgment rendered by the justice's court.

We concur: CONREY, P. J.; JAMES, J.

(40 Cal. App. 463)

COLYEAR v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

(Civ. 2964.)

(District Court of Appeal, Second District, Division 1, California. March 27, 1919.)

1. EXECUTION ⟸414—SUPPLEMENTARY PROCEEDINGS—ADVERSE INTEREST IN PROPERTY—WAREHOUSEMAN'S LIEN.

In supplementary proceedings under Code Civ. Proc. § 717, court's order, under section 719, requiring warehouseman, who was not a party to the action, to deliver judgment debtor's stored goods to judgment creditor notwithstanding warehouseman's claim of lien thereon for storage charges, was unwarranted, in view of section 720, warehouseman being entitled to have his right in the property determined in an ordinary action.

2. PROHIBITION ⟸3(5) — GROUNDS—THREAT TO ADJUDGE PETITIONER GUILTY OF CONTEMPT.

Where court made unwarranted order in supplementary proceedings directing warehouseman claiming lien on goods to deliver them to judgment creditor, and threatens to adjudge warehouseman in contempt and commit him to jail as punishment for refusal to comply therewith, an appeal from the order will not afford speedy and adequate remedy, and prohibition to prohibit court from adjudging him in contempt will lie.

Petition for writ of prohibition by Curtis C. Colyear doing business under the firm name and style of the Colyear Van & Storage Company against the Superior Court of the State of California in and for County of Los Angeles and another. Respondent ordered to desist and refrain from enforcing certain order.

Joseph A. Adair, W. S. Baird, and Henry O. Wackerbarth, all of Los Angeles, for petitioner.

Mabel Walker Willebrandt, of Los Angeles, for respondents.

SHAW, J. Prohibition. As appears from the verified petition, to which respondent has interposed a general demurrer and an answer, A. H. Mitchell, then in the possession of certain household furniture and furnishings, did, on September 4, 1918, deliver the same to petitioner who, as a warehouseman, received the same on storage for hire and issued a nonnegotiable warehouse receipt therefor. Thereafter the sheriff of Los Angeles county, under and by virtue of an execution issued upon a judgment rendered by the superior court of Los Angeles county in an action to which petitioner was not a party, brought therein by Harry Perkins against A. H. Mitchell for the possession of the goods, made demand upon petitioner for the delivery of the same to him, with which demand petitioner refused to comply, unless he produced an order therefor from Mitchell and paid the storage charges. Thereupon an order was issued in said action by respondent, copy of which was duly served upon petitioner, requiring him to appear in said court to answer concerning said property. Upon the appearance of petitioner in response to said order, a hearing was had wherein an order was made as follows:

"Harry Perkins v. A. H. Mitchell. In the matter of the order for appearance of A. H.

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Mitchell, judgment debtor, and the order for Colyear Van & Storage Company to appear and answer concerning property, which comes on now to be heard, F. Horowitz and Mabel W. Willebrandt appearing as attorneys for the plaintiff and H. O. Wackerbarth appearing for the defendant, it appearing that Colyear Van & Storage Company has the property described in the complaint, and is holding the same as the agent of defendant, it is ordered that said Colyear Van & Storage Company deliver said property to the plaintiff within 10 days."

Petitioner, claiming an interest in the property, refuses to comply with the order, by reason whereof respondent threatens to and will, unless prohibited by this court, adjudge petitioner guilty of contempt and commit him to jail as punishment therefor.

[1, 2] Petitioner was not a party to the action of Perkins v. Mitchell, and the order made, requiring him to deliver to plaintiff therein the goods in which he claimed an interest was wholly unwarranted. Counsel for respondent insists, however, that petitioner, though not a party to the action, if aggrieved by the order made, has a right to appeal therefrom, and since an appeal will afford him a plain, speedy, and adequate remedy in the ordinary course of law, prohibition will not lie. Conceding, but not holding, this to be true, a sufficient answer thereto is that petitioner is not seeking a review of the order, but seeks to have the court prohibited from making an order based thereon, which the court threatens to and will make, adjudging him guilty of contempt and committing him to jail for refusing to comply therewith, from which, if made, no appeal lies.

The order made was in a proceeding supplementary to execution, as provided by chapter 2 (of title 9 of part 2), Code of Civil Procedure. Section 717 provides that after a return of an execution against property of the judgment debtor and upon proof that any person has property of such judgment debtor, the judge may by order require such person to appear and answer concerning the same. It was under this provision of law that petitioner was required to appear and answer concerning the property. Section 719 provides that the judge upon such hearing may order any property belonging to the judgment debtor, which is in the hands of any other person, to be applied toward the satisfaction of the judgment, but with this express proviso:

"But no such order can be made as to * * * property in the hands of any other person, * * * if such person claims an interest in the property adverse to the judgment debtor."

It is perfectly clear that petitioner claimed an interest in the property adverse to Mitchell by virtue of his lien thereon as a warehouseman for the storage of the property consigned to him by one who, in so far as this record shows, was at the time of the consignment in the lawful possession thereof. The law does not authorize the trial of the rights of a third party claiming property adverse to a judgment debtor in this summary manner. He is entitled to his day in court, with an opportunity for the determination of his rights in an ordinary action, as specified in section 720, Code of Civil Procedure, which provides that, if it appears that a person having property of the judgment debtor or in any case claims an interest therein adverse to such judgment debtor, the judgment creditor may maintain an action against such person for the recovery thereof; and the court may by order forbid a disposition or transfer of the property until an action can be commenced and prosecuted to judgment.

The court acted in excess of its jurisdiction in making the order requiring petitioner to deliver possession of the property to plaintiff in said action. McDowell v. Bell, 86 Cal. 615, 25 Pac. 128; High v. Bank of Commerce, 103 Cal. 525, 37 Pac. 508; Lewis v. Chamberlain, 108 Cal. 525, 41 Pac. 413. Hence it follows that the violation of such order constitutes no warrant for adjudging petitioner guilty of contempt and imposing punishment therefor.

It is therefore ordered that respondent desist and refrain from any proceeding having for its purpose the enforcing of that certain order made by the superior court of Los Angeles county on March 6, 1919, in the case of Harry Perkins v. A. H. Mitchell.

We concur: CONREY, P. J.; JAMES, J.

(40 Cal. App. 561)

SCRIBANTE v. EDWARDS et al.
(Civ. 2721.)

(District Court of Appeal. First District, Division 2, California. April 4, 1919. Rehearing Denied by Supreme Court June 2, 1919.)

MECHANICS' LIENS ⇐72—EXTRA WORK ORDERED BY ARCHITECT—LIABILITY OF OWNER.

In a suit to foreclose mechanic's lien, contract to lay a concrete floor over the entire surface of a basement not less than 5 inches thick, the work to be performed under direction of the architect, *held* to bind the owner to pay for extra thickness of foundation ordered by architect in view of Civ. Code, §§ 2317, 2319, 2331, 2332, 2334, 3519, and 3521.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Q. Scribante against William Edwards and others. From the judgment rendered, defendants appeal. Affirmed.

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Edgar C. Chapman, of San Francisco, for appellants.

Albert Picard, of San Francisco, for respondent.

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BRITTAIN, J. The defendant owner appeals from a judgment on a mechanic's lien. As stated in the opening brief, the single point presented is upon the interpretation of the contract. No authorities are cited in the briefs. The contract was evidenced by two writings, both prepared by the architect employed by the owner, one in form an offer to do the work, and the other a formal acceptance of the offer. The work was to lay a concrete floor in the basement of an old building, under which there was a pressure of water, causing it to precolate through the old floor and to flood the basement. When the writings were prepared, the basement was flooded to a depth of about 18 inches and the old floor was covered with mud. It was impracticable, if not impossible, to ascertain the condition of the old floor, and the architect and contractor, at least, assumed it was substantially level. The offer was to pump out and to clean the basement and to do certain other work in addition to the main work of laying the concrete floor. Upon the assumption of substantial uniformity of the surface of the old floor, the contractor computed the amount of concrete which would be required to lay a floor with a foundation 5 inches thick with a surface of an additional thickness of one inch. The architect was not at that time sure whether a floor of the thickness bid upon would be sufficiently strong to stop out the percolating water, a unit price for extra thickness was fixed by a computation of the area of the basement multiplied by one inch to ascertain the number of cubic yards of concrete which would be required for each additional inch of thickness.

The clauses of the contract which are in question are the following:

"Lay a concrete floor over the entire surface of the basement not less than five inches thick with good and proper fall to the sump at N. E. corner of the basement; * * * lay a top or finish floor one inch thick. * * * This work is to be performed under the direction of Fred Burrage Wood, architect, for the sum of one thousand and twenty-five ($1,025.00) dollars. * * * Should you desire to increase the thickness of the base or foundation floor I will furnish the materials same as in proposed floor as above and perform the labor for the sum of one hundred and twenty-five ($125.00) per inch thickness over and above the proposed five inches."

When the basement was pumped out, upon the advice of the architect, the owner, through the architect, orally instructed the contractor to increase the thickness of the foundation one inch. It was then apparent that the old floor was undulating, and that a floor of uniform thickness would not permit drainage to the sump. The contractor informed the architect that, even with the proposed additional inch of concrete, if the floor were laid so as to permit drainage, it would leave only about 3 inches of thickness over the high places in the old floor. The architect thereupon directed the foundation to be made 6 inches thick over the high places and himself marked at more than 60 places on the walls and pillars the elevations to which the floor was to be laid. When the work was completed it was found the additional concrete over the original amount determined by computation was equivalent to 4½ inches over the entire floor, that is, the admittedly ordered inch plus 3½ inches additional which it is admitted went into the basement in filling the low spots in the original floor and in bringing the floor to the grade directed by the architect, acting for the owner.

On behalf of the appellant it is contended that under the contract as modified by the order of the additional inch of concrete the contractor was bound to lay a floor not less than 7 inches thick at the thinnest place, i. e., over the high places, on the old floor, and to lay that floor so that it would carry off the water and, further, that when the contractor discovered the condition of the floor after it had been pumped out, if the two requirements could not be fulfilled, the contractor should have refused to proceed with the work.

The contract bound the contractor to do the work under the architect's direction. The appellant by his argument admits the architect was the agent of the owner in ordering the contractor to lay the additional inch of foundation. To interpret the contract as contended for by the appellant would be to charge the contractor with the duty of determining at his peril which of the directions of the architect he was to fulfill and which he should disregard. Where the principal authorizes the agent to order work done, without notification to the contractor limiting the extent of the agent's power, the principal is bound, even though the agent exceeding his authority orders more work than the principal directed, in the absence of bad faith on the part of the contractor. Civ. Code, §§ 2317, 2319, 2331, 2334. When the attention of the architect was called to the physical impossibility of meeting the two conditions relied upon by the appellant, the architect directed the contractor to lay 7 inches of concrete on the high places and to work to grades which the architect then established. The work ordered by the architect was done satisfactorily. The work and the labor performed and the materials furnished were used in the alteration and repair of the appellant's building. Having received the benefit of the

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work, the owner should pay for it. Civ. Code, § 3521. The knowledge of the architect that the work was being done under his direction was notice to the owner. Civ. Code, § 2332. When the contractor told the architect what his order would require, the work might have been forbidden. Civ. Code, § 3519. There is no question presented as to the correctness of the amount for which judgment was rendered, if the interpretation of the contract by the lower court was correct. In holding the owner bound to pay for the extra work, the lower court interpreted the contract as binding the owner by the architect's order. This interpretation was correct.

The judgment is affirmed.

We concur: LANGDON, P. J.; HAVEN, J.

(40 Cal. App. 505)

ALCHIAN v. MacDONALD et al.
(Civ. 2643.)

(District Court of Appeal, First District, Division 1, California. March 31, 1919.)

1. BANKS AND BANKING ⟸139—STOPPING PAYMENT OF CHECK—EFFECT.

Ordinarily, stopping payment of check does not discharge the liability of the maker to the holder.

2. SALES ⟸128—RESCISSION BY BUYER.

Where the buyer of automobile, who gave postdated check so that he could stop payment if he did not secure clear title, redelivered the automobile to the seller and stopped payment of the check, the buyer completely rescinded the sale as effectually as if the check had been returned to him for cancellation.

3. REPLEVIN ⟸8(1)—INTEREST OR RIGHT OF POSSESSION.

Plaintiff, who at the time of commencement of his action in claim and delivery for automobile had no interest in or right of possession of the car, was not in a position to commence or maintain the action.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by A. H. Alchian against R. W. MacDonald and another. From judgment for plaintiff, the named defendant appeals. Reversed.

George G. Graham, of Fresno, for appellant.

Harry Sarkisian, of Fresno, for respondent.

WASTE, P. J. This is an action in claim and delivery for one automobile. The plaintiff had judgment, and defendant MacDonald, alone, appeals.

Defendant MacDonald was purchasing an automobile, under contract of sale, from the E. L. Peacock Auto Company of Oakland. He desired to dispose of the car without the fact becoming known to a number of parties to whom he was indebted. He proposed to defendant Haig, and the latter joined him in executing, a plan whereby this might be done; they to divide the profit over and above a specified amount. Thereupon both defendants, representing themselves as owners of the automobile, offered to sell the same to plaintiff, in consideration of the payment of the sum of $700. Upon their agreeing to perfect title in themselves plaintiff delivered, to defendant Haig, a postdated check, payable to Haig, for the amount of the purchase price, and took possession of the automobile. Both defendants signed and delivered to plaintiff a bill of sale of the car. Plaintiff's purpose in postdating his check was, he testified, "in order to find out if it (the automobile) was clean and clear, that is, so I could get clear title to it. If the title did not vest in me I intended to stop payment of the check."

On the day following the delivery of the automobile to plaintiff, defendant Haig, at the request of defendant MacDonald, and as agreed between the two, paid to the real owner of the car the balance of the purchase price, and received a bill of sale thereto, together with a transfer to himself of the policy of insurance covering the car. He delivered both of these documents to plaintiff.

A disagreement arose between defendants Haig and MacDonald over the matter. MacDonald communicated this fact to plaintiff and asked for a rescission of the sale and return of the car, offering to restore the check to plaintiff. Plaintiff prepared and MacDonald signed a document which read as follows:

"Fresno, California, January 31, 1918.

"I, the undersigned, call the sale of one Apperson roadster car, factory No. 15094 canceled to A. H. Alchian and I will send the check of $700 to him made on Samuel H. Haig, which I also consider void, and I have also taken possession of the same car.

"[Signed] R. W. MacDonald."

Relying on this signed agreement, which he retained, plaintiff returned the automobile to MacDonald and promised to cancel the check, when it was restored to him. The check was not returned. The plaintiff stopped payment and subsequently brought this action.

MacDonald had in the meantime mortgaged the automobile to a third party in whose possession it was, and from whom the sheriff took it under the claim and delivery proceedings. The mortgagee made a third party claim to protect against which a bond was given. The mortgagee was not made a party to the action.

The main question to be determined on this

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appeal is: Was plaintiff entitled to possession of the automobile at the time of the commencement of the action? He had tentatively closed the deal by delivery of a postdated check "subject to cancellation," as he so testified, "if I did not get the car." Five days after giving the check, and eleven days before it became payable, he voluntarily prepared, and took from MacDonald, the document canceling the sale to himself, and acknowledging delivery of possession to MacDonald. With his full consent, MacDonald took entire possession of the car.

[1, 2] Ordinarily, stopping payment of a check does not discharge the liability of the maker to the holder. 7 Corpus Juris, par. 429, and cases cited. But in the present case, Haig, the holder of the check, was merely acting for, and as the agent of, MacDonald. He had entered into a scheme of misrepresentation and concealment for the purpose of assisting the latter in more readily disposing of his interest in the automobile, and became the convenient medium for the roundabout transfer of the title of the car from defendant MacDonald to the plaintiff. The plaintiff was not concerned with any agreement between the two defendants, looking to a division of the proceeds of the sale. When he redelivered the automobile to one of them, and stopped payment of the check as to both, he withdrew the entire consideration for, and worked a complete rescission of, the sale, as effectually as if the check had been returned by the defendants for cancellation.

[3] The plaintiff did not, at the time of the commencement of the action, have any interest in, or right of possession of, the automobile. He was therefore not in a position to commence or maintain it. Garcia v. Gunn, 119 Cal. 315, 51 Pac. 684; Fredericks v. Tracy, 98 Cal. 658, 33 Pac. 750.

In view of the conclusion we have reached, we do not deem it necessary to pass upon the other points made on this appeal.

The judgment is reversed.

We concur: KERRIGAN, J.; RICHARDS, J.

(40 Cal. App. 687)

CITY OF LOS ANGELES v. CLINE et al. (Civ. 2768.)

(District Court of Appeal, Second District, Division 1, California. March 28, 1919. Rehearing Denied by Supreme Court May 26, 1919.)

STATUTES ⊂=85(5)—SPECIAL LAWS—CONDEMNATION PROCEEDINGS—ATTORNEY'S FEES.

St. 1911, p. 895, § 1, amending Street Opening Act 1903, § 14, so as to deprive defendants, in condemnation proceedings under such act, of attorney's fees given them, under section 6 and Code Civ. Proc. § 1255a, upon abandonment or dismissal of action, is violative of Const. art. 1, § 11, being a special law, in view of Street Opening Act 1903, § 36, and Street Opening Act March 6, 1889.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by the City of Los Angeles against George T. Cline, Bettie C. Rorick, William Rorick, and others. Action dismissed on plaintiff's motion, and from judgment of dismissal awarding the two last named defendants their costs and attorney's fees, plaintiff appeals. Affirmed.

Albert Lee Stephens, City Atty., Wm. P. Mealey, and C. D. Pillsbury, Deputy City Atty., all of Los Angeles, for appellant.

Daniel M. Hunsaker, Hunsaker & Britt, Le Roy M. Edwards, and Samuel Poorman, Jr., all of Los Angeles, for respondents.

CONREY, P. J. In this action the plaintiff proceeded under the "Street Opening Act of 1903," and sought to condemn and take for street purposes certain land of the respondents. After trial and a verdict assessing the value of the land to be taken, an interlocutory judgment was entered whereby the property of the respondents was condemned to the use of the plaintiff upon the payment of the amount specified in the judgment. The compensation provided for by said judgment was not paid. Instead thereof, the city attorney, after being duly authorized thereto by the city council, moved the court for dismissal of the action, and a judgment of dismissal was entered. Thereafter, upon motion of the respondents, the court set aside the judgment of dismissal and entered a new judgment of dismissal, awarding to respondents their costs, including the sum of $850 for attorney fees. From this judgment the plaintiff appeals, and this court is called upon to determine whether or not the lower court was authorized to allow attorney fees to the respondents.

Title 7 of part 3 of the Code of Civil Procedure prescribes the general rules for the exercise of the right of eminent domain in this state. In said title 7 is contained section 1255a, which was added to that Code by act approved March 17, 1911 (St. 1911, p. 377). It provides for the right of abandonment of a condemnation proceeding and that "upon such abandonment, express or implied, on motion of defendant, a judgment shall be entered dismissing the proceeding and awarding the defendant his costs and disbursements, which shall include all necessary expenses incurred in preparing for trial and reasonable attorney fees." Appellant does not challenge the constitutionality of section 1255a. That has been done in other cases, wherein the validity of the section was up-

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held. City of Sacramento v. Swanston, 29 Cal. App. 212, 155 Pac. 101; Silver Lake, etc., Co. v. City of Los Angeles, 32 Cal. App. 123, 162 Pac. 432. It was held that the proceeding to condemn property for a public use "is so differentiated from the ordinary actions or proceedings in a court of justice * * * as to bring it within the settled test justifying the assignment of the proceeding to a particular class for the purposes of reasonable provisions not applicable to other classes of actions."

Section 6 of the Street Opening Act of 1903 (St. 1903, p. 378) provides that the action for condemnation of land in proceedings under that act "shall, in all respects, be subject to and governed by such rules of the Code of Civil Procedure now existing, or that may be hereafter adopted, as may be applicable thereto, except in the particulars otherwise provided for in this act." Section 14 of that act declares the time and terms upon which proceedings thereunder may be abandoned. By act approved April 12, 1911 (St. 1911, p. 895, § 1), the Legislature made the following addition to said section 14:

"If the proceedings be abandoned or the action dismissed no attorney's fees shall be awarded the defendants or either or any of them."

Appellant contends that, by reason of this amendment, respondents are deprived of the right to attorney fees in this action, which right they otherwise could claim under section 1255a, Code of Civil Procedure. To this contention the respondents reply that said amendment of section 14 is void because it is in conflict with certain prohibitions contained in the Constitution of the state.

"All laws of a general nature shall have a uniform operation." Const. art. 1, § 11.

"The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * *

"Third. Regulating the practice of courts of justice. * * *

"Thirty-third. In all other cases where a general law can be made applicable." Const. art. 4, § 25.

These provisions of the Constitution have been illustrated and applied in numerous decisions, to only a few of which we need briefly refer. In City of Pasadena v. Stimson, 91 Cal. 251, 27 Pac. 607, after some discussion of earlier cases the court said:

"The conclusion is that, although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction, it is not general or constitutional if it confers particular privileges or imposes peculiar disabilities or burdensome conditions, in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law."

In Title, etc., Restoration Co. v. Kerrigan, 150 Cal. 289, 325, 88 Pac. 856, 866 (8 L. R. A. [N. S.] 682, 119 Am. St. Rep. 199), the Supreme Court again was called upon to define the differences between general laws and those which are special, and to emphasize the fact that under appropriate circumstances special rules may be made which, although applicable only to particular classes of cases, yet retain the characteristics of general laws. The court said:

"After all, the question of classification is primarily for the Legislature. The court is not to set aside a statute merely because in its view it may have been unwise or unnecessary to apply certain rules to one class of cases. Before the act can be declared invalid on this ground, it must appear to the court that there was no reasonable basis on which the peculiar legislative provision could have been made."

The Street Opening Act of 1903 is not the only statute under which the plaintiff might have elected to open the street and condemn therefor the land of respondents. Section 36 of that act provides that said act shall in no wise affect the Street Opening Act approved March 6, 1889 (St. 1889, p. 70), or any other acts on the same subject, but is intended to provide an alternative system of proceedings for the purposes stated. As the act of 1889 is silent on the subject of allowances for attorney fees, it follows without any doubt that proceedings under that act are governed by the provisions contained in section 1255a, Code of Civil Procedure, under which, upon abandonment and dismissal of the action, attorney fees must be allowed. There is no difference between the act of 1889 and the act of 1903 upon which to base a discrimination which would deprive the defendants of the right to an allowance for attorney fees in one proceeding, although that right clearly exists in the other proceeding. Moreover, there is much force in the argument of respondents that the rule stated in section 1255a, Code of Civil Procedure, allowing attorney fees generally upon abandonment and dismissal of condemnation proceedings, should exclusively control all such cases, because equally in all such cases the defendant property owner is brought into court against his will and without any claim that he has violated any obligation due from him to the plaintiff. In this respect the situation of the defendant is precisely the same in an action to condemn land for street purposes as in an action to take his land for the use of a railroad or for any other public use.

Our conclusion is that the provision here under consideration of section 14 of the Street Opening Act of 1903, is contrary to the limitations prescribed by the Constitution, and therefore may not be enforced.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

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(40 Cal. App. 614)

PEOPLE v. BONFANTI. (Cr. 838.)

(District Court of Appeal, First District, Division 1, California. April 9, 1919. Rehearing Denied May 9, 1919; Denied by Supreme Court June 5, 1919.)

1. CRIMINAL LAW ⟸1186(4)—HARMLESS ERROR—ALLEGATIONS OF INFORMATION.

In view of Const. art. 6, § 4½, a conviction of assault with intent to commit rape under Pen. Code, § 220, will not be reversed by reason of the information failing to state that the victim of the assault was not the wife of defendant; it clearly appearing on the trial that she was not his wife, but was the wife of another.

2. CRIMINAL LAW ⟸829(1)—INSTRUCTIONS.

It was not error to refuse requested instructions, where those given covered the law sought to be brought to the attention of the jury.

Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Mario Bonfanti was convicted of assault with intent to commit rape, and appeals. Affirmed.

Devoto, Richardson & Devoto, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

KERRIGAN, J. The defendant was convicted of the offense of assault with intent to commit rape, and appeals from the judgment. He urges three grounds in support of his appeal, the first of which is that the information fails to state an offense within the jurisdiction of the superior court—the court in which he was tried and convicted. The defect of the information referred to is that there is no statement therein that the victim of the assault was not the wife of its perpetrator; that accordingly, for aught that appears in the information, she may have been his wife, and consequently the alleged acts of violence constitute in law a simple assault, an offense not within the jurisdiction of the superior court.

The offense that the information purported to charge is that defined by section 220 of the Penal Code, which provides that "every person who assaults another with intent to commit rape * * * is punishable by imprisonment in the state prison. * * *" Section 261 of the same Code defines rape as "an act of sexual intercourse, accomplished with a female not the wife of the perpetrator," under variant conditions set forth in said section, among which is the accomplishment of the act by means of force and without the consent of the participant. It is thereupon argued that an information charging an assault with intent to commit rape must contain the same statement with reference to the woman as in a charge of rape itself, namely, that she was not the wife of the perpetrator.

The cases of People v. Miles, 9 Cal. App. 812, 101 Pac. 525, and People v. Everett, 10 Cal. App. 12, 101 Pac. 528, are cited in support of the appellant's contention. The first of these cases was upon an information charging the same offense as in the case at bar, and the second of them was upon an information charging rape, in both of which it was held that the omission to state therein that the female concerned was not the wife of the defendant rendered the information so defective as to necessitate a reversal of the judgment.

In this connection, however, it is urged by the Attorney General that the two cases cited, having been decided prior to the adoption of an amendment to the Constitution known as section 4½ of article 6 thereof, should no longer be regarded as controlling; a new rule having been prescribed by that amendment for the guidance of appellate courts in the decision of appeals.

The new rule of decision laid down by the Constitution is couched in the following terms:

"No judgment shall be set aside, or new trial granted, in any case, on the ground of the misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, * * * the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

The defect in the information here pointed out is an error of pleading, and, following the mandatory direction of the Constitution, the judgment should not be reversed or a new trial granted unless that error of pleading has, in the opinion of this court, formed after an examination of the entire cause, including the evidence, resulted in a miscarriage of justice. It becomes, then, pertinent to inquire how the omission to state in the information that the woman upon whom the defendant is charged with having committed the assault was not his wife affected his trial, and to determine whether the omission pointed out affected it to such an extent as to have brought about a miscarriage of justice. An examination of the record immediately discloses that the omission in question affected the trial not at all; in fact, the trial proceeded as if the allegation were there. Its absence was not noticed by the defendant. He did not even demur to the indictment; if he had done which his cause of complaint would have been at once removed, but without his thereby gaining any apparent advan-

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tage. For the fact is that the woman was not his wife. Some of the instructions to the jury proposed by his own counsel stated the fact baldly that he was in fact charged with an assault to commit rape. It appeared at the trial that the victim of his assault was not in fact his wife, but was the wife of another man—his neighbor—and the mother of three children. It could not be contended, even by the defendant, that if the information had contained the statement that the victim of the assault was not his wife, the trial would have proceeded with one iota's difference from the course it took, or that the verdict of the jury or the judgment of the court would have been other than it was.

[1] Under these circumstances, it appears to us that there could hardly be a case to which to apply more appropriately the rule of decision laid down by the Constitution.

This rule since its adoption has been applied many times, and, we think, in cases where the error relied upon was of a less trivial character, regarded from the point of view of its consequences, than the one here. Thus in People v. Tomsky, 20 Cal. App. 672, 130 Pac. 184, the trial was had without the defendant having entered a plea of guilty or not guilty. This must be conceded to be a very substantial departure from proper and regular procedure, but it was held not to be sufficient to require a reversal of the case where the record did not show that a miscarriage of justice had resulted. In People v. O'Bryan, 165 Cal. 55, 130 Pac. 1042, and People v. Lawlor, 21 Cal. App. 69, 131 Pac. 63, the errors upon which a reversal was sought were of improper admission of evidence or misdirection of the jury, but it was held that the constitutional rule of decision required the affirmanee of the judgment; it not appearing to the appellate court after its examination of the entire cause, including the evidence, that such errors had resulted in a miscarriage of justice.

[2] Two other grounds for reversal are urged, namely, that the court refused to instruct the jury in certain specific terms as requested by the defendant, and that the evidence fails to show that the assault established thereby had for its object the raping of its victim. An examination of the instructions actually given to the jury discloses that they covered the law sought to be brought to its attention in those that were refused, although in different terms, and the examination of the evidence that we have made satisfies us that the jury was warranted in finding this question of intent against the defendant.

For the reasons given, the judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

(40 Cal. App. 585)

HAUN v. TALLY et al. (Civ. 2626.)

(District Court of Appeal, Second District, Division 1, California. April 5, 1919. On Rehearing in Supreme Court in Bank, June 5, 1919.)

1. THEATERS AND SHOWS ⟸6—RULE OF RES IPSA LOQUITUR—APPLICABILITY.

Accident due to electric fan becoming detached from the connecting motor, resulting in the fan falling and striking plaintiff patron of defendant's theater on the head, was such as to make applicable the rule of res ipsa loquitur.

2. APPEAL AND ERROR ⟸880(2) — PARTY WHO MAY CLAIM ERROR.

In action against owner of theater and employé who installed electric fan, which became loose from its motor and fell, striking plaintiff on the head, that court advised jury that presumption of negligence from happening of accident did not apply to employé *held* a matter about which owner is not in a position to complain on appeal.

3. DAMAGES ⟸216(1)—INJURY TO PATRON—INSTRUCTIONS.

In action against owner of theater and employé who installed electric fan, which became loose from its motor and fell, striking plaintiff on the head, *held* court did not err in instructing that the expenses incurred by plaintiff for services of physician and value of time lost were the subjects of direct proof, and are to be determined only on the evidence which the jury has before it.

4. TRIAL ⟸260(8) — INSTRUCTION SUFFICIENTLY COVERED BY CHARGE—REFUSAL.

There was no error of a substantial nature in refusing to give a particular instruction which narrated the several acts contained in the charging part of the complaint as constituting negligence and advising the jury that plaintiff was required to make proof thereof, where the general charge of the court as given advised the jury that the burden was upon plaintiff to sustain the allegations made.

On Rehearing in Supreme Court in Bank.

5. NEGLIGENCE ⟸138(2) — INSTRUCTIONS — PRIMA FACIE NEGLIGENCE—COUNTERVAILING EVIDENCE.

In an action for injuries from fall of fan, instruction that the prima facie case of negligence made by falling of fan "would justify a verdict in favor of plaintiff, unless the evidence in the case negatives that prima facie presumption, and establishes to your satisfaction that it was not the negligence of the defendants," was erroneous, in not requiring plaintiff's evidence to preponderate in weight over countervailing evidence.

6. APPEAL AND ERROR ⟸1064(1)—REVIEW—HARMLESS ERROR.

In action for injuries from fall of fan, instruction as to prima facie case of negligence made by falling of fan, without requiring plain-

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tiff's evidence to preponderate over countervailing evidence, was harmless, in view of the evidence and the charge as a whole.

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Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Harold W. Haun against Thomas L. Tally and another. From an adverse judgment and from an order denying his motion for new trial, defendant named appeals. Affirmed.

Delphin M. Delmas, of Los Angeles, for appellant.

Schweitzer & Hutton, of Los Angeles, for respondent.

JAMES, J. This appeal is taken by defendant Tally from an adverse judgment and from an order made denying his motion for a new trial.

The action was one for damages for personal injuries alleged to have been sustained by the plaintiff through the negligence of the defendants. Tally was the owner of a theater, Darnell was his employé. On a certain day in the year 1914, Darnell, having received instructions from his employer so to do, procured and installed in one of the ventilating apertures of the theater an electrically propelled fan. On the 9th day of April of the same year plaintiff, after paying the required price of admission, was occupying a seat in the theater for the purpose of enjoying the entertainment. While he was so occupied the metal fan hereinbefore referred to became detached from the connecting motor and fell, striking the head of the plaintiff and inflicting quite a serious injury, compensation for which was assessed by the jury in this action at the sum of $3,500. The points upon which appellant Tally relies are few, and are succinctly stated in the opening brief of his counsel. They relate wholly to the matter of giving and refusal to give certain instructions to the jury. It will be necessary to preface a consideration of the contentions urged against the judgment with a statement as to some portions of the allegations of the complaint and the whole charge as given by the court to the jury. That portion of the complaint wherein the particular negligence of the appellant was referred to is as follows:

"On information and belief plaintiff alleges that the defendants, as a part of the furnishings and fixtures of the said theater, constructed, operated, installed, and maintained, for the convenience and comfort of the patrons of the said defendant Tally, a two ventilating fan, alternating currents, of six blades. That said defendants did not exercise due care in the construction, operation, installation, and maintenance of the said fan, but constructed, operated, installed, and maintained the same in a careless and negligent manner, and in particular that the said fan was so constructed and installed, operated and maintained that the same became loosened and did fall upon the patrons of said defendant Tally, and in particular on this plaintiff; that the said fan was so maintained, installed, and operated that the pressure of the running and operating the same caused the said fan to pull away from the motor and its bearings, thereby causing the said fan to fall from its said bearings on said 9th day of April, 1914, striking and injuring the plaintiff."

The court instructed the jury generally that the burden of proving negligence in the case was upon the party alleging that negligence, and that unless the jury could find that the plaintiff had established negligence by a preponderance of the evidence the verdict should be for the defendants. It instructed the jury as to the particular negligence alleged and relied upon by the plaintiff, in the terms of that paragraph of the complaint from which we have already quoted. This instruction followed:

"With relation to the operation, installation, and maintenance of the fan, the court instructs you it was the duty of the defendants to exercise ordinary care in the erection and installation of this appliance in the theater, and that that ordinary care is to be measured with relation, so far as this case is concerned, to the effect upon the patrons of the theater. If, therefore, you find that the fan in question fell on April 9, 1914, and injured the plaintiff while he was a patron in the theater it will be for you to determine whether or not such fall was the result of its negligent installation, operation, or maintenance. If you find that the fall was due to such maintenance, operation, or installation having been made in a negligent manner, your verdict in this case will be in favor of the plaintiff for such amount as you find from the evidence and under the instructions of the court he has suffered in the way of damages by reason of such negligence of the defendants, if you find they are negligent. The court further instructs you, gentlemen, in regard to the matter of negligence, that when a thing which causes an injury is shown to be under the management of the defendants, and the accident is such as in the ordinary course of things does not happen if those who have the management, with proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care. To apply that doctrine to the case in question, if you find that the falling of the fan in question was such a thing as does not ordinarily happen if those who have the management thereof use proper care in the management and operation thereof, it affords prima facie evidence of negligence, and would justify a verdict in favor of the plaintiff unless the evidence in the case negatives that prima facie presumption, and establishes to your satisfaction that it was not the result of the negligence of the defendants."

As to the matter of damages an instruction was given which contained the following statement:

"The expenses incurred by him for the services of physicians and surgeons and the value of any time lost are subjects of direct proof, and are to be determined only on the evidence which the jury has before it, and must not exceed the amounts specifically claimed therefor in the complaint. The other elements of damage are from necessity left to the sound discre-

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tion of the jury, but in no event must the amount of damages exceed the amount alleged, $25,000."

[1] There was no dispute as to the fact that the fan fell and injured the plaintiff in the manner described, or that it fell by reason of pulling or dropping away from its motor bearings. The fan was exclusively within the charge and control of the defendant Tally, and the occurrence of the accident was such a one as to make applicable instructions as to a presumption of negligence arising under the familiar rule of res ipsa loquitur. Counsel says that because the complaint alleged that "the pressure of the running and operating the same caused the said fan to pull away from the motor and its bearings, thereby causing the said fan to fall," the plaintiff exhibited the fact that he had knowledge of what the alleged acts of negligence consisted, and that such matters then demanded express proof, leaving no room for any presumption to be used in aid of the case of plaintiff. We do not concede that where specific acts of negligence are described, the plaintiff in making his proof will be deprived of the aid of the presumption of negligence in a proper case (respondent cites a case to the contrary, Cassady v. Old Colony Street Ry. Co., 184 Mass. 156, 68 N. E. 10, 63 L. R. A. 285); but that is not the situation here. Plaintiff alleges on information and belief that the fan was so negligently and carelessly constructed, installed, and operated as to become loose and fall, adding the further descriptive statement as to the pressure of running the fan having caused it to pull away from the motor bearings. Plaintiff did not attempt to particularize what the defects in the fan were which would permit the same when operated to become separated from the motor part of the appliance. The fan was intended to be operated, and, if properly constructed and maintained, would not have pulled away from its attachments while running. It is claimed, further, however, that by the instruction given on the question of the application of the rule of presumption of negligence the court went too far, and in effect placed the burden upon the appellant to establish nonnegligence as against the presumption by a preponderance of the evidence. It will be noted that the court in concluding that instruction stated to the jury that the prima facie case made out with the aid of the presumption "would justify a verdict in favor of the plaintiff unless the evidence in the case negatives that prima facie presumption, and establishes to your satisfaction that it was not the result of the negligence of the defendants." The argument of appellant impresses us with much force, and if we could consider the question an open one we would be inclined to agree that the instruction was improper. In giving this particular instruction the court seems to have left out of view the requirement that the evidence of the plaintiff must preponderate in weight, and that the defendant will be entitled to judgment where the countervailing evidence merely balances, but does not overcome, the case made by the plaintiff. Then, too, it might well be argued that proof to the "satisfaction" of the jury would require even more than a preponderance, and reach almost to proof beyond a reasonable doubt. We can see little difference between that instruction—referring now only to the use of the words "establishes to your satisfaction"—and one considered by the Supreme Court in Campbell v. Bradbury (Sup.) 176 Pac. 685. The language there considered is said by the court to amount to a "reasonable doubt" instruction. However that may be, the Supreme Court in a number of cases has given consideration to instructions similar to that about which complaint is here made, and has held that there was no error committed against a defendant by the giving thereof (Osgood v. Los Angeles Traction Co., 137 Cal. 280, 70 Pac. 169, 92 Am. St. Rep. 171), and as to the general application of the rule (Steele v. Pacific Electric Ry. Co., 168 Cal. 375, 143 Pac. 718; Wyatt v. Pacific Electric Ry. Co., 156 Cal. 170, 103 Pac. 892; Worden v. Central Fireproof Building Co., 172 Cal. 94, 155 Pac. 839). On the other side of the question, and in a case where the court did instruct the jury that the defendant was only required to introduce sufficient evidence "to balance such a presumption without overcoming it by preponderance of the evidence," the Supreme Court declined, and no doubt properly so, to reverse the case upon the appeal of the plaintiff. The Osgood Case, supra, however, directly meets the question which the instruction here considered proposes, by asserting that—

"This presumption [the presumption of negligence], which the law raises from proof of certain facts, is 'satisfactory if uncontradicted' (Code Civ. Proc. § 1963); and to meet it the evidence of defendant must show to the satisfaction of the jury that defendant was 'without any negligence on its part.'"

We will there leave this question and hold that there was no error in the instruction, so holding only because we think that the decisions of the Supreme Court have foreclosed us against the exercise of any original judgment in the matter.

[2] Further complaint is made because the court advised the jury that the presumption of negligence hereinbefore referred to applied only to the appellant and not to Darnell, his employé. The evidence showed that Darnell was instructed to procure the fan and to install it, and that he followed instructions in that regard, although he was not an expert in such matters. The defendant's liability, assuming that negligence was shown in the installation or operation of the fan, cannot be questioned. That Darnell may have been improperly exculpated we think is a matter about which the appellant is not in a position here to complain.

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[3] It is contended that the court erred in instructing the jury that the expenses incurred by the plaintiff for services of physicians and the value of time lost were "subjects of direct proof, and are to be determined only on the evidence which the jury has before it," in that there was left out of view the right of the jury to form its own opinion as to those elements of damage. No evidence was introduced by the defendant to contradict in any way the proof made by the plaintiff as to these matters. Strictly speaking, considering that the evidence referred to by the court would include the evidence as to the quantity of time lost by the plaintiff and the amount of services rendered by physicians and surgeons, the instruction was correct. The jury would have no right to go outside of the evidence to determine any of those things. The court's intention no doubt was to place before the jury the fact that these matters were matters of particular damage, to support which particular proof was needed, whereas, as to other general elements of damage, the sound discretion of the jury would control. The instruction is so phrased, and its language is quite clear.

[4] We do not think that there was any error of a substantial nature in the court's refusing to give a particular instruction offered by appellant which narrated the several things contained in the charging part of the complaint as constituting negligence and advised the jury that plaintiff was required to make proof thereof. The general charge of the court as given advised the jury that the burden was upon the plaintiff to sustain the allegations made.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

On Rehearing in Supreme Court in Bank. (L. A. 4380.)

PER CURIAM. [5, 6] In denying the application for a hearing in this court after decision by the District Court of Appeal of the Second Appellate District, Division 1, we are not to be understood as approving the instruction discussed in the opinion to the effect that the prima facie case of negligence made by the falling of the fan "would justify a verdict in favor of the plaintiff, unless the evidence in the case negatives that prima facie presumption, and *establishes to your satisfaction that it was not the result of the negligence of the defendants.*" We think the italicized portion of this instruction was erroneous for the reason suggested in the opinion of the District Court of Appeal, namely, in leaving out the requirement that the evidence of the plaintiff must preponderate in weight, and that the defendant will be entitled to judgment where the countervailing evidence merely balances, but does not outweigh, the case made by the plaintiff. But in view of the evidence and the charge of the court taken as a whole we cannot conceive that this defect in this particular instruction in any way contributed to the verdict, and therefore are of the opinion that the error must be held to be without prejudice.

The petition for a hearing in this court is denied.

All concur, except WILBUR, J., not participating.

(40 Cal. App. 332)

ARGYLE DREDGING CO. v. CHAMBERS, State Controller. (Civ. 1997.)

(District Court of Appeal, Third District, California. March 19, 1919.)

1. STATUTES ⟸76(1)—SPECIAL LEGISLATION — ACT AUTHORIZING PURCHASE OF WARRANTS OF DRAINAGE DISTRICT.

Act Jan. 30, 1919, authorizing the state board of control to purchase warrants of the Sacramento and San Joaquin drainage district, issued in payment for the expense of continuing the construction of the east levee of the Sutter by-pass, is not violative of Const. art. 4, § 25, subd. 33, forbidding special laws in all cases where a general law can be made applicable.

2. STATES ⟸119—GIFT OF LOAN BY STATE—RECLAMATION DISTRICTS—"CORPORATIONS"—STATUTE.

Act Jan. 30, 1919, authorizing state board of control to purchase warrants of Sacramento and San Joaquin drainage district, issued in payment for expense of continuing construction of east levee of Sutter by-pass, is not violative of Const. art. 4, § 31, prohibiting the giving or lending of credit of the state or making a gift to any individual, municipal, or other corporation whatever; reclamation districts, and particularly the Sacramento and San Joaquin drainage district, not being in strictness "corporations" at all, but governmental agencies.

[For other definitions, see Words and Phrases, First and Second Series, Corporation.]

Application for writ of mandate by the Argyle Dredging Company against John S. Chambers, as Controller of the State of California. Demurrer to the application overruled, and peremptory writ prayed for ordered to issue.

James S. Spilman and Chas. H. Oatman, both of San Francisco, for petitioner.

John W. Carrigan, of Los Angeles, and Jas. L. Attridge, of San Jose, for respondent.

Robt. T. Devlin, of San Francisco, as amicus curiæ.

U. S. Webb, Atty. Gen., for the State.

CHIPMAN, P. J. This is an application for a writ of mandate compelling the controller to issue his warrant for the payment of plaintiff's claim. As the matter was one of emergency, and as at the argument we were fully convinced that the writ should issue, it was so ordered from the bench. By the request of all parties we will state the case and the reasons for our conclusion.

It appears from the petition as follows: That the Sacramento and San Joaquin drainage district is "a body politic and corporate created by the act of the Legislature of this state, approved December 24, 1911" (Stats. 1911, Extra Session, p. 117), as amended and supplemented by the act of May 26, 1913 (Stats. 1913, p. 252), and was further amended and supplemented by the act of June 9, 1915 (Stats. of 1915, p. 1338), which

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said act of 1911, as amended by said act of 1915, "is known and designated and referred to as the 'Reclamation Board Act,' as provided in section 31 of said acts as so amended and supplemented"; that the reclamation board referred to in the petition was created and exists as provided for in said Reclamation Board Act; "that the management and control of the said Sacramento and San Joaquin drainage district is by virtue of section 5 of said Reclamation Board Act vested in the said reclamation board." We quote from the petition:

"V. That pursuant to the provisions of said Reclamation Board Act the said reclamation board did, in accordance with the provisions of section 13 of said Reclamation Board Act, adopt and determine upon a certain portion or project of the plans to be carried out by said board and did designate the same by the name and number of 'Sutter-Butte By-Pass Project No. Six,' and did pass its order and resolution for the levying of an assessment in the sum of more than $10,000,000 upon the lands within said Sacramento and San Joaquin district to be benefited thereby, as might be determined in the manner provided by law, and did direct that said assessment be known and designated as 'Sutter-Butte By-Pass Assessment No. Six,' and did appoint three assessors for the purpose of making said assessment, all in the manner required and provided by said Reclamation Board Act.

"VI. That a part of the said Sutter-Butte by-pass project No. 6 so adopted and determined upon by said reclamation board is the construction of a levee along the East line of a by-pass in Sutter Basin, in Sutter county, California, known as the Sutter by-pass, the said levee being known and designated as the east levee of the Sutter by-pass.

"VII. That after the adoption of said Sutter-Butte by-pass project No. 6 the said reclamation board, acting for and on behalf of the said Sacramento and San Joaquin drainage district, entered into a contract with your petitioner for dredging work to be done by the dredger Argyle in and about the construction of the said east levee of the Sutter by-pass. That pursuant to said contract, and in the summer of 1918, your petitioner commenced work upon said east levee of the Sutter by-pass with the said dredger Argyle, which work has been prosecuted continuously ever since. That on the 1st and 2d days of February, 1919, your petitioner, pursuant to said contract, performed work upon the construction of the said east levee of the Sutter by-pass, for which work so performed on said two days your petitioner was entitled to be paid by said reclamation board for and on behalf of said Sacramento and San Joaquin drainage district the sum of $255 according to the terms of said contract.

"VIII. That thereafter the claim of your petitioner for said sum of $255 against the said Sacramento and San Joaquin drainage district, acting by and through the reclamation board, was duly presented to and allowed by the said reclamation board, and was thereafter submitted to the state board of control for its scrutiny and approval, and was thereafter approved by the said state board of control, and thereafter, and on February 20, 1919, a warrant numbered 24274, was duly drawn by the state controller upon the state treasurer in favor of your petitioner for said sum of $255, payable out of said Sutter-Butte by-pass assessment No. 6, for the amount of the said claim of your petitioner, which said warrant was thereupon and on said day by the said state controller delivered to your petitioner and was by your petitioner on February 21, 1919, presented to the state treasurer for payment, but there were no funds in the hands of the state treasurer to pay the said warrant when so presented, and the said state treasurer did thereupon register the said warrant and did indorse on said warrant the date of said presentation and the fact that it was not paid for want of funds, all as provided in and by section 15 of the said Reclamation Board Act.

"IX. That the Legislature of this state now in session passed an act, entitled 'An act authorizing the state board of control to purchase warrants of the Sacramento and San Joaquin drainage district issued in payment for the expense of continuing the construction of the east levee of the Sutter by-pass, appropriating money therefor, and providing for reimbursement to the state of such appropriation,' which said act was approved by the Governor of this state on January 30, 1919. That a copy of said act is hereunto annexed and marked Exhibit A, and is hereby referred to and made a part hereof. That said Legislature did, in section 6 of said act, declare that it deemed it necessary for the immediate preservation of the public health and safety that said act should go into immediate effect, and did in section 6 of said act set forth a statement of the facts constituting such necessity, which said section of said act was passed by each house of said Legislature upon an aye and nay vote upon a separate roll call thereon, as provided by section 1 of article 4 of the Constitution of this state. That it was further determined and declared by said Legislature in and by section 6 of said act, that said act constituted an urgency measure which under the provisions of section 1 of article 4 of the Constitution of the state of California should go into immediate effect, and that said act did go into effect immediately upon the signing and approval of the same by the Governor of this state on January 30, 1919.

"X. That on February 27, 1919, your petitioner, being then the owner and holder of said warrant for $255 payable out of the said Sutter-Butte by-pass assessment No. 6, did offer to sell said warrant at par to the state board of control, pursuant to the provisions of said last named act; and the said state board of control did thereupon and then and there accept said offer, and did purchase said warrant from your petitioner at the price of $255, being the par value thereof, and did prepare and approve a claim in favor of your petitioner for said sum of $255 in payment therefor, payable out of the appropriation of $300,000 made by said last-named act, and did present said claim to the respondent, John S. Chambers, who is and then was the controller of the state of California, and did request said respondent as such controller to draw a warrant upon the state treasurer payable out of said appropriation of $300,000 for the sum of $255 in favor of your petitioner, in payment of the purchase price of said warrant of like amount so purchased by said board of control as aforesaid. That said respondent as such state controller then and there refused and still refuses to draw said warrant as so requested by said board of control, or otherwise, or at all.

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"XI. That said appropriation of $300,000 was so made by said act of January 30, 1919, there was in the state treasury, and not otherwise appropriated, a sum of much more than said sum of $300,000. That no part of said appropriation of $300,000 made by said last-named act has ever been drawn or expended, but the same remains in the state treasury subject to the provisions of said act.

"XII. That the drawing of said warrant as so requested by said state board of control is an act which the law specially enjoins upon the said respondent as such state controller as a duty resulting from his office."

A demurrer to the petition was interposed by respondent on the following grounds: (1) That the act of January 30, 1919, violates section 21 of article 1 of the Constitution of the state of California, in that it is class and special legislation; that it is giving or lending the credit of the state in violation of section 31 of article 4, and in making an allowance for compensation on a contract for services rendered under contract unauthorized by law; (2) that it cannot be ascertained from the petition who is the real party in interest; (3) that the petition does not state facts sufficient to constitute a cause for granting the writ prayed for.

The insufficiency of the facts or the failure to disclose who is the real party in interest was not seriously urged. Nor do we think either point well taken. Unless the act in question is unconstitutional, mandamus is the appropriate remedy, and the facts alleged were sufficient to justify the issuance of the writ. It clearly enough appears that petitioner is the real party in interest.

Is the act of January 30, 1919, violative of the Constitution? It becomes necessary to ascertain the nature and character of the Sacramento and San Joaquin drainage district. The validity of the Reclamation Board Act is not called in question. The constitutionality of acts of this character was established and set at rest in the case of People ex rel. Chapman v. Sacramento Drainage District, 155 Cal. 373, 103 Pac. 207.

The origin and administrative and legislative history of the Reclamation Board Act, its nature and character, were concisely stated at the argument by Mr. Robert T. Devlin, who appeared amicus curiæ. The statement accords with our information upon the subject and we therefore take the liberty of using it. We quote from the notes written by our stenographic reporter:

"The problem of flood control has been a problem that has engaged the United States government and the state of California for more than half a century. For the last 50 years the United States government has been engaged in studying the flood condition of the Sacramento valley, for the purpose of preventing floods and increasing the navigability of the river. The state of California has been engaged in the same work. They sent for Mr. Eads, who had control of the Mississippi river, to come to California and make a report. He reported a plan for the improvement of the Sacramento river to prevent the very things that this act now before us was to do. The United States government made its report through Col. Mendel and others. In 1893 the débris commission was formed, first, to see that hydraulic mining should not be continued without permits; and, second, to take steps to restore the navigability of the river to the condition which it was in 1851 or 1852, about the time California was ceded to the Union. California again, when Governor Pardee was Governor, provided for a commission and invited three engineers to come to California, one of them being Col. Dabney, having charge of the Mississippi work. They made a report. The United States government was investigating this matter all the time, and finally there culminated what is called the Capt. Jackson report, which was made in 1911. That report was a report having for its object three things: First, the restoration of the navigability of the Sacramento river; secondly, the prevention of disastrous floods; and, thirdly, incidentally, the reclamation of private land. That report, Document 81, said that those three objects were inextricably involved, so you could not improve flood conditions and the navigability of the stream without aiding the landowner. The matter was of such importance to the state of California that Governor Johnson, in convening the Legislature in special session, made it as one of the objects to be legislated upon. He named eight or nine objects of such importance to the people that the Legislature should be convened for the purpose of considering them, and one of the objects was the consideration of the report of Capt. Jackson. "At the special session in 1911 the Legislature of this state adopted that report of Capt. Jackson as a part of the state policy and declared that part of the work should be carried out. In 1911, in pursuance of that plan, the state of California constituted the reclamation board and provided for the appointment of three commissioners and provided that all future works in California should be in conformity with that report. Two years following, the state of California created the Sacramento and San Joaquin drainage district, referred to in this petition, being a territory including the Sacramento and San Joaquin valleys determined by state engineers as being territory subject to flood control and flood injury, and provided that that board might carry on the work which is described in this petition. Subsequently, in 1917, the national Congress adopted the Jackson report and appropriated six million some odd thousand dollars for the purpose of carrying it out, to be used in conjunction with appropriations of like amounts made by the state of California, with the provision on the part of the United States government that the obligation of the United States should not exceed $1,000,000 per year. The state of California has made those appropriations, and to-day and for the last several years past, as a part of this work, the United States government and the state of California are co-operating in the lower parts of the Sacramento river in widening the river and in deepening its channel. Now, this work is all one project. This Sutter by-pass taps the river at the north, conducts the water out through two series of levees to be built, making an adjoining river or an additional river, carries it down to the Fremont weir, clear across the Sacramento river into the Yolo basin, and down to tidewater. This work is carried out exclusively by a state agency and by a state

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board. Capt. Jackson's report stated that, roughly speaking, the obligation resting upon the United States and the state of California and upon the landowners might be divided into three parts, so the nation would pay one-third, the state one-third, and the landowners one-third, and that the total estimated cost of the entire project would be $33,000,000, placing upon the state of California as a direct responsibility $11,000,000, upon the United States a like sum of $11,000,000, and upon the landowners $11,000,000. Owing to the fact that work progressed from time to time and a certain part of the work was done by private owners, this was reduced to a little more than $18,000,000, and upon that basis of $18,000,000 the Congress of the United States has already appropriated one-third, $6,000,000, binding the United States government to contribute over $6,000,000 to this work. * * *

"Some 25 or 30 years ago, the state of California tapped the Sacramento at Tisdale weir, by building a weir that allows the water to escape from the Sacramento river when it reaches a certain height, and that is the water that is doing the damage. By the state's action this water is taken out of the Sacramento river and thrown upon that territory on the east. For the purpose of taking care of that water, these by-passes are being constructed. If these by-passes are not constructed, this water that the state of California takes out of its own volition (nobody else has control of it) is taken out and dumped upon private land—up to some years ago, upon the lands known as 'District 1600,' now upon the lands in 'District 1.' In other words, the floods in that section are caused by the state government in taking water out of the river and dumping it on private lands. For the purpose of performing that governmental duty, the state of California is now building these by-passes. It has spent already more than $1,000,000 and has obtained the money by using its warrants, which warrants have been taken by private persons. We have now reached the point where private persons refuse to take warrants further."

It is well to recall what the Supreme Court said in People v. Sacramento Drainage District, supra, in speaking of districts of the character of the one here: Said the court:

"It is unnecessary to repeat the reasons set forth in the decisions in those cases [cases cited], by which the conclusion there reached was expressed, to the effect that such districts are, in strictness, not corporations at all, but rather governmental agencies to carry out a specific purpose—the agency ceasing with the accomplishment of the purpose. But, additionally, it may be said that the likeness of these agencies to corporations is superficial, and that the similitude—for it is no more than this—ceases, if consideration be paid to the fact that the state could accomplish this very work without organizing a district as such at all, and without giving the landowners within the district any voice in the selection of the managers or trustees. Thus it would be perfectly legal and competent for the Legislature, delimiting a tract of land, itself to appoint a commissioner or commissioners to perform all of the functions which, under the existing schemes, are performed by the trustees and the assessors."

The act of 1911 created the reclamation board to consist of three members; adopted the plan of the California débris commission, empowering the board to make modifications, as a general scheme for reclamation flood control in the Sacramento valley. The act of 1913 enlarged the board to seven members, created the San Joaquin and Sacramento valley drainage district and authorized the reclamation board to go forward with the construction of the project and to levy assessments on lands in the district in aid of that purpose. The act provided that in the carrying out of the work the board should divide it into separate projects or divisions, each to be taken up separately and a separate assessment levied therefor, each such project to have a distinctive name and number and its funds to be held separately.

These assessment funds are to be collected by the county treasurers in the counties affected and by them to be deposited in the state treasury and paid out by the state treasurer on warrants drawn by the controller against the state treasurer, as directed by the reclamation board, payable out of that particular assessment in each such separate project. Warrants may be drawn against any assessment whenever it has been ordered by the reclamation board and the assessors have been appointed; these warrants may issue for work before the assessments are collected and when thus drawn may be presented to and registered by the state treasurer, who is authorized to register them and indorse them not paid for want of funds and they shall thereafter bear interest from date of registration.

As alleged in the petition, the reclamation board adopted a project, known as Sutter-Butte by-pass project No. 6 and levied an assessment for its construction, known as Sutter-Butte by-pass assessment No. 6 and appointed the assessors therefor. At this stage the controller was authorized to draw warrants for construction work against this assessment on the request of the reclamation board, in anticipation of collections on the assessment. The reclamation board was able to make contracts for work on the east levee of this by-pass, being part of the project No. 6, payable in warrants against its assessment No. 6. Arrangements were made whereby private interests cashed these warrants to a very considerable amount. This arrangement having ended and the necessity for the uninterrupted prosecution of the work being imperative the act of January 30, 1919, was passed to meet the emergency.

This act, in effect, appropriated the sum of $300,000, and authorized the state board of control to purchase at their face value (to the extent of not exceeding said amount) all warrants of said drainage district drawn by the state controller, as provided by the Reclamation Board Act and payable out of said assessment and "issued in payment for the expense of continuing the construction of the east levee of the Sutter by-pass." Section 5 of said act provides:

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"The state controller shall draw warrants upon the state treasurer, payable out of said appropriation, in such amounts and at such times and in favor of such persons as the board of control may request, and the state treasurer shall pay the same."

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After the passage of this act, petitioner, Argyle Dredging Company, continued to work under contract with the reclamation board and the claim here was allowed for $255 for such work. It was duly allowed by the reclamation board and approved by the board of control, the state controller drew and issued to petitioner his warrant against the reclamation board's assessment No. 6 for $255, and it was registered by the state treasurer as not paid for want of funds. No question arises as to the regularity of the proceedings. The state board of control, however, contracted with petitioner, proceeding under the act of 1919, to purchase this warrant at its face value and requested the state controller to direct the payment out of the fund thus appropriated. This the controller refused to do and hence the action.

[1] The Constitution does not deprive the Legislature of the power to pass all special acts. It forbids special laws in all cases where a general law can be made applicable. Section 25, subd. 33, art. 4. It was said by the Supreme Court:

"The Legislature must, in the first instance, determine whether or not a general law can be made applicable in the particular case. The court will not interfere with its judgment on the subject, unless it clearly and beyond reasonable doubt appears that it adjudged contrary to the fact." Wheeler v. Herbert, 152 Cal. 224, 232, 92 Pac. 353, 357, citing cases.

It does not appear and it is not claimed that conditions such as prevail in the Sacramento and San Joaquin drainage district exist elsewhere in the state, nor do we think that a general law could reasonably be made applicable. But as was said in People v. Mullender, 132 Cal. 217, 222, 64 Pac. 299, 301:

"We would certainly not hold such a law invalid merely because it would, in our opinion, have been possible to frame a general law under which the same purpose could have been accomplished."

It was also there said:

"The language of said paragraph [section 25, art. 4] plainly implies that there can or may be cases where a local or special act may be wise, salutary, and appropriate, and in no wise promotive of those evils which result from a general and indiscriminate resort to local and special legislation."

Such in our judgment is the case here.

[2] In no just sense can the act be said to violate section 31, article 4, which prohibits the giving or lending the credit of the state or making a gift to "any individual, * * * municipal or other corporation whatever." As we have seen (People v. Sac. Drainage District, supra), reclamation districts "are, in strictness, not corporations at all, but rather governmental agencies to carry out a specific purpose—the agency ceasing with the accomplishment of the purpose." So completely are these districts so regarded, as we are informed, that their warrants are not taxable nor is the interest payable on those warrants taxable by the United States as income; so, also, are the salaries of the officers of such districts not subject to the payment of an income tax for the reason that the government regards them as part of the state.

Much more closely is the Sacramento and San Joaquin drainage district knitted to the state and really part of it than is the ordinary drainage district. Section 7 of the Reclamation Act of 1915 declares that—

"The state of California and the people are hereby declared to have a primary and supreme interest in having created, maintained and protected on the banks of the Sacramento and San Joaquin rivers and their tributaries and the by-passes and overflow channels and barriers maintained herein, good and sufficient levees and embankments or other works of reclamation, adequately protecting the lands overflowed or subject to overflow by said streams, * * * and it shall be the duty of the reclamation board to enforce on behalf of the state of California and the people thereof the erection, maintenance, and protection of such levees * * * as will best serve the interest of the state of California. The purposes and objects of this act are to carry into effect the plans of the California débris commission with such modifications and amendments and such additional plans as have been or may hereafter be adopted by the reclamation board for the control of the flood waters of the Sacramento and San Joaquin rivers and their tributaries and said levees and to vest in said reclamation board control and jurisdiction over said plans."

We then have an institution, a state agency, created by the state, under the exclusive control and management of the state, administered by officers appointed by the Governor of the state, and engaged in an enterprise of state-wide concern—the act itself providing that "the state of California and the people thereof are hereby declared to have a primary and supreme interest" in its objects and purposes.

But, aside from these considerations, we think the act of January 30, 1919, is neither more nor less than an act authorizing the state board of control to invest state money in the warrants duly and regularly issued under the act precisely as that board may now and has been since its organization authorized by law to invest state funds in United States and state bonds, municipal bonds, school district bonds, highway and irrigation district bonds. The state has simply added another class of securities in which

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the board of control may invest state funds. The fact that an appropriation of moneys made to meet the anticipated purchase, in this particular instance, does not affect the power of the Legislature to make the appropriation or the power of the board to make the investment. The act specifically provides for the payment of these warrants out of assessments, when collected, and when paid, the money goes back into the state treasury just as it would upon payment of any of said bonds purchased by the board of control.

In no view of the case can we see that either the Legislature or the board of control has exceeded its authority. The demurrer is overruled, and it is ordered that the peremptory writ prayed for be issued.

We concur: BURNETT, J.; HART, J.

(40 Cal. App. 479)

TRULL v. INDEPENDENT ORDER OF PURITANS. (Civ. 2733.)

(District Court of Appeal. First District, Division 2, California. March 28, 1919.)

1. INSURANCE ⟸645(3) — LIFE INSURANCE—EVIDENCE.

Admission of life insurance certificate running to one "Prull" instead of deceased "Trull" is not erroneous, where defendant had received premium payments from deceased, and its answer pleaded its assumption of certificate.

2. PLEADING ⟸182 — ANSWER — FAILURE TO REPLY—EFFECT.

Where answer set forth deceased's life insurance application in full and was not denied under oath within 10 days, the application becomes admitted under direct provisions of Code Civ. Proc. § 448.

3. INSURANCE ⟸665(2) — LIFE INSURANCE—EVIDENCE.

Evidence that one "Trull" had paid premiums on life insurance certificate for many years, etc., *held* to sustain finding that certificate was in fact issued to him, although under name of "Prull."

4. INSURANCE ⟸665(3) — LIFE INSURANCE—EVIDENCE.

Evidence of defendant's medical examiner and others *held* to sustain finding that deceased was not guilty of misrepresentation in stating his health was good when making a life insurance application.

5. INSURANCE ⟸646(3) — LIFE INSURANCE—BURDEN OF PROOF.

Defendant insurance company has burden of proving that deceased misrepresented condition of his health when applying for life insurance.

6. INSURANCE ⟸686 — COMPLAINT — SUFFICIENCY.

Complaint to recover on defendant's assumption of a life insurance certificate *held* not defective for failure to fully set out deceased's application for insurance.

Appeal from Superior Court, City and County of San Francisco; Geo. E. Crothers, Judge.

Action by Catherine Trull against the Independent Order of Puritans. Judgment for plaintiff, and defendant appeals. Affirmed.

Chas. F. Fury, of Petaluma, for appellant.
Olin L. Berry, of San Francisco, for respondent.

LANGDON, P. J. The defendant appeals from a judgment on a life insurance policy issued by the Knights of Honor and assumed by the defendant.

From an examination of the entire record, it appears that in 1890 the Knights of Honor issued a policy or certificate of insurance in the name of George E. Prull, which was delivered to George E. Trull. The Knights of Honor received payments of premiums from Trull for something over 25 years; the last payment having been made in November, 1915, one month after the Knights of Honor had gone into the hands of a receiver. The acceptance indorsed on the certificate was signed "George E. Trull." On November 13, 1915, Trull made an application to the defendant for the latter organization to assume the insurance, in which the applicant recited the facts of his membership in the Knights of Honor, warranted that he was then in sound health, that he knew of no cause in connection with his physical condition that would be a bar to his securing life insurance, or would in any way shorten his life, and that any untruthful statements or violations of the laws of this order should render his certificate void. This application was accepted by the defendant, which issued to him a receipt book in the name of George E. Trull, in which it entered successive payments made to it by him monthly. Trull died in June, 1916, and the defendant refused to pay to the beneficiary, the widow of the insured, who brought this suit.

In the complaint it is alleged that the Knights of Honor issued "a certain policy of insurance in the words and figures following, to wit: [Here being set forth the original benefit certificate.]" The certificate stated that it was issued "upon evidence received from said lodge [one in San Francisco] that he has lawfully received the degree of Manhood, and is a contributor to the widows and orphans benefit fund of this order and upon condition that statements made by said member in his petition for membership, and the statements made by him to the medical examiner, be made a part of this contract, and warranted to be true, and upon condition that he complies with the laws, rules, and regulations now governing this order, or

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that may be hereafter enacted for its government."

The defendant demurred generally and specially, because the statements made to the medical examiner were not alleged. After the demurrer was overruled, the defendant answered, denying the issuance of the certificate and that it was as set forth in the complaint for the reason that it had no information or belief on the subject sufficient to enable it to answer thereto. There were similar denials in regard to the allegations, as to the payment of premiums and the performance of conditions by the insured under the terms of the policy, and as to the alleged financial difficulties of the Knights of Honor. The defendant set up the application of Trull to the defendant for the assumption of the insurance, and alleged on information and belief that at the time of making the latter application Trull was suffering from a disease which, it was further alleged, contributed to his death.

The appellant relies on claimed errors in rulings on evidence, insufficiency of the evidence to justify the decision, and claimed error in overruling the demurrer.

[1] The defendant's first exception was to the admission over objection of the original certificate of insurance, because it purported to run to George E. Prull instead of George E. Trull. The suit was on the contract of the defendant assuming in favor of Trull and his beneficiary the obligation of the Knights of Honor to pay on the original certificate issued to Trull, although the name was written therein as Prull. It does not appear the defendant was in any way misled. The defendant had received payments from Trull, and in its answer it set up its own assumption of the particular certificate, referring to it by number. The lower court treated the word "Prull" in the certificate as a clerical error. Under all the circumstances the certificate was properly received in evidence.

[2] The defendant offered in evidence the application for the assumption of the insurance contract by the defendant and excepted to its rejection by the court. The application was set forth in full in the answer, and was not denied under oath within 10 days. It was therefore admitted for all purposes of the case. Code Civ. Proc. § 448. The court found that it was made by Trull, and further found that the statements contained in it were not untrue. If these findings are supported, the appellant was not injured by any remarks made by the judge at the time of his ruling concerning the materiality of the evidence.

[3-5] The appellant claims the evidence was insufficient to justify the decision. The finding that the original certificate was issued to Trull is attacked. This is the same contention in regard to the clerical error by which the name was written "Prull," although both insurers received the premium payments from Trull. This finding was sustained by the evidence. The finding that the statements made in the application for assumption are true is sustained by the evidence notwithstanding the attempt on the part of the appellant to avoid the effect of the evidence of its own medical witness, the attendant physician of Mr. Trull, who testified that at the time of the application for assumption he had no reason to believe that Trull was otherwise than in good health. The burden of proving misrepresentations was on the defendant, and the only witness it produced was the physician. It not only failed to make out its defense, but supported the plaintiff's case. No other finding could properly have been made. Mickschl v. National Council, etc., 180 Pac. 27; Speegle v. Leese, 51 Cal. 415; Leviston v. Ryan, 75 Cal. 293, 17 Pac. 239; Connolly v. Hingley, 82 Cal. 643, 23 Pac. 278.

[6] Appellant's last contention is that the complaint does not state facts sufficient to constitute a cause of action. Reliance is placed on Gilmore v. Lycoming Ins. Co., 55 Cal. 123. Reference is made to Tischler v. Insurance Co., 66 Cal. 178, 4 Pac. 1169, and Schenck v. Insurance Co., 71 Cal. 28, 11 Pac. 807. After these cases were decided the Supreme Court reconsidered the matter in Cowan v. Insurance Co., 78 Cal. 181, 20 Pac. 408. A quotation from the opinion in the latter case is determinative upon the contention made by the appellant:

"It is argued that the complaint is defective in that it does not set forth the application of the assured, which is declared to form a part of the policy. It appears clearly from the complaint that there was an application which was made a part of the policy. The contents are not stated in the complaint. But it is stated in the complaint by appending the policy to and making it a part of it that there was an application, and that that application should be considered a warranty by the assured. This stipulation of the contract is a solemn engagement by the assured that the representations made in the application at the time they were made, and when the policy became a contract, were true and correct. There are two classes of conditions usually inserted in policies, the first pointing to the time of the contract, the second to things which may occur or which may have to be performed at a time subsequent. In the former case the stipulation is called an affirmative warranty, and in the latter a promissory warranty. * * * Affirmative warranties are sometimes called warranties in præsenti. * * * A breach of an affirmative warranty consists in the falsehood of the affirmation when made, of a promissory warranty, which is in its nature executory, of the nonperformance of the stipulation. * * * In counting on a policy of insurance, we cannot see that there is any necessity of averring performance by the insured of anything warranted to be true when the policy was issued, for the reason that there was nothing to be performed. When the assured has warranted a thing to exist or a representation to be true,

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at a time when the policy becomes consummated as a contract, he has done all he can do."

Further, referring to the provisions of Code of Civil Procedure, § 457, permitting the pleader to state he has performed all the conditions of the contract, the court said:

"It is said that something material or which may be material to plaintiff's right to recover has been left out of the complaint. In reply to this we say it does not appear that anything material in the application, or which may be material to plaintiff's case, has been left out. The application is not before us, and we cannot say what is in it; therefore we cannot say that anything material is omitted. * * * As to the contention that there may be something material in the application which is omitted from the complaint, in addition to what is said above, we will further say that a demurrer to a complaint should not be sustained because there may be possibly something in an application affecting plaintiff's right to recover which is not averred in the complaint. Certainly we should not reverse a ruling of the court below overruling a demurrer on a 'perhaps.' Error should clearly appear to justify such a course."

The appellant seeks to distinguish this case from the present one because the court added:

"In ruling against the defendant on the point above discussed, we desire to say further that we cannot see how it can receive any detriment from the lack of the suggested allegation. The policy states that the application is filed with the defendant, and in his answer defendant can set it out and aver nonperformance of anything required by it to be performed."

The reasoning applies with equal force here. The defendant assumed the obligations of the contract in its entirety. It must have been fully informed in regard to its terms. It accepted the premiums paid after the assumption. If it did not know the terms of the contract when it assumed them, it could not be heard to say, after accepting its benefits, that it had no information regarding those terms. Yet that is just what it did say in its answer.

The judgment is affirmed.

We concur: BRITTAIN, J.; HAVEN, J.

(40 Cal. App. 371)

O'NEIL v. BRODE. (Civ. 2630.)

(District Court of Appeal, Second District, Division 1, California. March 21, 1919.)

1. MUNICIPAL CORPORATIONS ⟸541 — IMPROVEMENTS — PARKS AND PLAYGROUNDS — DELINQUENCY AS TO ASSESSMENT.

Under St. 1909, p. 1070, §§ 18, 19, the fact of delinquency in payment of an assessment rather than the attaching by the street superintendent of a certificate as to the fact established the jurisdiction of the board of public works of the city of Los Angeles to proceed with sale of the property for delinquency in paying its share of the expenses of a park improvement.

2. MUNICIPAL CORPORATIONS ⟸577—PARKS AND PLAYGROUNDS — ASSESSMENT OF EXPENSES—CERTIFICATE OF SALE—SIGNATURE BY PRESIDENT.

Certificate of sale of property for delinquency as to assessment of proportionate part of an expense of park improvement pursuant to Acts 1909, p. 1066, executed in duplicate by the street superintendent, one copy of which was signed by the president of board of public works of city of Los Angeles by his own hand, and other was signed by a fac simile stamp signature of same officer impressed on document by assessment clerk by president's direction (the copy so signed being retained in the files of the office, and the other delivered to the purchaser), was sufficiently signed.

3. MUNICIPAL CORPORATIONS ⟸582—PARKS AND PLAYGROUNDS — ASSESSMENTS OF EXPENSES—SALE DEED TO PURCHASER—SIGNATURE BY PRESIDENT.

The board of public works of city of Los Angeles, by resolution adopted prior to the enactment of St. 1909, p. 1066, had power to direct its president to make or sign a deed to the purchaser of land sold for delinquency as to assessment of the proportionate expense of a park improvement, though the charter of the city provides that all documents required to be signed and executed by the board shall be signed by the order of the board, or by the president, or by two members.

4. MUNICIPAL CORPORATIONS ⟸581—PARKS AND PLAYGROUNDS — ASSESSMENT OF EXPENSES—SALE FOR DELINQUENCY—NOTICE TO REDEEM.

Notice to redeem land from sale for delinquency as to assessment of proportionate part of expense of park improvement under St. 1909, p. 1066, given by the purchaser, referring to the improvement for which the property was sold, and stating the amount required to be paid to effect redemption, *held* valid, though stating there would be added also $3 for service of notice and making of affidavit, though the charge was unauthorized.

5. MUNICIPAL CORPORATIONS ⟸581—PARKS AND PLAYGROUNDS — ASSESSMENT OF EXPENSES—SALE FOR DELINQUENCY—AFFIDAVIT OF SERVICE OF NOTICE.

Affidavit of service of notice to redeem land from sale for delinquency as to assessment of proportionate part of expense of park improvement under St. 1909, p. 1066, *held* not faulty in failing to state the name of the person on whom service was made, setting forth that the purchaser served on the owner and occupant of the property a notice, etc., the requirement of the statute.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by William J. O'Neil against A. W. Brode. Judgment for plaintiff, and defendant appeals. Reversed.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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George H. Moore, of Los Angeles, for appellant.

Conner, Heath & Maxwell, of Los Angeles, for respondent.

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JAMES, J. Plaintiff had judgment quieting his title to a certain parcel of land located in the city of Los Angeles, from which judgment defendant has appealed. Defendant's claim of title to the land in question was based upon a deed issued by the board of public works of the city of Los Angeles, which deed had for its foundation a sale for delinquent assessment made under the authority of an act of the Legislature approved April, 1909. Stats. 1909, p. 1066. This act authorized the acquiring of property by municipalities for purposes of public parks or public playgrounds. The trial court held with the plaintiff that there were such irregularities in the procedure adopted by the assessment officers and in the notice to redeem as given by the defendant as to invalidate the deed. It is admitted by the plaintiff that all the proceedings taken up to the time when assessments became delinquent were regular.

[1] 1. The first asserted defect consists in the failure of the board of public works to make a certificate upon the assessment roll of the fact that the assessments had become delinquent. A certificate was in fact made, but was signed, "Board of Public Works, by R. I. Follmer, Assistant Clerk." Of course, it must be conceded that there was no authority in a clerk to execute the certificate on behalf of the board; so that the real question presented is as to whether the failure of the board to make such a certificate was vital to the proceedings which followed. Section 18 of the act referred to, as relating to the making of assessments, after declaring that notice shall be given by publication of the fact that the assessment has been recorded in the office of the street superintendent (the board of public works acting in the stead of such an official under the charter of the city of Los Angeles), and that the sums assessed are due and payable within 30 days from the date of the first publication of the notice, provides that "on the expiration of said period of thirty days, all assessments then unpaid shall become delinquent, and the street superintendent shall certify such fact at the foot of said assessment roll, and mark each such assessment 'Delinquent,' and add five per cent. to the amount of each delinquent assessment." The section immediately following provides that within 10 days "from the date of such delinquency" the street superintendent shall begin the publication of a list of delinquent assessments, which shall contain a description of each parcel of the property delinquent, the name of the owner as stated in the assessment roll, and the amount of the assessment, penalty, and costs due, including the cost of advertising, and shall append a notice that, unless each delinquent assessment is paid, the property upon which such assessment is a lien will be sold at public auction at a time stated in the notice. It will be noted that the act declares that the unpaid assessments, upon the expiration of 30 days from the date of publication of the notice first referred to, shall become delinquent, and that the street superintendent shall, within 10 days from the date of delinquency, begin the publication of a list of the delinquent assessments. The assessments under the express terms of the act are delinquent before the certificate is required to be made at the foot of the assessment roll. The subsequent notice to be published by which the owners are to be informed that, unless the delinquent assessments, together with penalties and costs, are paid, their property will be sold, is not required to contain the certificate so attached to the roll, and it does not appear that the making of such certificate is at all a prerequisite jurisdictional matter which must occur before the last notice to the property owner, is published. It is not contended that there was a failure of the board to mark the overdue assessments "Delinquent" as required by the act; hence upon the roll itself there would be indicated which of the assessments had not been paid and were subject to the delinquency penalty. We think it was the fact of delinquency, rather than the attaching of a certificate as to that fact, which established the jurisdiction of the board to proceed with the sale of the property. Direct authorities bearing upon this question are not many, but the reasoning of the Supreme Court in Bienfield v. Van Ness, 176 Cal. 585, at page 591, 169 Pac. 225, we think is applicable here.

[2] 2. The act further required that after making sale of property for delinquent assessment the street superintendent must execute in duplicate a certificate of sale, one copy of which is to be filed in the superintendent's office and the other delivered to the purchaser. The certificate of sale was made in duplicate, except that one copy was signed by the president of the board of public works by his own hand, and the other was signed by a fac simile stamp signature of the same officer, which was impressed upon the document by the assessment clerk. This clerk, however, testified that he stamped the signature on the duplicate at the direction of the president of the board; that the original was delivered to the purchaser, and the one signed by the rubber stamp retained in the files of the office. We think that the duplicate was sufficiently signed by the president of the board, and that for the purpose he adopted the rubber stamp as expressing his signature. That he had power to direct the attaching of the stamp by the clerk, and that

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the signature in law would become his own act, we have no doubt. Williams v. McDonald, 58 Cal. 527; Pennington v. Baehr, 48 Cal. 565; Jansen v. McCahill, 22 Cal. 563, 83 Am. Dec. 84.

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[3] 3. The deed issued to defendant as purchaser at the sale was signed by the president of the board of public works. It is claimed that its execution in that manner was unauthorized, because the charter of the city of Los Angeles provides that "all documents required to be signed or executed by the board of public works shall be signed on order of the board by the president or by two members thereof." Prior to the time when the proceedings were instituted and prior to the adoption of the act under which the same were taken, the board of public works had adopted a general resolution directing among other things, "that the president of the board of public works, or, in the absence of the president, two members thereof, be and they hereby are authorized and directed in the name of and on behalf of said board, to sign and execute all certificates of sale and all deeds of property sold for delinquent assessments for the opening and widening of streets, alleys, and other public places." It was under authority of this resolution that the president of the board made the deed which was delivered to the appellant. We think that the board had power to direct its president to make all deeds of the nature indicated in the resolution, as the act to be done was one which involved no discretion on the part of the board—was purely a ministerial function which could not be avoided. Nor do we think that the fact that this resolution was adopted before the act of the Legislature under which the proceedings were taken makes any difference. The authorization and direction given by the resolution applied to all proceedings and such acts connected therewith as might then or in the future be required to be performed as an official duty. We have given some attention to that subject in a case recently decided, the decision in which, however, is not yet final. Hayes v. Handley et al., decided March 14, 1919. [See decision of Supreme Court. 187 Pac. 952.]

[4, 5] 4. The notice to redeem as given by the appellant as purchaser sufficiently referred to the improvement for which the property was sold and stated the amount required to be paid to effect redemption. The fact that it contained the statement that there would be added also "$3 for the service of this notice and making affidavit thereto, as allowed by law," even though such charge was unauthorized, did not invalidate the notice. Simmons v. McCarthy, 118 Cal. 623, at page 627, 50 Pac. 761. The affidavit of service of the notice to redeem we do not think was faulty in failing to state the name of the person upon whom service was made. The law requires such notice to be served "upon the owner of the property and upon the occupant"; the affidavit set forth that appellant, on the 6th day of February, 1914, as purchaser, did "serve upon the owner and occupant of said property a notice," etc. It was shown by the evidence of appellant that he in fact served a notice to redeem upon the plaintiff, who was also upon the property at the time. We think the objections as raised as to the irregularities which occurred subsequent to the date of delinquency of the assessments do not show such substantial departure from the requirements of the act as to invalidate the title obtained by the appellant.

The judgment appealed from is reversed.

We concur: CONREY, P. J.; SHAW, J.

(40 Cal. App. 645)

STOCK v. STITES. (Civ. 1921.)

(District Court of Appeal, Third District, California. April 14, 1919.)

QUIETING TITLE ⟸47(2)—STREET IMPROVEMENTS—ACT TO QUIET TITLE AGAINST LIEN—FINDINGS.

In action to quiet title against lien, arising out of issuance of bond for street improvements, court's finding "that before the passing of the resolution * * * careful estimates of the cost and expenses thereof had been required to be furnished to said common council by the city engineer, * * * and special specifications therefor had been furnished by him," *held* sufficient finding of compliance with Vrooman Act, § 3, providing that city engineer shall furnish common council, if required to so do by council, "plans and specifications, and careful estimates of the cost and expenses thereof," the words "special specifications therefor" referring to and embracing "careful estimates of the cost and expenses."

Appeal from Superior Court, Santa Clara County; W. A. Beasly, Judge.

Action by Elizabeth A. Stock against O. T. Stites. Judgment for plaintiff, and defendant appeals. Reversed.

Hoefler & Morris and L. M. Hoefler, all of San Francisco (George F. Snyder, of San Francisco, of counsel), for appellant.

W. M. Beggs and R. C. McComish, both of San Jose, for respondent.

BUCK, Presiding Judge pro tem. This is an action to quiet title against a lien arising out of the issuance of a bond for street improvements on plaintiff's lot in the city of San Jose. Plaintiff had judgment, from which defendant appeals.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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Appellant's contention in this case that the street in question had not been previously accepted has been sustained by the Supreme Court in the case of Ransome-Crummey Co. v. Bennett, 171 Pac. 304.

Also respondent's contention that the bond act under which the bond in question was issued does not apply to San Jose has been recently disposed of in appellant's favor by this court in the case of Ahlman v. Barber Asphalt Paving Co. et al., 181 Pac. 238.

Further, for the purpose of sustaining the judgment, respondent in this court contends for the first time that from a certain paragraph in defendant's answer and the finding made thereon it appears "that there was no authority in law to issue" the bonds in question. Respondent quotes as follows from the answer and finding:

"That before the passing of the resolution * * * careful estimates of the costs and expenses thereof had been required by it to be furnished to said common council by the city engineer of said city."

Relying upon this, respondent claims that the bond issue is defective because it does not appear from defendant's answer and finding herein that there was a compliance with section 3 of the Vrooman Act (St. 1885, p. 148), which provides that—

"Before passing any resolution for the construction of said improvements, plans, and specifications, and careful estimates of the cost and expenses thereof, shall be furnished to said city council, if required by it, by the city engineer of said city."

Respondent filed no demurrer, either special or general, attacking the foregoing allegation, and the finding was made accordingly. But it should be noted that the allegation and finding contained also the following language immediately following the language quoted and relied upon by counsel:

"We believe that this language, in the absence of any special demurrer, possesses sufficient scope and pregnancy to supply the defect indicated by counsel. The language being as follows: '* * * And special specifications therefor had been furnished by him and had been filed in the office of the said city clerk on the 8th day of April, 1912."

The words "special specifications therefor" can be deemed to refer to and embrace the "careful estimates of the costs and expenses." And certainly a furnishing by the city engineer of specifications or a specification of "a careful estimate" is in substance and effect the furnishing by him of a statement of the estimates. The Century Dictionary gives as one of the meanings of "specification":

"An act of specifying, or making a detailed statement, or the statement so made; a definite or formal mention of price; as, a specification of one's requirements, for example, 'all who had relatives or friends in this predicament were required to furnish a specification of them.' Prescott, Ferd. & Isa., 1, 7."

And for an example of the scope of the word "therefor," see Hutchinson v. City of Olympia, 2 Wash. T. 314, 5 Pac. 606, 607; Marcus v. Rovinsky, 95 Me. 106, 49 Atl. 420, 421.

Also the form of expression used by the pleader to convey the above idea of compliance with the statute has received a certain countenance and approval in this state from its use in the well-known California textbook, Page on California Street Law, p. 891, § 7.

Also if there had been a special demurrer it does not appear that the facts were such that the answer could not have been so amended as to obviate the objections made. Ransome-Crummey Co. v. Bennett, supra.

The judgment is reversed.

We concur: HART, J.; BURNETT, J.

(40 Cal. App. 424)

DAVIES v. RAMSDELL et al. (Civ. 2724.)

(District Court of Appeal. First District, Division 2, California. March 25, 1919. Rehearing Denied April 23, 1919. Denied by Supreme Court May 22, 1919.)

1. APPEAL AND ERROR ⟸256 — QUESTIONS REVIEWABLE — ABSENCE OF EXCEPTION—MOTION TO STRIKE PLEADING—STATUTES—"ORDER DEEMED EXCEPTED TO."

Since an order refusing to strike out a pleading or a portion thereof is not an order deemed excepted to under Code Civ. Proc. § 647, an exception must be taken at the time the decision is made, under section 646.

2. MORTGAGES ⟸364—SALE BY TRUSTEE—PURCHASE BY CREDITOR—PAYMENT.

Where the consideration for the property sold by a trustee to satisfy an indebtedness secured by it was the satisfaction of the indebtedness, it was not necessary that the creditor should actually pay for the property in gold coin.

3. MORTGAGES ⟸370 — SETTING ASIDE OF TRUSTEE'S DEED—EFFECT—SECOND SALE.

Where in ejectment a deed to plaintiff creditor from the trustee under deed of trust securing the indebtedness was set aside by consent, and the property again sold to plaintiff, and a second deed from the trustee made to her, the judgment was as much a part of the chain of title as was the deed, and any buyer is presumed to know that in no action could plaintiff set up title by virtue of the first deed set aside, so that defendant cannot claim, in a second action to quiet title, that the sale by the trustee deprived defendant of the benefit of competition of buyers, because nobody other than the holder of the legal title could buy without buying a lawsuit.

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4. ESTOPPEL ⟸91(1)—CONSENT JUDGMENT.

Where in ejectment a deed to plaintiff creditor from the trustee under deed of trust securing the indebtedness was set aside by consent, and the property again sold to plaintiff, and a second deed from the trustee made to her, the consent judgment, with acceptance of benefits thereunder, estopped defendant to claim that the first trustee's deed was not a nullity, in contradiction of the consent judgment, but conveyed legal title, so that no title passed under the second deed.

5. PLEADING ⟸9—CONCLUSION OF LAW—TITLE TO LAND.

In suit to quiet title, in view of the special allegations of the complaint, plaintiff's allegations that she had not voluntarily or involuntarily parted with any interest in the land acquired by her, and that by proceedings previously mentioned she had become and was the owner of the land, etc., *held* merely a conclusion of law arising from the facts previously alleged.

6. PLEADING ⟸347—MOTION FOR JUDGMENT—INSUFFICIENT DENIAL—CONCLUSION—DENIAL AS PREVENTING JUDGMENT ON.

In suit to quiet title, where defendant's denial that plaintiff had title was in effect a conclusion of law from the facts set out by defendant in her answer, as plaintiff's allegation that she had title was in effect a conclusion of law from the facts alleged in the complaint, and was an erroneous conclusion, it cannot avail defendant to prevent judgment against her on the pleadings.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by Glennie Davies against Lucie C. Ramsdell and others. Judgment for plaintiff, and defendants appeal. Affirmed. See, also, 183 Pac. 702.

C. D. Dethlefsen, of Oakland, and Peck, Bunker & Cole, of San Francisco, for appellants.

Ralph R. Eltse and Elston, Clark & Nichols, all of Berkeley, for respondent.

LANGDON, P. J. This is an appeal from a judgment for plaintiff in a suit to quiet title to certain real property in the county of Alameda. Defendant filed a motion to strike out parts of the complaint, which motion was denied; also a demurrer to the complaint, which was overruled; defendant then answered, and judgment was given for the plaintiff upon a motion for judgment on the pleadings.

Instead of filing the ordinary short form of complaint to quiet title, plaintiff set up in the complaint in detail that the defendant executed a note and trust deed to evidence and secure a loan of $5,000, made by the plaintiff to the defendant; that the defendant had defaulted in payments and the trustee had sold the property to satisfy the debt; that the sale was postponed under an arrangement between the plaintiff and defendant, and a dispute arose as to this arrangement; that it was claimed by the defendant that proper notice of the sale had not been given. It was further alleged that the plaintiff had sued the defendant in another action in which these facts were involved, and which was terminated by a judgment entered upon a stipulation that the trustee's deed be set aside, and that immediately after the entry of such judgment, the plaintiff requested the trustee to again advertise the property for sale, because of the default of the defendant, and after notice, the property was again sold to the plaintiff, and a second deed from the trustee made to her. It was also alleged in the complaint that the defendant disputes the ownership of the plaintiff, and claims that she is entitled to hold the property and to refuse to pay the indebtedness; that these claims are made in bad faith and fraudulently, for the sole purpose of harassing and annoying the plaintiff and exacting from the plaintiff a sum of money to get rid of such claims; that the defendant is insolvent, and retains possession of the premises; that the defendant has failed to pay taxes and street assessments; that the rental value of the property is $50 per month, and that a receiver should be appointed. Plaintiff prayed for a judgment that the defendant is estopped and barred by the judgment set up in the complaint; that the plaintiff is the owner of the real property; that defendant has no interest in the same; that defendant be enjoined from asserting any claim thereto, and that the plaintiff be awarded possession; and that, pending a final judgment, a receiver should be appointed.

In the answer, the defendant claimed to be the owner of the property in possession, and entitled to the possession. Defendant alleged that she made the note and trust deed; that for the purpose of defrauding her, the plaintiff entered into a conspiracy with the Berkeley Bank of Savings & Trust Company, named as trustee in the deed of trust, in pursuance of which the trustee sold the property to the plaintiff and executed a deed therefor, but that plaintiff paid no money to the trustee in support of her bid; that the plaintiff commenced the action, and the defendant answered and cross-complained, as stated in the complaint; that the judgment was entered thereon (the judgment being set up in the answer); that the value of the property is upwards of $10,000; that the defendant is not insolvent; that the defendant had declared a homestead on the property; that in pursuance of the alleged conspiracy, the second sale by the trustee took place and the property was sold to the plaintiff for $5,749.71; that the defendant had demanded the surrender of the canceled note, which had been re-

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fused; that the trustee knew that the plaintiff was the only person who could bid at the sale, because of the then condition of the title, the trustee having been so advised by the defendant; that the second trust deed was made in pursuance of the alleged conspiracy; that the trustee had no power to sell, and denies plaintiff's allegation that she is the owner of the property.

[1] The motion to strike out was directed to all of the recitals of the complaint claimed by the defendant to be a mere deraignment of title. The refusal to grant this motion is assigned by the appellant here as error. It does not appear from the transcript that exception was taken to the ruling refusing to strike out. It will be presumed that counsel acquiesced in the ruling, and the objection cannot be urged on appeal. "The exception must be taken at the time the decision is made" (Code Civ. Proc. § 646) in all cases except those specified in § 647, Code of Civil Procedure. An order refusing to strike out a pleading, or a portion thereof, is not an order deemed excepted to under section 647, Code of Civil Procedure. Ganceart v. Henry, 98 Cal. 281, 283, 33 Pac. 92.

[2, 3] The second objection of appellant is that the court erred in overruling the defendant's demurrer to the complaint. It is urged that the complaint is defective in not showing that an amount of money equal to that bid by the creditor at the sale was actually paid to the trustee, and that the trustee had divested itself of title by the first sale, and therefore had no power to make a second sale. In regard to the first objection, it appears from the complaint that the property was sold for the purpose of satisfying the indebtedness secured by it, and that the property was "struck off and sold" to the owner and holder of said indebtedness "for said sum." The consideration for the property was the satisfaction of the indebtedness, and it was not necessary that the plaintiff should actually pay for the property in gold coin. As to the second objection, it will be necessary for us to consider for a moment the judgment in the ejectment suit between the same parties, which judgment is set out in the complaint herein. It is admitted on this appeal that in the ejectment suit the plaintiff there, who is also the plaintiff and respondent here, relied upon the first trustee's deed, and defendant denied the efficacy of that deed to pass title, whereupon the parties stipulated that the first trustee's deed was a nullity, and upon the stipulation, judgment was entered as between those parties to that effect. Upon the present suit to quiet title, the plaintiff relies upon a second trustee's deed, and the defendant says, notwithstanding the former judgment, no title passed under the second deed, because the original trustee conveyed title under the first deed, and in support of this position argues two points: (1) That despite the prior judgment that the deed was a nullity, as a matter of fact it conveyed legal title to the grantee named; and (2) the sale by the original trustee deprived the defendant of the benefit of competition of buyers, because nobody other than the holder of the legal title could buy without buying a lawsuit. This second contention may be disposed of very briefly, as it is without merit, for the reason that the judgment was as much a part of the chain of title as was the deed to the plaintiff, and any buyer would be presumed to know that in no action could the plaintiff in that case set up title of any character in herself by virtue of the first deed.

[4] A consideration of defendant's first objection convinces us that it, also, is without merit. Defendant contends that in the second suit (the present suit) she is not estopped by the consent adjudication in the first suit that the original deed was a nullity, because the original trustee was not a party to the suit and the deed was not in fact a nullity, but conveyed legal title to the plaintiff, which under the case of Seccombe v. Roe, 22 Cal. App. 139, 133 Pac. 507, placed her in a position of a substituted trustee for the original trustee.

When the stipulation was made and the judgment entered, the plaintiff, under the defendant's theory, combined in herself the two relations of trustee and beneficiary of the trust under the trust deed. She agreed with the defendant for the defendant's benefit that the trust deed was a nullity for all purposes. The original trustee accepted the result of this stipulation by executing at her request the second trust deed. Having had the benefit of one result of the stipulation in the first suit, the defendant must bear the burden of the other results of the stipulation, and in a suit between the same parties cannot be heard to say that the deed was effective for any purpose—contrary to the stipulation and judgment between the parties—and this regardless of any legal effect that the instrument may have had as between other parties. Himmelmann v. Sullivan, 40 Cal. 125. The very basis of estoppel is that regardless of the real fact, the parties have placed themselves in a position where they will not be heard to assert any state of facts, whether true or false, in contravention of their agreement. This is as true as to estoppels of record as to estoppels in pais. Love v. Waltz, 7 Cal. 250.

A very similar question arose in the case of Jackson v. Lodge, 36 Cal. 38. That was an action to recover a piece of land, title to which was, in 1860, in one Turman under a deed absolute on its face, and which Turman subsequently conveyed to Lodge, the defendant, and after which he again conveyed

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to one Jackson. Jackson was the plaintiff and Lodge the defendant. It appeared that Jackson, Turman, and another, prior to the conveyance to Lodge, had borrowed money from him. Upon default, Lodge brought suit against Jackson and his comakers, Turman and the other. Turman allowed the judgment to go by default. Jackson and the other answered, setting forth that they executed the note for accommodation, and that shortly after the execution of the note, Turman, for the purpose of paying it, had conveyed the land to Lodge. Lodge denied the deed to him was made in satisfaction of the note. It was thereafter found that the deed was absolute and not a mortgage. Jackson, having succeeded in his defense against the note on the sole ground that the deed from Turman to Lodge was a conveyance of land in satisfaction of the note, then sought in the second suit to recover the same land under his subsequent deed on the sole ground that the conveyance was not absolute in satisfaction of the note, but a mortgage to secure it. It was urged that Turman who had defaulted in the original suit, would not have been estopped by that judgment. The court said, in language directly applicable to this case:

"The question now is not what title Jackson took by the conveyance, but whether he is concluded by the prior adjudication of the same matter in which he and Lodge were parties, in which he was directly interested in determining the character of the conveyance, and in which it was found and adjudicated in his favor that his grantor had already conveyed the land to Lodge. The benefits of that adjudication he has fully enjoyed. For he has taken a title which, however good it may be, he has once litigated, and had adjudicated and thereby estopped himself from further litigation. He did it with full knowledge of the facts, and he cannot complain. At all events he is concluded."

It has been held in the case of Donner v. Palmer, 51 Cal. 629, that if the parties to an action in ejectment agree to facts which are based on the presumption that at a certain time a title was in a third person, and the court decide on the facts, neither party can afterward be heard to assert, for the purpose of avoiding the effect of the judgment, that such third person had no title. We think this case answers the contention of appellant that the trustee had no power to convey at the time it executed the second deed to the plaintiff.

[5, 6] The third objection of appellant is that the court erred in granting the motion of plaintiff for judgment on the pleadings. The appellant's position, in effect, is that even though the affirmative allegations of the answer should be held to constitute an estoppel, an issue was raised as to the ownership of the plaintiff by a denial of such ownership in the answer. As we have heretofore remarked, the complaint in this case did not contain the ordinary recitals of a complaint to quiet title. The plaintiff pleaded the specific and detailed facts of her ownership and right of possession to the real property in controversy and her special equities, growing out of the relations of the parties, the sale by the trustee, the stipulation and prior judgment between the parties, and the second sale to the plaintiff—and then she alleged that she had not voluntarily or involuntarily parted with any interest acquired by her, and that "by the proceedings hereinbefore mentioned the plaintiff has become, and by such proceedings she now is, the owner of the said real property and of the whole thereof." We think that under the special allegations of the complaint in this case this allegation of ownership is but a conclusion of law arising from the facts previously alleged, and the denial of this conclusion in the answer raised no issue. While it is true that, in general, an allegation that a party is the owner of real property is an allegation of an ultimate fact, and not of a conclusion of law, and there are a number of cases in this state so holding, yet it has been held also that the same averment may be a statement of fact or a conclusion of law, according to the context. Heeser v. Miller, 77 Cal. 192, 19 Pac. 375; Levins v. Rovegno, 71 Cal. 273, 12 Pac. 161; Turner v. White, 73 Cal. 300, 14 Pac. 794. In the present case, the complaint does not contain an allegation of unqualified ownership, but only an allegation of the consequences resulting from the transactions set forth in the complaint. The allegation is that "by the proceedings hereinbefore mentioned * * * the plaintiff is the owner, * * *" etc This is a legal conclusion, and its denial raises no issue. Furthermore, the denial by the defendant of this conclusion of law was a denial inconsistent with the facts admitted in the answer. It was in effect also a conclusion of law from the facts set out by the defendant, and it was, under our conclusions here, an erroneous conclusion therefrom. Under such circumstances it cannot avail to prevent a judgment on the pleadings. Drew v. Pedlar, 87 Cal. 444, 25 Pac. 749, 22 Am. St. Rep. 257.

In addition to the cases above referred to, the case of Hamman v. Milne (Sup.) 178 Pac. 523, recently decided by our Supreme Court, holds that where in a suit to quiet title, the defendants were precluded from attacking the validity of certain patents upon which the plaintiff relied, judgment on the pleadings is proper.

Under the pleadings in this case, we are of the opinion that judgment on the pleadings was proper.

The judgment is affirmed.

We concur: HAVEN, J.; BRITTAIN, J.

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(40 Cal. App. 451)

SUTTER BUTTE CANAL CO. v. RICHVALE LAND CO. et al. (Civ. 1933.)

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(District Court of Appeal, Third District, California. March 27, 1919.)

1. WATERS AND WATER COURSES ⟸254—IRRIGATION CONTRACT — PERFORMANCE — EVIDENCE.

In action to recover for water alleged to have been furnished by plaintiff to a land company for irrigation, *held*, under the evidence, that plaintiff did not deliver water in accordance with the contract.

2. ESTOPPEL ⟸78(1)—RESERVATION IN CONVEYANCE.

Where respondents in contract of purchase agreed with vendor that contract and deed should be subject to prior instrument reserving right of way for irrigation ditches, and thereafter vendor and plaintiff entered into contract under which plaintiff was to furnish water for the premises and vendor should supply all necessary rights of way, *held* respondents are estopped from urging that the language used in the prior instrument does not measure up to a reservation, and that they are entitled to compensation for land taken in construction of ditches.

3. VENDOR AND PURCHASER ⟸46—RESERVATION OF RIGHT OF WAY—REVERSION.

It being the intention of the vendor and purchasers in contract of sale to except from operation of deed a right of way for irrigation ditches, the court is not justified in resorting to technical refinement as to the meaning of "reversions" to defeat the manifest intent to exclude right of way.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by the Sutter Butte Canal Company against the Richvale Land Company, W. H. Bradley, and W. W. Ralls, in which the two defendants last named filed cross-complaints. At the beginning of the trial, the company withdrew. Judgment for cross-complainants, and plaintiff appeals. Reversed.

Henry Ingram, of Gridley, and W. H. Carlin, of Marysville, for appellant.

Samuel J. Nunn, of Chico, for respondents.

J. Oscar Goldstein, of Chico, for defendant.

BURNETT, J. The action was brought to recover $129 for water alleged to have been furnished to the Richvale Land Company under a certain contract, which is set out in the complaint and which makes the charge a lien upon the land to be irrigated. The real property involved consists of lot No. 35, and the east half of lot No. 36 of Richvale Colony, No. 1, in Butte county, the legal title to which was and is in said land company, although prior to the execution of said contract for water Bradley and Ralls had entered into an agreement with the Richvale Land Company for the purchase of the land, and they were actually in the possession and use of it during the year 1914, the period with which we are herein concerned. At the beginning of the trial, the Richvale Land Company withdrew, and the trial was had on the complaint and answer and the cross-complaint of Bradley and Ralls and answer thereto by plaintiff. The cross-complaint denied that plaintiff had furnished the water as agreed, and cross-complainants set up a claim for damages to their crop of rice because of the failure to deliver the water in time, also a claim for compensation for 4.18 acres of land alleged to have been taken by plaintiff in constructing ditches and roads. The court found that plaintiff had failed to deliver the water according to its contract, thereby damaging cross-complainants to the extent of $277.90 and had appropriated 3.13 acres of the land for which Bradley and Ralls were allowed the sum of $250.40.

It is conceded that the vital questions presented on this appeal are two, as follows: "Did plaintiff deliver the water in the year 1914 in accordance with its contract?" and "Were defendants Bradley and Ralls entitled to judgment for the 3.13 acres of land in question?"

[1] As to the first of these, we think plaintiff is in error in the claim that there is no substantial evidence in support of the adverse finding of the court. It appears that plaintiff was to furnish 95 second feet of water for the irrigation of some 5,066 acres of land altogether, including the lots in controversy, and Mr. Charles T. Tulloch, superintendent and manager of plaintiff, testified positively that the requisite amount was furnished.

It also appears without question that the amount agreed upon was amply sufficient for the purposes of all the landowners. It may be stated further that no witness for respondents attempted to specify the number of second feet that was actually furnished, but several of them related facts from which the conclusion would follow that there was a material omission to comply with the requirement of the contract. It seems unnecessary to recite the testimony or to comment upon it further than to say that the declaration of the witnesses that there was a "shortage" in the supply could be understood to mean, under the circumstances detailed by the witnesses, only that the amount furnished was less than what was promised. The term itself, in a sense, represented the opinion of the witness, but no objection was made on that ground, and we cannot say that the lower court attributed to it a greater significance than it deserved. The other question we regard as of more serious moment.

[2] There is no controversy as to the extent of the land that is embraced in the

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ditches and roads used by plaintiff for its irrigating system or as to its value, but it is claimed by appellant that this is not the proper subject of counterclaim or cross-complaint and, furthermore, that appellant obtained a right of way for these roads and ditches by virtue of certain instruments set out in the record.

This latter contention will first receive our attention. The original instrument was executed by the Richvale Land Company on September 20, 1909, and it was recorded in the county recorder's office in Book H of Miscellaneous Records. Said document was termed: "Stipulation, Richvale Colony No. 1." Among other things it recited:

"The said Richvale Land Company intends selling the said colony in tracts to various purchasers. Now, therefore, it is stipulated that in all such sales the said Richvale Land Company reserves to itself and assigns the right of way over the following property to be used as roads by the general public and the right to enter upon, open, and grade said roads. The property so reserved is a part of said Richvale Colony No. 1, and is particularly described as follows, to wit," said description including the lots in controversy.

Said "stipulation" proceeds:

"And, it is still further stipulated that in all such sales Richvale Land Company reserves to its assigns and successors a right of way in, to, and across said Colony No. 1 and all portions thereof for the purpose of constructing and maintaining and operating (free of cost) irrigation and drainage ditches and to flow water therein, however, not unnecessarily to the detriment of purchasers of property."

We may state that there is no controversy as to the road, and it will therefore be eliminated from further consideration. Nor is there any claim that any of the ditches which were constructed was or is "unnecessarily detrimental" to any one. Then comes the subsequent agreement of sale with respondents of November 8, 1909, covering said lot No. 35 and the east one-half of lot No. 36 and containing the covenant:

"It is agreed by and between the parties hereto that on the performance of all the stipulations, covenants and provisions herein on the part of the purchaser the company will execute and deliver to the purchaser, his heirs or assigns, a good and sufficient deed conveying title to the land contracted to be conveyed upon the conditions, however, that the contract and deed made hereunder shall be subject to the terms, provisions, reservations, stipulations, etc., set out and contained or referred to in a certain instrument, dated the 20th day of September, 1909, and recorded the same day in the office of the county recorder of said Butte county in Book H of Miscellaneous Records, at pages 409 and 410. The purchaser hereby assents to the said terms, provisions, reservations, stipulations, etc., in said instrument contained."

Then follows the agreement of June 30, 1911, between appellant and the Richvale Land Company, providing that appellant will furnish water for these very premises, and binding the party of the first part (appellant) to construct and complete for the second party (Richvale Land Company) "on or before the 30th day of December, 1911, all lateral ditches, weirs, gates and structures necessary in its judgment for the delivery of water to said land." The agreement further provides that the Richvale Land Company would "supply all necessary rights of way therefor and install service gates" and maintain the ditches, weirs, etc., and would pay the party of the first part the sum of $13.50 per acre for the construction of said canals and ditches. In accordance with the terms of this contract, said structures were completed by appellant, there being apparently no controversy as to their proper location. The case thus stands for appellant apparently as follows: The undisputed owner of the land, by a solemn instrument of record, declares the purpose and intention to reserve from the operation of any future sale a right of way for canals and ditches necessary for irrigation. Thereafter an agreement of sale for a portion of said land is executed, in which the vendees recognize and consent to said "reservation." This transaction is followed by an agreement between the said owner and appellant, whereby the former grants to the latter a right of way for said purpose, which is accepted and its location agreed upon and the structures completed. Assuming that each step as thus detailed is legally what it purports to be, of course, no one would contend that said vendees could successfully urge a claim against appellant for compensation for the land used for said right of way. But the point is made that the attempted "reservation" for the right of way for said ditches, in said instrument of September 20, 1909, is entirely void, for the reason that it is in favor of a third party, and, also, because said third party is not designated and identified. The "reservation," it is to be remembered, does not read "Richvale Land Company reserves to *itself*, its assigns and successors," as is usual in such cases, but the provision is "Richvale Land Company reserves to its assigns and successors," etc.

In Eldridge v. See Yup, 17 Cal. 52, it was held that such a covenant or reservation would be void, the court saying:

"A person who is not a party to a deed cannot take anything by it unless it be by way of remainder. The grantor cannot covenant with a stranger to the deed."

However, it is sometimes the case that what is called a "reservation" is treated as an "exception" and effect given to it, although, under the established rules of interpretation, it is inoperative as a "reservation." Martin v. Cook, 102 Mich. 267, 60 N. W. 679; Burchard v. Walther, 58 Neb. 539, 78 N. W. 1061; Bridger v. Pierson, 45 N. Y. 601; Red-

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ding v. Vogt, 140 N. C. 562, 53 S. E. 337, 6 Ann. Cas. 312. This is in line with the recognized policy of the law to give effect, as far as possible, to the intention and purpose of the parties to an instrument.

[3] But, it is apparent herein that the said provision in the instrument of September 20, 1909, strictly speaking, constitutes neither a "reservation" nor an "exception." This follows from the fact that the instrument was not a conveyance, nor an agreement for the conveyance, of any property, nor did it purport to be such an instrument. However, it was written evidence of the purpose of the owner to withhold from the operation of the deed to any future purchaser of said land or any portion thereof a right of way for said ditches and canals. Whether the recording of said instrument would constitute notice of such intent we need not consider, since there is no dispute herein as to *actual* knowledge of that instrument. Moreover, as we have seen, respondents expressly agreed to be bound by the terms of that instrument. Their title rests upon said executory agreement of November 8, 1909. We must scan its terms to ascertain the intent of the parties. The vendor therein agreed to convey to the vendees a good and sufficient deed, subject, however, "to the terms, provisions, reservations and stipulations," etc., of said instrument of September 20, 1909. In other words, reading the stipulation of the earlier instrument as thus incorporated in said agreement of sale, we find that the Richvale Land Company, upon the consideration of certain payments by respondents, "agrees to sell and convey unto the purchaser and the purchaser agrees to buy * * * the following real estate * * * subject to the following stipulation that in such sale Richvale Land Company reserves to its assigns and successors a right of way in, to, and across said Colony No. 1 and all portions thereof," etc. No one could doubt from this language that it was the intention of the parties to except from the operation of the deed a right of way for said purpose, and a court is not justified in resorting to technical refinement as to the meaning of "reversions" to defeat the manifest intent of the parties to exclude this right of way.

Again, it is too late for respondents to urge successfully that the language used does not measure up to the definition of a reservation. They deliberately agreed that their deed should be subject to such reservation, and, acting upon that agreement, appellant and the Richvale Land Company entered into their contract under which the improvements were made without any objection, we may assume, from respondents, and they should now be estopped from claiming that said stipulation and reservation is void. That an attempted reservation or exception in a conveyance in favor of a stranger, although not conferring title, may sometimes operate as an admission in his favor, or as an estoppel against the grantor, is supported by the authorities. Butler v. Gosling, 130 Cal. 422, 62 Pac. 596. The same principle would apply to the vendee in a case like this, where he has agreed to the reservation.

As indicated above, there is no question before us as to the authority of the Richvale Land Company to locate the right of way. Where a dispute does arise in such cases, however, the rule to be applied is thoroughly considered in Brown v. Ratliff, 21 Cal. App. 282, 131 Pac. 769, and Ballard v. Titus, 157 Cal. 673, 110 Pac. 118. If we are right in the foregoing, the other point suggested by appellant becomes unimportant, and we need not consider it.

We think the trial judge was in error in allowing cross-complainants compensation for the land appropriated for said right of way, and for that reason the judgment is reversed.

We concur: CHIPMAN, P. J.; HART, J.

(40 Cal. App. 492)

HOME TELEPHONE & TELEGRAPH CO. v. CITY OF LOS ANGELES et al.

(Civ. 1856.)

(District Court of Appeal, Second District, Division 1, California. March 28, 1919.)

1. LICENSES ⟸34 — RECOVERY—VOLUNTARY PAYMENT.

Taxpayer may recover license tax claimed to have been involuntarily paid, though he was not threatened with actual imprisonment or threatened with the penalty of having his right to do business taken away.

2. LICENSES ⟸34 — RECOVERY—VOLUNTARY PAYMENT.

That license tax collector has recourse to civil action to collect tax does not divest payment of license under protest, of its voluntary character; for protestant can contest validity of tax without suffering risk of incurring excessive penalties or arrest.

3. LICENSES ⟸34—ACTION TO RECOVER LICENSE PAID—SUFFICIENCY OF EVIDENCE—VOLUNTARY PAYMENT.

In action against city to recover license tax paid under ordinance void under Const. art. 13, § 14, where ordinance imposed penalty of fine or imprisonment for failure to pay license, evidence *held* to sustain finding that plaintiff had been coerced into paying the license tax.

4. LICENSES ⟸34 — RECOVERY — WRITTEN PROTEST—SUFFICIENCY.

Where payer of license tax had discussed ordinance imposing tax with collector, claiming it to be unconstitutional, failure of written protest to payment of license to state grounds for invalidity of ordinance was not fatal to recovery of the license paid.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by the Home Telephone & Telegraph Company against the City of Los Angeles and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Albert Lee Stephens, City Atty., and Charles S. Burnell, Asst. City Atty., both of Los Angeles, for appellants.

John E. Biby and Trippet, Chapman & Biby, all of Los Angeles, for respondent.

JAMES, J. This appeal is taken by the defendant city of Los Angeles and certain of its officers from a judgment entered in favor of the plaintiff. The judgment was for the return of certain fees paid as a license for the conducting of a telephone business within the city of Los Angeles. It was admitted that under an amendment to the Constitution of the state, adopted in November, 1910 (section 14, art. 13), the municipality had no power to exact a license tax from the plaintiff, and that its ordinance attempting so to do was void. The ordinance under which the claim for license tax was made against the plaintiff provided that telephone companies should pay a license tax monthly; that any tax remaining unpaid for a period of 10 days should have added a penalty of 10 per cent.; that "any person, firm or corporation" violating any of the provisions of the ordinance should be deemed guilty of a misdemeanor, and upon conviction thereof shall be punishable by a fine of not less than $5 nor more than $200, or by imprisonment in the city jail for a period of not more than 100 days, or by both such fine and imprisonment; and that "each such person, firm or corporation shall be deemed guilty of a separate offense for every day during any portion of which any violation of any provision of this ordinance is committed, continued or permitted. * * *" There was testimony heard by the trial judge on behalf of the plaintiff showing that the secretary of the latter had had interviews with the tax and license collector, whose duty it was to enforce the terms of the license ordinance, and that it was orally called to the attention of the collector during these conversations that the Constitution had been amended, and the officer of the plaintiff inquired if the city attorney had not advised them regarding the noncollection of the license tax, and that the tax collector had answered, "No," that "they were going right ahead with the operation of it, and that we would have to pay up or they would have to enforce the penalties." Further conversation was had to the same effect, the tax collector's office insisting upon payment of the tax; whereupon the tax was paid by the plaintiff, the payments being accompanied by a written notice of protest. The secretary of the plaintiff corporation testified that he feared proceedings of arrest if payment was not made. He testified further:

"My recollection was that in the interview that we had in the tax and license collector's office the general statement was made, 'You know the provisions of the ordinance, and if you fail to comply with them you or somebody will have to be arrested under the provisions of the ordinance.' And practically every time we paid afterwards there was an argument because we did not think it was a proper charge to be made, and thought it was illegally made. While I can't point to specific instances, I might say that we practically had an argument every time the payment was made right from January on, and even back of that."

Appellants raise several points in support of their claim that the judgment entered cannot be sustained. The principal of these contentions is that the payments must be considered as voluntary, as no acts were committed on behalf of the city such as would amount to legal coercion. Under the provisions of the ordinance which have already been noted, there was a delinquency penalty to be imposed where the licensee failed to pay his license tax within 10 days from the due date. A further provision existed providing for the arrest of those who violated any of the provisions of the ordinance, with a possible fine and imprisonment, the maximum being $200 fine or 100 days in jail, respectively, and that each day during which such violation continued would constitute a separate offense. Appellant's counsel cite Trower v. City and County of San Francisco, 152 Cal. 479, 92 Pac. 1025, 15 L. R. A. (N. S.) 183, where the Supreme Court, in defining what constitutes legal duress which will give involuntary character to payments made under pretended force of law, declares:

"The distinction to be observed is between a payment made for the purpose of protecting or securing the present enjoyment of a right to which the person is immediately entitled, and a payment made to prevent a threatened disturbance of such right where there is no authority to interfere with its enjoyment until the right of the threatening party shall be established in a judicial proceeding in which the rights of the respective parties may be presented and determined. In the latter case a payment to avoid such threatened contest is regarded as voluntary, while in the former case it is compulsory."

Also Justice v. Robinson, 142 Cal. 199, 75 Pac. 776, the court there stating:

"The general rule in reference to the payment of taxes under protest, where not controlled by some statutory provision, is, that, in the absence of acts amounting to duress or coercion, the payment is deemed to be voluntary, and a mere protest made at the time of such payment does not divest it of its voluntary character. Where there is no legal compulsion, the legal effect of the payment is not impaired by protest."

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[1] A number of other cases are cited, among them some from other jurisdictions, which are all declarative of the generally accepted rule that there must be a sufficient showing of legal coercion before a person may pay a public tax and not have such payment considered voluntary. We think, however, that it is not essential to a recovery of such a tax that the person be threatened with actual imprisonment or threatened with the penalty of having his right to do business taken away. There may be penalties which fall perhaps short of this mark to avoid which the person paying may protect himself by protest. As was said in Atchison, T. & S. F. Ry. Co. v. O'Connor, 223 U. S. 280, 32 Sup. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913C, 1050, cited in Hartford Fire Insurance Co. v. Jordan, 168 Cal. 270, 142 Pac. 839:

"Courts sometimes, perhaps, have been a little too slow to recognize the implied duress under which payment is made. But even if the state is driven to an action, if at the same time the citizen is put at a serious disadvantage in the assertion of his legal, in this case of his constitutional, rights, by defense in the suit, justice may require that he should be at liberty to avoid those disadvantages by paying promptly and bringing suit on his side. He is entitled to assert his supposed right on reasonably equal terms."

That case, to be sure, had to do with the payment of corporation franchise tax where the failure to pay the tax, if the same were determined legal, would have resulted in the corporation being deprived of its right to do business in the particular state.

[2] If under the ordinance here considered the tax collector had only recourse to a civil action to collect the license tax, then there could be no payment under protest sufficient to divest the payment of its voluntary character; for the protestant could then contest the validity of the tax without suffering the risk of incurring excessive penalties or arrest. But in the enforcement of the provisions of the ordinance there was available to the tax collector the machinery of the municipal criminal courts, and with the provision of the ordinance, as stated, that a violation continued should be deemed a new offense on each succeeding day, the plaintiff might have incurred liability for a large amount of money by way of criminal fines before the legality of the tax could have been finally determined. This is assuming that the arrest would be that of the corporation under the provisions of the Penal Code, rather than the arrest of officials of the corporation individually. In addition to this, there would seem to be little doubt but that there might be such action on the part of the officials of the corporation in violation of the terms of the ordinance as might subject them to individual arrest and thus create an additional reason why the payments made to avoid such consequences should not be considered as voluntary. The secretary of the corporation, according to his testimony, had it in mind that arrests might follow, as the tax-collecting authority had informed him that the "penalties" of the ordinance would be enforced. The state of mind of the official was of more important legal consideration than any undisclosed intent of the officers whose duty it was to collect the city's license taxes. "And a threat of arrest for which there is no ground does not constitute a duress, as the person threatened could not be put in fear thereby. But these rules fail to take into consideration that the question at issue in such cases is whether the mind of the person was overcome by impending criminal proceedings to such an extent as to make his act of payment involuntary. No hard and fast rule therefore should be laid down, but each case must be decided on its own peculiar facts." 21 Ruling Case Law, § 178, p. 154.

[3] Our conclusion on the proposition stated is that there was sufficient evidence to sustain the finding of the trial judge that the plaintiff was coerced into making the payments for which recovery was sought.

[4] It is next contended that the written protest filed at the time of the making of the license tax payments was not sufficient, for the reason that particular grounds were not sufficiently stated. The notice of protest did advise the license collector that the licensee considered the ordinance void, and it was further stated in the notice that the ordinance was in violation of the Constitution of the United States and of the Fourteenth Amendment thereof. We have referred hereinbefore to the testimony of the secretary of the corporation wherein it was shown that he had discussed with the license collector the effect of the amendment made to the California Constitution in 1910, and had claimed that under that amendment the plaintiff company should not be required to pay the tax; that, notwithstanding this notification, the collecting officer insisted that he would enforce the penalties of the ordinance. It has recently been held by our Supreme Court that such a protest may be made orally, and that particular grounds thereof need not be expressly stated, where the collecting official is already informed of the reasons upon which the paying party objects to the tax. Spencer et al. v. City of Los Angeles et al. (Sup.) 179 Pac. 163.

We have examined the specifications pointing to alleged errors of the court in receiving certain testimony, and are satisfied that upon these assignments no such error is shown as to warrant a reversal of the judgment.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

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(40 Cal. App. 484)

JOHNSON v. WUNNER. (Civ. 2669.)

(District Court of Appeal, First District, Division 1, California. March 28, 1919.)

1. SPECIFIC PERFORMANCE ⟸82(3) — CONTRACTS ENFORCEABLE—MUTUALITY.

Oral contract, under which plaintiff landlord agreed to erect building on adjoining property if defendant tenant would then lease entire premises, cannot be specifically enforced by plaintiff after performing his part and tendering lease to defendant for execution, since agreement lacked mutuality.

2. PLEADING ⟸8(20)—CONCLUSIONS OF LAW —INJURY OR DAMAGE.

A complaint seeking specific performance of a lease, which alleges that, unless said lease be executed plaintiff will suffer great and irreparable injury and loss, states a mere conclusion of law, and does not authorize granting damages, instead of specific performance.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action for specific performance by Mina H. Johnson against C. Wunner. Judgment for defendant, and plaintiff appeals. Affirmed.

Walter H. Robinson, of San Francisco, for appellant.

Costello & Costello, of San Francisco (E. R. Hoerchner, of San Francisco, for counsel), for respondent.

KERRIGAN, J. This is an action to compel specific performance of an oral contract, which plaintiff claimed was fully performed on her part. At the time the contract was entered into the parties occupied the relation of landlord and tenant. The defendant, who is the tenant, conducted a grocery store in premises owned by plaintiff, and he was desirous of increasing the dimensions of his floor space. Accordingly the parties entered into an oral agreement whereby plaintiff agreed to purchase a vacant lot adjoining the leased premises and erect thereon a building as an addition to the store held by respondent as lessee. The purchase of the lot was made by plaintiff for the sum of $4.700, and plans for the erection of the building were prepared. In these plans it was provided that the east wall of the leased building should be removed, so that the addition erected should be connected with and open into the store, and thus become an integral part of it. It was further orally agreed by the parties that, before the erection of the building reached the stage where the removal of said wall was necessary, a new lease of the entire premises would be executed. Thereupon plaintiff erected at a cost of some $3,000 the contemplated addition, which, having reached the point when it became necessary to remove the wall, plaintiff signed and tendered the contemplated lease, which defendant refused to execute. Construction of the addition was thereupon discontinued by plaintiff, owing to defendant's refusal to comply with his agreement, and this action was brought to compel respondent to specifically perform his contract. Judgment went for defendant, and plaintiff appeals, taking his appeal on the judgment roll alone.

[1] In support of the judgment respondent argues that, as the agreement was one for the erection and completion of a building, it is not the subject of specific performance for the reason that it lacked mutuality, and it was upon this ground that the trial court rendered judgment in favor of defendant. It is conceded that contracts of this character cannot generally be specifically enforced, the reason being that the obligor cannot be forced to perform, and that therefore the obligee should not be compelled so to do. But it is insisted that in the instant case the contract was fully performed, for the reason that, the parties having agreed to execute the lease when the work had progressed to the point when the intersecting wall was to be removed, when that time arrived nothing further remained executory. But a contract of this character at no period of its existence is specifically enforceable. Neither party to an obligation can be compelled specifically to perform it, unless the other party has performed, or is liable to specifically perform, everything that he has thereby undertaken (Los Angeles v. Occidental Oil Co., 144 Cal. 528, 532, 78 Pac. 25; Tuohy v. Moore, 133 Cal. 516, 65 Pac. 1107); and under this rule the contract cannot be divided into independent covenants (Id.). This being so, specific performance was rightfully refused.

[2] Plaintiff further claims that, if the relief sought is not obtainable, she is still entitled to some relief. The only other possible relief would be damages for breach of the agreement. Plaintiff's whole theory of her cause of action, however, was for specific performance. Her complaint is entitled "Complaint in Specific Performance of Lease," and the prayer is confined to that form of relief. No issue of damages was tendered. The only allegation of damages in plaintiff's complaint is found in the recital "that unless said lease be executed plaintiff will suffer great and irreparable injury and loss." Such an allegation is a mere conclusion of law. Mechanics' Foundry v. Ryall, 75 Cal. 602, 17 Pac. 703; Bishop v. Owens, 5 Cal. App. 87, 89 Pac. 844. Before a court of equity can intervene, it is necessary to al-

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lege the facts entitling plaintiff to the relief sought. Here no such facts are set forth.

For the reasons given the judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

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(40 Cal. App. 458)

DAVIS v. BLASINGAME. (Civ. 2642.)

(District Court of Appeal, First District, Division 1, California. March 27, 1919. Rehearing Denied by Supreme Court May 26, 1919.)

1. ANIMALS ⟸91 — TRESPASS — REPEAL OF STATUTE.

St. 1907, p. 999, concerning trespassing animals upon private lands and the recovery of damages resulting therefrom, did not operate to repeal St. 1873–74, p. 50, and recovery can be had for the depasturing of unfenced land in Fresno county by trespassing animals.

2. ANIMALS ⟸100(2¼)—TRESPASS—ACTION FOR DAMAGES—LIMITATIONS.

Under St. 1873–74, p. 50, an action for recovery of damages for trespass of stock upon unfenced lands in Fresno county is not limited as to its time of commencement to 60 days after the time of trespass.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by W. T. Davis against A. A. Blasingame. Judgment for plaintiff, and defendant appeals. Affirmed.

D. T. Winne and C. K. Bonestell, both of Fresno, for appellant.

Geo. Cosgrave, of Fresno, for respondent.

RICHARDS, J. This is an appeal from a judgment in plaintiff's favor in an action for damages for the alleged trespass of the defendant's cattle upon the lands of the plaintiff and another, and the consequent depasturing of the same. The complaint contains two causes of action, one relating to the depasturing of the plaintiff's own lands, and one relating to the depasturing of the lands of another who assigned his cause of action to the plaintiff. The defense consists in a denial of the allegations of both counts of the complaint. The evidence educed upon the trial showed that the parties to the action were neighbors living in the eastern foothills of Fresno county, and owning tracts of land of considerable acreage in propinquity to each other. With the exception of about 300 acres, the lands of the plaintiff and his assignor were uninclosed, and the defendant pastured his stock repeatedly upon these uninclosed lands after warning to desist from so doing. The trial court rendered judgment in the plaintiff's favor for the damages in the sum of $1,003.35, with costs of suit.

The only two points urged by the appellant upon this appeal are: First, that no recovery can be had for the depasturing of land in Fresno county unless the land is fenced; and, second, that even if such an action is maintainable, it must be commenced within 60 days after the commission of the trespass. The determination of these points requires an inquiry into the state of the statutory law, and the decisions construing the same, in relation to fences upon pastoral lands in the county of Fresno. This inquiry may well begin with the case of Blevins v. Mullally, 22 Cal. App. 519, 135 Pac. 307, in which Mr. Justice Hart, after a very thorough review of the statutes and cases bearing upon the subject, holds that the rule of the common law which required every man to keep his beasts within his own close was abrogated by the Legislature of this state in 1850 (Stats. 1850, pp. 131, 214), and was for a time thereafter not in force in any of the counties of the state of California, but that, commencing in the year 1863, the rule of the common law began to be restored to operation by special acts in that and later years, applying to an increasing number of the counties of the state as conditions changed therein from a pastoral to an agricultural or horticultural state. The first county to be thus affected was the county of Santa Clara. St. 1863, p. 581, as amended by St. 1871–72, p. 580. In the case of Hahn v. Garratt, 69 Cal. 146, 10 Pac. 329, these acts were held to intend that an owner of land in the county of Santa Clara was no longer required to fence it against cattle belonging to another person, but could maintain an action for damages against the owner of cattle permitting them to trespass upon such uninclosed land. In the year 1874 the Legislature passed an act (St. 1873–74, p. 50) entitled "An act to protect agriculture and to prevent the trespassing of animals upon private property in the counties of Fresno, Tulare, Kern, Ventura, Santa Barbara, San Luis Obispo and Monterey." The act provides that the owner or occupant of lands in the designated counties, whether such lands be inclosed or not, should have the right to take up and impound stock found upon such lands, and proceed to sell such stock for the damages occasioned by their trespass. Section 8 of the act gave to such owner or occupant of such lands the right to maintain an action for the trespass in any court of competent jurisdiction without exercising his right of impounding such stock, provided such action was commenced within 60 days. In the case of Triscony v. Brandenstein, 66 Cal. 514, 6 Pac. 384, the Supreme Court had occasion to construe and apply this statute to a case of trespassing cattle upon unfenced lands in the county of Monterey, and the court there held that a cause of action existed for such trespass in that county in ad-

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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dition to the remedy of the proceeding in rem provided for in that statute, and that the plaintiff in that action was not restricted to the period of 60 days within which to bring his action.

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In the case of Heilbron v. Heinlen, 70 Cal. 482, 12 Pac. 385, which was an action for the trespassing of stock upon unfenced land in Fresno county, the Supreme Court sustained such action upon the authority of Triscony v. Brandenstein, supra, holding that the plaintiff was not confined in his proofs to the trespasses committed by the defendant's cattle within 60 days prior to the commencement of his action. A similar ruling was made in the case of Zumwalt v. Dickey, 92 Cal. 156, 28 Pac. 212, an action arising in the county of Tulare.

[1, 2] In the year 1878 the Legislature passed an act entitled "An act concerning the trespassing of animals upon private lands in certain counties of the State of California." By the terms of this act it was declared to be unlawful for any animals, the property of another person, to enter upon any land owned or lawfully in the possession of another than the owner of such animal. The act as at first passed was made applicable to the county of Colusa and certain other counties of the state, not including Fresno, Monterey, or Tulare, and was later in the same session amended so as to apply to the county of Los Angeles. Stats. 1877–78, pp. 176, 878. It was this act which was under review in the case of Blevins v. Mullally, supra, and which was further considered in its application to the county of Los Angeles in the case of Hicks v. Butterworth, 30 Cal. App. 564, 159 Pac. 224. In each of these cases last above cited an important question applicable to the case at bar arose. This was the question as to the effect upon the statute of 1877–78, and necessarily also upon the statute of 1873–74, of the act of the Legislature passed in 1907, entitled "An act concerning trespassing animals upon private lands and the recovery of damages resulting therefrom." St. 1907, p. 999. By the terms of this latter act it was made unlawful for any person owning or in possession of an animal to suffer or permit such animal to break in or enter upon any land of another person where such land is planted to growing crops, vines, fruit trees, or vegetables, "and is at the time entirely inclosed by a substantial fence or other inclosure." The act provides that "all acts and parts of acts in conflict with this act are hereby repealed." The question discussed by the District Courts of the Second and Third Districts in the two cases last above cited was as to the effect of this act upon the act of 1877–78, and inferentially also upon the act of 1873–74. In both of these cases the conclusion was arrived at that the act of 1907 did not operate to repeal the act of 1877–78, or any other of the special acts declaring the common-law rule as to trespassing stock upon uninclosed lands to be in force in the counties designated therein, but only to limit the application of such rule to lands other than those specially required to be inclosed under the terms of the latter enactment. In each of the foregoing cases a petition for rehearing before the Supreme Court was denied.

The law as thus stabilized by the line of authorities above set forth would seem to be that the rule of the common law regarding the keeping of stock within its owner's close is in full force and effect in its application to pastoral lands in the county of Fresno, and that an action for the recovery of damages for the trespass of stock upon such uninclosed lands is not limited as to its time of commencement to 60 days after the act of trespass complained of. It follows that neither of the two points urged by the appellant herein has sufficient merit to justify a reversal of the case. It may be stated that nothing which was said in the case of Montezuma Improvement Co. v. Simmerly,[1] decided by the Second division of this court, is to be taken as contrary to the views herein expressed, that case having application to the county of Mendocino, in which the common-law rule as to trespass has never been in force.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

(40 Cal. App. 532)

GIANELLI v. BRISCOE. (Civ. 1928.)

(District Court of Appeal, Third District, California. April 2, 1919.)

APPEAL AND ERROR ⊜80(4)—JUDGMENTS APPEALABLE—"FINAL JUDGMENT."

In a suit for the dissolution of a partnership, appointment of a receiver, an accounting, sale of the property, and for a deficiency decree, a decree failing to determine the amount of proceeds and profits due plaintiff, being interlocutory merely, is not appealable; a judgment being final only when it terminates the litigation on the merits and leaves nothing to be done but enforce by execution what has been determined.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Suit by Andrew Gianelli against Michael Briscoe. On the death of plaintiff, Bridget Gianelli was substituted as the administratrix of his estate, and from a decree in her favor, defendant appeals. Appeal dismissed.

⊜ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] Opinion of Court of Appeals superseded by that of Supreme Court, 189 Pac. 100.

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A. H. Ashley, of Stockton, for appellant.
A. H. Carpenter, of Stockton, for respondent.

HART, J. The pleadings disclose that there is a dispute between the parties as to whether or not, for about 14 years, there was a partnership existing in the saloon business in the city of Stockton between Andrew Gianelli, plaintiff's intestate, who commenced the action, and the defendant.

The complaint was filed on October 16, 1916. It was alleged that a partnership between the parties was formed in April, 1902; that it existed until July 2, 1916, at which time defendant took exclusive possession of the partnership property and has prevented plaintiff from having access thereto, and retains the income derived from said business. The prayer of the complaint was that said partnership be dissolved; that a receiver be appointed to take possession of the partnership property; that defendant be ordered to account to plaintiff for all moneys and property received by him, in running said partnership since the 2d day of October, 1912; that plaintiff's share thereof be paid to him by the receiver out of the proceeds realized from the sale of the property; and for judgment against defendant for any deficiency.

On April 16, 1917, the trial court caused to be filed an "interlocutory decree," the material portions of which are as follows:

"This cause came regularly on for trial upon certain preliminary questions as to whether a partnership existed between plaintiff and defendant, and whether plaintiff was entitled to a dissolution of the same, and to an accounting thereof, on the 5th day of December, 1915, before the court sitting without a jury." It was then stated that evidence was introduced and the matter was submitted to the court for decision, "and all and singular the law and the premises being understood and considered, the court makes and renders its interlocutory decree herein as follows: * * *

"That from the date of the aforesaid agreement of partnership up to the 2d day of July, 1916, both plaintiff and defendant observed and carried out the terms and conditions of said agreement, when on the date last named the defendant, in violation of the terms and conditions of said agreement of partnership, took exclusive and adverse possession of said entire saloon business and all the property thereof, including all the proceeds and profits thereof since the 2d day of July, 1916, and converted the same to his own use, and thereby deprived plaintiff of his right thereto.

"The plaintiff is entitled to a decree dissolving the aforesaid partnership and to an accounting from defendant of all the profits thereof since the 2d day of July, 1916, and to have all the property of said partnership, including the good will thereof, sold, and to have all the proceeds of such sale and the net amount of all moneys received by said defendant from said partnership business since the said 2d day of July, 1916, as may appear by said accounting, equally divided between him and said defendant, and the defendant is hereby directed to render such account within 30 days from date hereof.

"It is further ordered that upon the rendition of said account and a satisfactory settlement and division of the proceeds thereof, and after a legal and proper sale of all the said partnership property and a satisfactory division of the proceeds thereof, as herein provided, the same be reported to this court for approval and confirmation."

Other than what might be regarded as such in the decree, the court made no findings.

Defendant appeals from the judgment under the alternative method.

The first proposition submitted for consideration is that the decree is merely interlocutory, and that therefore no appeal lies therefrom. Upon that ground the respondent insists that the appeal should be dismissed. On the other hand, the appellant contends that since, as is the claim, all the vital issues in controversy are adjudicated by the decree, the same is final.

It is not claimed that, if the decree from which the appeal is taken is interlocutory, it is one from which an appeal will lie. Nor in that case could any such claim be sustained, inasmuch as it is not among those interlocutory orders or decrees from which an appeal is authorized to be taken by section 963 of the Code of Civil Procedure. Illinois Trust & Sav. Bank v. Alvord, 99 Cal. 407, 410, 33 Pac. 1132. And we think the decree appealed from is merely interlocutory, and not a final judgment. It will be observed that it leaves for future determination and adjudication the question as to the proceeds and profits accruing and derived from the business of the partnership from the 2d day of July, 1916, which, it is stated in the decree, were received by the defendant and converted by him to his own exclusive use. It is therefore still necessary, before a final judgment can be rendered, that the amount of such proceeds and profits shall be ascertained by the accounting which was ordered and the same determined and adjudicated by the court upon a consideration of the report of the account of said proceeds to be rendered and returned by the defendant within 30 days from the date of the rendition and entry of the decree.

It is true that the language of the last paragraph of the decree contemplates that the parties themselves may agree to a settlement, in which case all that would remain to be done would be the approval and confirmation of the same by the court upon a report to it of such settlement. And the appellant takes the position that this is all that can be done or that no more is left to be done except to confirm such report as may be made and to enforce by execution

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the decree already made. But the position is founded on a precarious or indefinite premise, viz. that there will be arrived at between the parties litigant a satisfactory agreement as to the profits withheld from the plaintiff and division thereof, but the assumption that such will be the result of the accounting conducted by the parties themselves cannot be granted. It is possible, if, indeed (in view of the hostile feeling which would in such a controversy as this naturally arise between 'the opposing litigants), not probable, that a satisfactory or any settlement cannot be agreed upon between the parties themselves, and thus the controversy finally settled. In that case the court would, of course, be compelled to take evidence and make findings as to the several vital matters necessarily involved in the question of profits retained and converted by the defendant and the division thereof, and thereupon render judgment accordingly. It would in such case have to be ascertained and determined by the court how much, if any, of the profits of the business that the defendant received into his possession of which he had made no account to the plaintiff or which he had wrongfully appropriated to his sole and exclusive use. It is, however, not material to inquire whether a satisfactory arrangement or agreement might be reached between the parties themselves so as to leave nothing remaining for the court to do but to confirm the findings contained in the report of their accounting and see that the judgment is then executed. The important proposition is, as above stated, that there are vital matters which the decree appealed from does not adjudicate, but which are left for future determination and adjudication by a judgment or decree from which it would not be seriously contended that an appeal would not lie, since, unlike the decree already entered herein, it would involve a full, complete, and definitive adjudication of all the essential questions in the action.

A judgment is final only "when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined." Klever v. Seawell, 65 Fed. 373, 12 C. C. A. 653; Express Co.'s Case, 108 U. S. 24, 2 Sup. Ct. 6, 27 L. Ed. 638; Griffin v. Orman, 9 Fla. 22; In re Smith, 98 Cal. 636, 640, 33 Pac. 744; Doudell v. Shoo, 159 Cal. 448, 453, 114 Pac. 579. In the last-named case it is said:

"Our system of procedure contemplates that there shall be but one final judgment in a case [citing cases], and in the absence of a clear showing, it is not to be presumed that the court would attempt to dispose of a case piecemeal by successive final judgments, each covering a part of the matters in controversy."

In the case of Clark v. Dunnam, 46 Cal. 204, cited by appellant, involving an action for the dissolution of a copartnership, the court below made specific findings as to all the assets and indebtedness of the firm, and entered a decree whereby a sale of the partnership property and effects were to be made, and directed the payment of all the debts of the partnership and a distribution of whatever might remain of the proceeds of the sale amongst the copartners in certain proportions which were fixed by the decree. The Supreme Court entertained an appeal from the judgment in that case holding it to be a final judgment because all the essential matters in controversy were thereby fully and completely adjudicated. There was nothing remaining to be done but to enforce by execution what had been determined by the judgment. The litigation between the parties on the merits was thus terminated. And if, in this case, the court had ascertained and determined the amount of the profits of the business which the decree declares were received and converted by the defendant, and so have determined how much thereof the plaintiff was entitled to, we would, of course, have a case here to which the case of Clark v. Dunnam would be in all respects analogous, but manifestly that case is not like this, and is therefore not in point. The other cases cited by the appellant are not similar to this, and consequently are of no assistance to him.

Our conclusion is that an appeal does not lie from the decree here, and the appeal therefrom is, therefore hereby dismissed.

We concur: BUCK, Presiding Judge pro tem.; BURNETT, J.

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(40 Cal. App. 471)

BLESSING v. FETTERS et al. (Civ. 1905.)

(District Court of Appeal, Third District, California. March 28, 1919. Rehearing Denied by Supreme Court May 26, 1919.)

1. LANDLORD AND TENANT ⟸184(2)—DEPOSITS TO SECURE LEASE—TERMINATION OF TENANCY BY EVICTION.

In an action by a tenant's successor in interest to recover a deposit made by the tenant with the landlord, evidence *held* sufficient to sustain a finding that the lease was terminated by eviction, so that the landlord was not entitled to retain the deposit.

2. LANDLORD AND TENANT ⟸172(2)—"CONSTRUCTIVE EVICTION"—WHAT CONSTITUTES.

Any intentional and injurious interference by a landlord, which deprives the tenant of the means or the power of beneficial enjoyment of the demised premises, or any part thereof, or materially impairs such beneficial enjoyment, is a "constructive eviction."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Constructive Eviction.]

3. LANDLORD AND TENANT ⟸184(2)—DEPOSITS TO SECURE LEASE — LANDLORD'S RIGHT OF RETENTION.

A landlord is not entitled to retain deposits given to secure certain covenants of the lease after the termination thereof by eviction.

4. LANDLORD AND TENANT ⟸76(3) — ASSIGNMENTS OF LEASE—NECESSITY OF LANDLORD'S CONSENT.

Under a lease requiring the landlord's written consent to an assignment by the tenant, that the tenant assigned a half-interest in the lease to his partner without the written consent of the landlord, and in violation of covenants of the lease, did not forfeit the lease, where the landlord accepted rent from the original tenant with knowledge of the assignment.

5. LANDLORD AND TENANT ⟸101½—PARTNERSHIP — EFFECT OF BANKRUPTCY PROCEEDINGS.

Where an original lessee forms a partnership, he is entitled to possession of the premises, after the bankruptcy of his partner, by his right as original lessee, and as the remaining solvent partner, until he consents to have the partnership property administered in bankruptcy.

6. HUSBAND AND WIFE ⟸238(3)—ACTIONS — JOINDER OF HUSBAND — JUDGMENT AGAINST HUSBAND FORMALLY JOINED.

In an action by a tenant to recover a deposit securing the lease, after termination of the tenancy by wrongful eviction by defendant, that defendant's husband is joined as a defendant as a formality required by Code Civ. Proc. § 370, does not authorize a judgment against such husband personally.

Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

Action by Charles B. Blessing against Emma Fetters and husband. Judgment for plaintiff, and defendants appeal. Modified and affirmed.

W. F. Cowan, of Santa Rosa, for appellants.

Reuben G. Hunt and Samuel M. Samter, both of San Francisco, for respondent.

BUCK, Judge pro tem. This is an action brought by a successor in interest of a tenant to recover from the landlord moneys deposited as security for the performance of the covenants of the lease, upon the claim that there had been an eviction of the tenant by the landlord and a consequent termination of the lease. With the foregoing cause of action there is joined a cause of action to recover the sum of $250 deposited by the tenant with the landlord at the time of the making of the lease, with the understanding that this sum should be returned by the landlord to the tenant at the termination of the lease, upon the renewal of a certain liquor license in favor of the landlord.

The case was tried without a jury, and the court found that there was an eviction, and that plaintiff was entitled to recover the $250 deposited to cover the saloon license, and also was entitled to recover the sum of $1,000 deposited as security for the performance of the covenants of the lease, less the sum of $350, being the damage caused by breach of covenant to take proper care of the premises and goods leased. Judgment accordingly in the sum of $900 was given against defendants Emma Fetters and her husband, George Fetters, from which they each took this appeal.

In appellants' brief no points are made or suggested in regard to the findings or evidence in the cause of action in regard to the $250 deposited on account of the liquor license. In their brief "appellants claim in this action that the sole question for decision is: Did the lessor either actually or constructively evict the tenant Nichols?" On this issue the finding of the court was as follows:

"On or about the 13th day of September, 1917, the defendant Emma Fetters, while the said lease was still in full force and effect, wrongfully re-entered upon the said hotel premises and evicted all persons therefrom and assumed possession thereof, all without the consent and against the will of said partnership, said Nichols, and said bankrupt, and thereby terminated said lease, and released the said Nichols from his obligation to pay rent under said lease. Ever since such re-entry the defendant Emma Fetters has been and now is in full possession of the said premises to the exclusion of said Nichols, the said bankrupt, the said partnership, and the plaintiff as such receiver and trustee. Ever since on or about the 4th day of October, 1917, the defendants have been operating the said hotel premises for their own use and benefit, to the exclusion of said Nichols,

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the said bankrupt, the said partnership, and the plaintiff as such receiver and trustee."

This finding is in strict accord with the issues made by the pleadings, and no issue is raised by the pleadings in regard to the termination of the lease in any other manner than by the eviction above found. On most points the evidence is sharply in conflict, and in some respects the inferences which may be drawn from the evidence are equally conflicting; but it substantially appears from the evidence that the lease in question was executed on the 2d day of January, 1917, for the term of five years, at the annual rental of $960, payable quarterly in advance, and was for the property known as the "Hotel Chauvet," consisting of the hotel building and hotel equipments and furniture therein contained, and of the estimated value of $1,000. The lease contained the usual covenants for the payment of rent, and that the tenant should not "voluntarily or involuntarily assign this lease without the written consent" of the landlord, and provided that the tenant should conduct the hotel business in a quiet, lawful, and orderly manner, and should properly care for the premises and keep the buildings in good condition of repair at his own cost and expense, and "upon the expiration of this lease, or any sooner determination thereof, the tenant will quit and surrender the premises and all of said personal property in as good state and condition as reasonable use and wear thereof will permit." And the lease further recited that the tenant, upon the execution of the lease, has deposited with the landlord "the sum of one thousand ($1,000.00) dollars as a guaranty that he will faithfully perform each and every of the covenants of this lease, and said sum of one thousand ($1,000.00) dollars is to be kept and retained by the said party of the first part (the landlord) during the term of this lease as a guaranty for the faithful performance thereof, and any damage or detriment that said party of the first part may sustain by reason of any violation of any of the covenants of this lease shall be indemnified and paid from said sum of one thousand ($1,000.00) dollars."

On May 15th, following the execution of the lease, the tenant Nichols entered into an agreement of partnership with one Oscar Banks for the purpose of conducting the hotel and saloon business in the leased premises. For a one-half interest in the business Banks paid to Nichols the sum of $800, and received from Nichols an assignment of a one-half interest in the lease and moneys deposited under the terms of the lease. The defendant had knowledge of this transaction and of the association of Banks in the business, but never gave any written consent to the assignment, though there is testimony to the effect that she promised so to do. On July 1, 1918, the rent, payable quarterly in advance to October 2, 1918, was paid by Nichols and accepted by the landlord. Later in July some controversy arose between the parties and the landlord, Emma Fetters, who claimed that the hotel business was not being conducted in a proper and lawful manner, and after offering Banks $250 for his interest she stated:

"If you don't want to sell sooner or later, you have to go out; and if you don't go out, I will show you that I have to put you out."

About two weeks after this Nichols went away on a trip, leaving his partner, Banks, "in charge of the place." But he returned in about two weeks after some attachments had been levied upon the place. After these attachments were paid off by himself and Banks, he went away again, leaving Banks in charge, and saying that "he wanted to go on a trip." Shortly after other attachments were levied, and Mrs. Fetters appeared at the place and told Banks "that, if Mr. Nichols wasn't there, she would have to take over the place, and if I would not go out she would put me out, and that I had no business over there, and I should not stay; that I would spoil her business, her whole investment." To which Banks replied, "I am in charge of this place, and I take very well care for it." Whereupon Banks "sent a telegram to Mr. Nichols that the Chauvet Hotel, the saloon, was attached, and I ask him for his advice what to do. I waited a couple of days, and finally a telegram came and said to do the best I could; so I went up to Santa Rosa, and I left Mr. Billie Karns in charge of the place, and I told him if anybody comes and wanted to go in that place, don't let him in." Upon returning from Santa Rosa about September 11th, Banks was taken in custody by the constable upon a warrant of arrest sworn to by Mrs. Fetters and taken back to the hotel, where he found Mrs. Fetters in possession with the constable. She told him, among other things:

"If you don't go out, I will have to put you out; and if you don't go out, I will put you in jail, you to stay there."

After Mrs. Fetters had taken an inventory of the furniture in the place, Banks was told by her that he could now go; and Banks, left, fearing, as he states, that if he didn't go she would have him prosecuted and sent to the state's prison, and "Mrs. Fetters commanded the constable to lock everything in the house, let nobody in there, and she would put somebody in, or the constable would put somebody in, and Mr. Doon, what was there, I told him to take charge of the place, and she says, 'There will be nobody here in the place; that place belongs to me, and I don't want to have nobody run my place.' So I went to take

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the bus to Napa and I never went back." Banks had already contemplated going into bankruptcy, and for that purpose had made an inventory of and segregated a part of the personal property belonging to him on the premises, and on September 13th Banks filed his petition in bankruptcy, and on that day was adjudged a bankrupt. On September 28th the plaintiff herein was appointed receiver, and on October 4th appointed trustee in bankruptcy. On September 20th Nichols filed in the bankruptcy court his written consent to the administration of the partnership affairs by the bankruptcy court. But prior to this, and since the attachments were dissolved by the adjudication in bankruptcy, Mrs. Fetters directed the attachment keeper of the property on the premises to "stay there and take care of the place; that she would have to keep a man there on account of the neighbors"; also at the time of the last attachment, on or about September 11th, Mrs. Fetters told one of the attaching creditors, who had just levied an attachment at her suggestion:

"We will have to get them out, or I will have to get them out. The remark was made at the time I put the attachment on there; struck me that Mrs. Fetters certainly wanted to get them out."

[1-3] From the foregoing it appears that there was sufficient evidence to justify the finding of the trial court that there was a termination of the lease by eviction before the appointment of the trustee in bankruptcy, and that consequently the defendant landlord was not entitled to retain the deposit given to secure the performance of the covenants of the lease after it had been thus wrongfully terminated by her. As stated in the case of New State Brewing Ass'n v. Miller, 43 Okl. 183, 141 Pac. 1175:

"Any intentional and injurious interference by the landlord, which deprives the tenant of the means or the power of beneficial enjoyment of the demised premises, or any part thereof, or materially impairs such beneficial enjoyment, is a constructive eviction."

And the case of Onward Const. Co. v. Harris (Sup.) 144 N. Y. Supp. 318, holds that threats and abusive language may in some instances be sufficient to constitute an eviction. And the following authorities are conclusive on the proposition that a landlord is not entitled to retain a deposit given to secure certain covenants after the termination of the lease by eviction: Green v. Frahm, 176 Cal. 259, 168 Pac. 114; Rehkopf v. Wirz, 31 Cal. App. 695, 161 Pac. 285; Rez v. Summers, 34 Cal. App. 527, 168 Pac. 156; Wollenshlager v. MacLean, 34 Cal. App. 102, 166 Pac. 853; Tiffany on Landlord and Tenant, pp. 1221, 1258; Wilson v. Agnew, 25 Colo. App. 109, 136 Pac. 96.

[4] Though the assignment of the half-interest in the lease to Banks and its use by the partnership was without the written consent of the landlord, and in violation of the covenant in the lease, it did not create a forfeiture of the lease, especially after the landlord had accepted the rent with knowledge of the assignment. Garcia v. Gunn, 119 Cal. 315, 319, 51 Pac. 684.

[5] The evidence is sufficient to show that at the time of Banks' eviction, Nichols had not abandoned the lease, and that Banks was attempting to hold possession, not only for himself, but also to take care of the property for Nichols. Furthermore, even after the bankruptcy proceedings, on September 13th, Nichols was entitled to hold possession and to have some one on the premises on his behalf, not only under his right as original lessee, but also as the remaining solvent partner until he consented to have the partnership property administered in bankruptcy. Francis v. McNeal, 228 U. S. 696, at page 700, 33 Sup. Ct. 701, 57 L. Ed. 1029, L. R. A. 1915E, 706.

[6] Appellants insist that in any event the judgment against the husband, George Fetters, should be reversed; and it is clear both from the evidence and the judgment roll that no judgment should have been entered against him. In the complaint it is stated that:

"Said George Fetters is joined as party defendant herein only because of the provisions of section 370 of the Code of Civil Procedure of the state of California."

And at the opening of the trial counsel stated:

"The only reason George Fetters is joined as a defendant is because he is the husband of Emma Fetters."

But, notwithstanding this, the plaintiff took judgment that he "have and recover of and from the defendants Emma Fetters and George Fetters, her husband, the sum of $900," etc. By its terms this judgment unjustly binds and affects, not only the separate property of George Fetters but also the community property. But, as stated in the case of Terry v. Superior Court, 110 Cal. at page 88, 42 Pac. at page 465, husbands become—

"proper and necessary parties defendant, not, however, to the end that they or their property should be bound by the judgment, but solely that they might be able to aid their wives in their defense. The present utility of the statute in this progressive day may be open to question, but, however this may be, it was passed at a time when the lawmakers, perhaps with mistaken chivalry, believed that a wife, brought into litigation, might be the better for the comfort, protection, and support of her husband's authorized presence."

See, also, Van Maren v. Johnson, 15 Cal. 308.

Substantial justice, however, can be ac-

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complished by a modification of the judgment. Davis v. Lamb et al., 5 Cal. Unrep. 765, 35 Pac. 306.

It is therefore ordered that the judgment as to the defendant Emma Fetters be affirmed, with direction to the trial court that the judgment be modified, so as to provide that it do not affect the separate property of the defendant George Fetters or the community property (Van Maren v. Johnson, supra), and, as so modified, the judgment will be affirmed, without costs to either appellant.

We concur: HART, J.; BURNETT, J.

(40 Cal. App. 501)

KIRCH v. WATTELL et al. (Civ. 2619.)

(District Court of Appeal, Second District, Division 1, California. March 29, 1919.)

1. SPECIFIC PERFORMANCE ⇐32(3)—MUTUALITY.

Under agreement expressed in part in a memorandum and in part by certain escrow instruments given to a trustee selected by the parties, whereby plaintiff sold to defendant furnishings, furniture, and leasehold interest in a lodging house, *held*, that there was such mutuality of obligation as entitled plaintiff to specific performance, though the agreement contained a provision for liquidated damages.

2. DAMAGES ⇐85—LIQUIDATED DAMAGES OR SECURITY.

Where purchaser agreed that upon his default, deed held by a trustee and transferring certain property to plaintiff as security was to be delivered to plaintiff, and that purchaser should forfeit property as liquidated damages, plaintiff was entitled to the deed as security upon default of purchaser, though provision for liquidated damages was void.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Claire J. Kirch against Junot Wattell and another. Decree for plaintiff, and defendants appeal. Affirmed.

Bernard Potter, of Los Angeles, for appellants.

Ira L. Brunk and J. H. Creighton, both of Los Angeles, for respondent.

PER CURIAM. In this action a decree was entered agreeable to the prayer of the complaint requiring specific performance of the agreement made between defendant Wattell and the plaintiff. In the decree it was further determined that a deed made by Wattell to his codefendant was void as to the plaintiff. The cause of action grew out of a transaction had wherein plaintiff sold to Wattell the furniture, furnishings, and her leasehold interest in a certain lodging house located in the city of Los Angeles. The agreement was expressed in part in a memorandum made at the time and signed by both parties, and in part by certain escrow instructions give to a trustee selected by the parties.

[1] Counsel for appellants, in insisting that there was no mutuality such as would entitle the plaintiff to the remedy which she obtained in this action, refers only to the memorandum first made, which is only in part expressive of the admitted agreement intended to be entered into. In order to arrive at the full purpose of the contracting parties, the escrow instructions constituted a necessary part of the contract. The lodging house sold by plaintiff to Wattell was furnished, and the agreed price was $3,750 for the furnishings, furniture, and leasehold interest. Wattell agreed first to pay the sum of $1,200 on or before the 26th day of December, 1914, and agreed to execute a chattel mortgage on the furniture for $2,550, which should be payable in certain parts per month, with interest stated. It was provided that an extension of time might be given in certain contingencies. As further security that he would comply with the terms of the agreement, Wattell was to deposit a deed with the trustee, transferring title to a lot in the city of Los Angeles to the plaintiff, which deed was to be held by the trustee until default was made by Wattell, whereupon it was to deliver it to the plaintiff. It was stated in the agreement that upon default of Wattell to fulfill his obligations under the contract the deed was to be delivered to the plaintiff, and the contract recited that "the second party [Wattell] agrees to forfeit above named property as liquidated damages." An extension of time was given on the contract, but defendant failed to make the payments to the plaintiff as required, whereupon this action was brought. We think that specific performance was the appropriate remedy, and that plaintiff was not required to resort to an action for damages as her only means of obtaining satisfaction of the obligations assumed by the defendant. Shannon v. Cavanaugh, 12 Cal. App. 434, 107 Pac. 574.

[2] Appellants insist that the court improperly decreed that the deed from Wattell to the plaintiff should be delivered to the plaintiff to be held as security. They argue that the term of the contract providing that the property should be taken under the deed as for liquidated damages was void for the reason that the case was not such a one as to permit damages to be fixed in advance. We may agree that this was so. However, assuming that the plaintiff had received the deed, she would have been entitled to retain it as security for the performance of the obligations of the defendant. She could not have claimed the property transferred by

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defendant absolutely as her own, but would have been required to foreclose in order to subject the lot to the payment of her debt. So here the court properly decreed that the deed should be delivered and held in the same way. The form of the chattel mortgage which the court decreed should be executed by Wattell was precisely in record, as to the payments to be made, with the contract as expressed in the memorandum agreement and the trust instructions executed by Wattell. The court found against the defendant's claim that there had been fraudulent representations as to the value of the lodging house, furnishings, and furniture; hence we are not concerned with that question here, as there was sufficient evidence to support those findings. The contract between these parties was poorly expressed, and the action taken under it somewhat disconnected. However, on the record before us we cannot perceive wherein justice has miscarried in this case.

The judgment appealed from is affirmed.

(40 Cal. App. 466)

CALIFORNIA HIGHWAY COMMISSION OF DEPARTMENT OF ENGINEERING OF STATE OF CALIFORNIA v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al. (Civ. 2945.)

(District Court of Appeal, Second District, Division 1, California. March 27, 1919. Rehearing Denied by Supreme Court May 26, 1919.)

MASTER AND SERVANT ⟸361—WORKMEN'S COMPENSATION — RELATION OF EMPLOYER AND EMPLOYÉ—EVIDENCE.

Where deceased was fatally injured by the overturning of an automobile secured by the highway commission to transport him and another to the place where they, if acceptable to the foreman, would be employed, *held* deceased was not in the employ of the commission at the time of the injury, and his dependents were not entitled to compensation.

Proceedings by Nettie H. McGillivray and others, for compensation for the death of George J. McGillivray, opposed by the California Highway Commission of Department of Engineering of the State of California. Compensation awarded, and the Highway Commission petitions for writ of review. Award annulled.

Daniel W. Burbank, of San Francisco (F. J. Creede, of San Francisco, of counsel), for petitioner.

Christopher M. Bradley, of San Francisco, for respondents.

SHAW, J. Upon a writ of review issued herein we are asked to annul an award of compensation made by the Industrial Accident Commission against the California Highway Commission and in favor of dependents of George J. McGillivray, deceased, who is alleged to have died as the result of injuries received while in the employ of the Highway Commission.

The facts are as follows: In May, 1918, petitioner was engaged in constructing highways some distance from the city of Los Angeles, where the office of its division superintendent, whose duties were the general supervision of the work in his division, was located. Each section or job of work was in charge of a superintendent or foreman on the ground. In the month of May the Public Employment Bureau of Los Angeles, having received notice from the division superintendent's office that petitioner was in need of laborers, sent George J. McGillivray to the office of said superintendent, where he applied for work as a teamster, and was told by Mr. Swartz, then in charge of the office, that he could secure a job by applying to Mr. J. G. Beckjord, the foreman on the ground of what was known as the "Ridge Route," distant some 60 miles from Los Angeles, provided he was satisfactory to him. He was also informed as to compensation paid and the amount deducted therefrom as board for employés, who were required to furnish their own blankets, and told that transportation to the place would be furnished him, no charge for which would be made, provided he held his job for one month. For the purpose of conveying deceased and another to the work, the Highway Commission secured an automobile, the owner of which undertook, for hire, the transportation of the men to the place where they, if acceptable to the foreman, would be employed. On the way to the prospective work the automobile overturned, injuring McGillivray, as a result of which he died. In the employment of men for the work Swartz had no authority other than, when men were needed and finding those whom he thought would be acceptable to the foreman, to send them on to the work, telling them, as he did McGillivray, that they could secure a job provided they were satisfactory to the foreman; that as to men thus sent to him the foreman was vested with full authority, as in cases of independent application, to employ them or not, as he might determine. Indeed, as conclusively shown by the evidence, the only person who had the right to employ labor upon the work was the foreman in charge, who frequently refused to accept men sent to him by the office, and that nothing was paid for time consumed in going from Los Angeles to the place of prospective employment.

Upon these facts, as to which there is no controversy, a majority of the commissioners

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found that McGillivray at the time he received the injuries which caused his death was an employé of petitioner, and that the injury arose out of and in the course of his employment as such employé. In our opinion, there is no evidence to support this finding. As appears from the facts, the relation of the Los Angeles office of petitioner to the foreman on the ground in charge of the work, having sole power to engage laborers, was identical with that of an employment office in finding work for those seeking employment. As was done in this case by Swartz, they are informed as to wages, terms, and conditions upon which, if satisfactory, employment may be obtained by applying to the person in charge of work at a designated place. But until such application is made, and the party accepted, the relation of employer and employé is not established. The information as to wages, terms, and conditions under which petitioner was employing men upon the Ridge Route, coupled with the statement made by Swartz that deceased could secure a job there if he proved satisfactory to the foreman in charge of the work, no doubt induced him to undertake the trip in the hope of obtaining employment; but, in the absence of proof that he applied to the foreman or entered upon service, it is insufficient to establish the relation of master and servant, without which compensation for injury or death cannot be awarded. Deceased knew that success in obtaining employment depended upon the foreman who, as shown by the uncontradicted evidence, was vested with full and arbitrary power in determining whom he would or would not employ. Hence, until he had reported to the foreman and there was some word or act on his part manifesting an acceptance of his proffered service, he could not be said to be an employé of the Highway Commission. Indeed, upon arriving at the camp and finding conditions unsatisfactory, he might, at his option, conclude that he would not apply for work. He was traveling upon his own time, for his own benefit, was not performing, and had never performed, any service for petitioner. The fact that he, instead of providing his own means of conveyance and cost of transportation, availed himself of the proffered offer of petitioner to advance the cost thereof, is an immaterial factor in the consideration of the question, since "the law operates upon a status, i. e., that of employer and employé, and affixes certain rights and obligations to that status." North Alaska S. Co. v. Pillsbury, 174 Cal. 1, 162 Pac. 93, L. R. A. 1917E, 642. Since the status did not exist, the provisions of the Compensation Act are not applicable.

The award is annulled.

We concur: CONREY, P. J.; JAMES, J.

(40 Cal. App. 434)

GROSJEAN v. BOARD OF EDUCATION OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 2684.)

(District Court of Appeal, First District, Division 1, California. March 25, 1919. Rehearing Denied by Supreme Court May 22, 1919.)

1. SCHOOLS AND SCHOOL DISTRICTS ⟸56—RULES OF BOARD OF EDUCATION—SUSPENSION OR FAILURE TO OBSERVE.

Rules of Board of Education of City and County of San Francisco, § 12, providing that any rules might be amended or repealed by the affirmative vote of three members at any meeting, provided notice in writing of such intended amendment or repeal had been given at a previous meeting, was merely a rule of procedure for the guidance or protection of the members of the board, which they could suspend or ignore on occasion, and in respect to their action in so doing only the members themselves had a right to complain.

2. SCHOOLS AND SCHOOL DISTRICTS ⟸56—RULE OF BOARD OF EDUCATION—SUSPENSION.

Rules of Board of Education of City and County of San Francisco, § 12, providing that any rules might be amended or repealed by the affirmative vote of three members at any meeting, provided notice in writing had been given at a previous meeting, was effectually suspended by the board through its unanimous action in passing amendment to another rule without the formality of the notice in writing of its proposed enactment.

3. SCHOOLS AND SCHOOL DISTRICTS ⟸141(1)—RULES OF BOARD OF EDUCATION—CHANGE—NOTICE TO TEACHER.

Rules of board of education of city and county of San Francisco, § 47, requiring principals when officially notified of any changes or amendments to the rules to cause them to be inserted in the copy belonging to each teacher, was complied with sufficiently where the principal of a teacher directed her attention to a new rule regarding absence of teachers shortly after its passage, and where the teacher then read the rule.

4. MUNICIPAL CORPORATIONS ⟸8—CHARTER—OPERATION AS GENERAL LAWS.

The charter of the city and county of San Francisco, in creating the duties and relations of the superintendent of schools and the board of education, is to be regarded as a state law of equal dignity with the general laws of the state, so long as in school matters it is not in conflict with them.

5. SCHOOLS AND SCHOOL DISTRICTS ⟸141(5)—DISMISSAL OF TEACHER—SUPERINTENDENT OF BOARD OF EDUCATION—RIGHT TO OBJECT.

A school-teacher of the city and county of San Francisco, dismissed from her position, cannot object, on application for mandamus for reinstatement, that the superintendent of schools was disqualified to sit or act as a member of the board of education in hearing and determining charges which he had, as prosecutor, laid

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before the body; the fact being that he did not sit or act as a member of the board in the final determination of the charges.

6. SCHOOLS AND SCHOOL DISTRICTS ⟸53(2)—BOARD OF EDUCATION—DISQUALIFICATION OF SUPERINTENDENT OF SCHOOLS.

In relation to the acts of such inferior and quasi judicial tribunals as boards of education, boards of supervisors, town councils, and other governing bodies of public subdivisions or municipal corporations, the rules relating to the disqualification of officers, as the superintendent of schools, ex officio a member of the board of education, have but a limited application.

7. SCHOOLS AND SCHOOL DISTRICTS ⟸141(5)—REMOVAL OF TEACHER—OBJECTION TO BOARD OF EDUCATION AS TRIBUNAL—LATE CHARACTER.

Where a school-teacher of the city and county of San Francisco, when meeting charges before the board of education, did not object to any passion or prejudice of the board, but did object on appeal from the decision of the board to the superintendent of schools, the objection was too late, even if it had been valid instead of general.

Appeal from Superior Court, City and County of San Francisco; Geo. E. Crothers, Judge.

Application for writ of mandate by Elly S. M. Grosjean against the Board of Education of the City and County of San Francisco, State of California, and others. From judgment for defendants on demurrer to the application, plaintiff appeals. Judgment affirmed.

C. W. Eastin, of San Francisco, for appellant.

George Lull, City Atty., Milton Marks, Asst. City Atty., and Edward F. Moran, all of San Francisco, for respondents.

RICHARDS, J. This is an appeal from a judgment in the defendants' favor after an order sustaining their demurrer to the sufficiency of the plaintiff's application for a writ of mandate.

The plaintiff, prior to May 12, 1917, had been a teacher in the public schools of San Francisco for many years, holding diplomas and certificates which entitled her to be a teacher therein and to be retained in such position unless dismissed therefrom for "insubordination, immoral or unprofessional conduct," after the presentation of charges and a hearing thereon as provided by law. It appears affirmatively from the plaintiff's petition that such charges were presented and a hearing had thereon before the said board of education, which thereupon made an order for the plaintiff's dismissal. It is the regularity and legality of this action on the part of said board which the plaintiff attacked by her petition and which she assails upon this appeal.

It sufficiently appears upon the face of the plaintiff's petition that the alleged dereliction of duty which furnished the basis of the charges which were preferred against her was that of insubordination, consisting: First in violations of the rules of the board of education, by repeated absences from her place in the particular school to which she had been assigned; and, second, in insubordination, by failing or refusing to report at the office of the superintendent of schools when required to do so in order to explain such absences. The charges presented against the plaintiff to the board of education by the superintendent of schools on April 30, 1917, specifically asserted that the plaintiff had been absent from her duties without permission for 17 school days out of a possible 20 during four weeks in the months of March and April, 1917, the dates of such absences being March 13th, 14th, 15th, and 16th, after which a vacation intervened from March 26th to April 9th; then followed absences on April 9th, 10th, 11th, 12th, 13th, 17th, 18th, 19th, 20th, 24th, 25th, 26th, and 27th. Prior to April 10, 1917, section 86 of the rules of the board of education read as follows:

"Teachers desiring to be absent from duty for more than one calendar week must give notice thereof to the board, stating the cause and duration of such absence. Such notification, made upon official blanks, and approved by the principal, must be sent to the board. In cases of sudden illness, or other emergency, teachers may absent themselves temporarily without permission for a term not to exceed five days."

On Apirl 10th the board of education adopted the following resolution, purporting to change this particular rule:

"Whereas regularity in attendance is a prime duty of the teacher; therefore be it

"Resolved, that section 86 of the rules be and it is hereby abolished and the following substituted therefor:

"In cases of serious sickness or death in the family and of illness grave enough to keep a teacher at home or in a hospital, teachers may absent themselves without permission for a term not to exceed five days. Where teachers wish to absent themselves for other reasons they must notify the board, stating the cause and duration of such absence, and obtain permission therefor, to be certified to them by the secretary of the board of education."

[1] It is the contention of the appellant that the foregoing change in said rule 86 of the board was not legally made, and hence ineffectual, for the reason that its adoption was in alleged violation of section 12 of the rules of the board, which provides as follows:

"Sec. 12. Any rules adopted by the board may be amended or repealed by the affirmative vote of three members at any meeting, provided

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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notice in writing of such intended amendment or repeal has been given at a previous meeting."

We perceive no merit in this contention. The section above quoted is merely a rule of parliamentary procedure adopted for the guidance, and it may be protection, of the members of the board, and which they had power to suspend or ignore when occasion required, and, in respect to their action in so doing, no one but the members of the board themselves would have a right to complain. Hutcheson v. Storrie (Tex. Civ. App.) 48 S. W. 785; Greeley v. Hamman, 17 Colo. 30, 28 Pac. 460; Cooley, Const. Lim. (7th Ed.) p. 113; Heiskell v. Mayor, etc., 65 Md. 125, 4 Atl. 116, 57 Am. Rep. 311.

[2] Besides we think the rule referred to was effectually suspended by the board of education through its unanimous action in passing the amendment to rule 86 without the formality of the notice in writing of its proposed enactment required by section 12. People v. Rochester, 5 Lans. (N. Y.) 11; Nelson v. City of Omaha, 84 Neb. 434, 121 N. W. 453.

[3] It is next contended by the appellant that she was not legally notified of the change thus made in rule 86 of the board, and was therefore not bound by it. This contention is predicated upon section 47 of the said rules, which reads as follows:

"Sec. 47. Principals, when officially notified of any changes or amendments to these rules, shall immediately cause them to be neatly inserted in the copy of the rules belonging to each teacher in their respective schools."

While it is conceded by the respondent that the record does not affirmatively show that this requirement was complied with, it is pointed out that the plaintiff nowhere alleges that she was not personally made acquainted with the fact and substance of the change in the rule within a day or two after such change was made. On the contrary, the plaintiff sets forth in her petition the full text of the charges made against her, wherein it appears that her principal directed her attention to the new rule regarding absences of teachers shortly after its passage, and that she then read it. This statement the plaintiff nowhere denies; and since the rule imposing upon principals the duty of pasting copies of changes made in the teachers' books of rules has for its only purpose the giving to such teachers notice of the text of changes thus made, this purpose was fully subserved by the plaintiff's reading of the rule.

[4] This brings us to a consideration of the charges which were presented against the plaintiff, and the procedure thereon, to which the plaintiff and appellant offers several more or less specific objections. The charges were presented by the superintendent of schools acting under the express authority and duty conferred upon him by the terms of the city charter, which in chapters I to VI of article VII thereof provides a system of government of the public schools of San Francisco in amplification of the provisions of the Political Code. We perceive no valid objection to the assignment of this specific duty to the superintendent of schools, who is made by the charter an ex officio member of the board of education. The charter in creating these duties and relations is to be regarded as a state law of equal dignity with the general laws of the state so long as in school matters it is not in conflict with them. Stern v. Council, etc., 25 Cal. App. 685, 145 Pac. 167.

Turning now to the substance of the charges themselves, we find that the plaintiff was therein charged with having been absent from her duties four days in the middle of March, 1917, without excuse; that she was again absent during all of the school days of the week commencing April 9, 1917; and was again absent during all of the school days of the following week excepting Monday, if school was held on that day; and was again absent on all of the school days of the succeeding week, again excepting Monday, all of which absences were without permission or excuse. It would be a very strained construction of rule 86 of the board of education as it read prior to April 10, 1917, which would permit teachers without the excuse of illness or other emergency to absent themselves from their place and duty for three successive weeks with the exception of two separate intervening days, without being liable to the charge of dereliction of duty; even, therefore, if rule 86 had not been validly amended on April 10, 1917, as the plaintiff charges, these unexplained absences would have been a violation of both the letter and spirit of the original rule. The change in the rule effected by its valid amendment on the latter date puts the matter, however, beyond dispute, since the amendment requires that teachers wishing to absent themselves from their places for any other reasons than serious sickness or death in their families, or illness of themselves grave enough to keep them at home or in the hospital, must notify the board of education of the cause and duration of such absences, and obtain permission therefor. Under this amended rule the plaintiff by her absences after April 10, 1917, or at least after the rule as changed had been read by her within a brief time thereafter, had subjected herself to the charges which were preferred against her. These charges further specify that on April 18, 1917, the board of education by letter of that date directed the principal of her school to notify the plaintiff to report to the office of the superintendent of schools, but, owing to her absence, this notice was not conveyed to her until

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April 23d, which was one of the Mondays when she was at school. She did not so report, nor attempt to do so until after the close of school hours on that day, when she did attempt to report, but failed to find the superintendent in his office. On the following Monday she called the superintendent on the telephone, when he told her that he had prepared charges against her. On that day she again absented herself without permission for the remainder of the week.

The foregoing facts form the basis of the charges which the superintendent presented to the board on April 30, 1917. Upon their presentation the board suspended the plaintiff, and fixed the date of hearing thereon for May 12, 1917, of which the plaintiff had due notice. She appeared before the board on that day, and pleaded not guilty to the charges, but apparently offered no objection to the right of the superintendent to present, or of the board to hear, such charges upon any of the grounds of bias, prejudice, or interest which she now urges against the legality of the proceeding. Upon the hearing upon said charges, and after the taking of evidence pro and con thereon without objection on the plaintiff's part, the board made its findings sustaining said charges and dismissing her from her position as a teacher in the public schools. The plaintiff appealed to the superintendent of schools within the time and in the manner provided by the school laws, which appeal was denied by the superintendent on June 4, 1917. To the charges thus presented, the hearing thus held, the findings and order thus made, and the appeal thus taken and determined, the plaintiff presented certain objections in her petition, and has reiterated these upon this appeal.

[5, 6] The chief of these objections, aside from those already noted and disposed of, relate to the alleged disqualification of the superintendent to present, and of the members of the board of education to hear and determine, said charges by reason of the asserted bias and prejudice of these officials. As to the alleged disqualification of the superintendent of schools to present charges, there is no merit in the plaintiff's claim, since the charter expressly imposes the duty of presenting such charges upon that particular official, and any bias or prejudice which he might have could not affect his right and duty to prepare and present the charges in question. The more serious part of the objection is that relating to the alleged disqualification of the board of education to act in the hearing and determination thereon. The first part of this objection embraces the asserted disqualification of the superintendent of schools to sit or act as a member of the board in the hearing and determination of charges which he has himself in the character of a prosecutor laid before that body. Such an objection might in a proper case prove effectual, but not in the case at bar, since the plaintiff's petition affirmatively shows that the superintendent of schools, while ex officio a member of the board, did not in fact sit or act as a member of the board, in the final determination thereon. But aside from this we think the authorities quite consistently hold that in relation to the acts of such inferior and only quasi judicial tribunals as boards of education, boards of supervisors, town councils, and other governing bodies of public subdivisions or municipal corporations, the rules relating to the disqualification of regular judicial tribunals or officers have but a limited application. In the recent case of Federal Construction Co. v. Curd, 177 Pac. 469, this subject was quite fully discussed in a case not distinguishable in principle from the case at bar, and in which the court declared it to be the settled rule "that the interest of one or all of the members of boards of trustees, city councils, or other municipal bodies charged with the making or rectifying of assessments for street or other improvements may have, arising from the fact of their ownership of property directly affected by the proposed improvement, does not create such a disqualification to sit or act in the premises as to render their action void as not constituting due process of law." Other cases bearing upon the same subject and applying the same rule to officials sitting upon the hearing of charges against municipal officers are the following: Riggins v. Richards, 97 Tex. 229, 77 S. W. 946; State v. Com. Council, 90 Wis. 612, 64 N. W. 304; McQuillin on Municipal Corp., vol. 2, § 565.

[7] Aside, however, from these considerations, the plaintiff's petition discloses that the plaintiff's objection to the action of the board of education or any of its members, in proceeding to try her upon the charges presented by the superintendent of schools upon the ground of their or any of their disqualification by reason of bias or prejudice, was made for the first time after the trial, decision, and order for her dismissal, and in her appeal to the superintendent for a reversal of such decision and order, and that her objection then taken was merely the general one "that the said findings, decision, and order were the result of passion and prejudice on the part of said board of education." Such an objection came entirely too late, even had the same been valid, since it is a general rule of law applicable to the alleged disqualification of judicial officers that the objection upon that ground must be presented at the inception of the hearing, and must be supported by affidavits. This rule and the reasoning which supports it also applies to the appeal taken by the plaintiff to the superintendent of schools, against

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whom she makes for the first time in her petition a similar charge, but to whom she committed her cause upon appeal without objection as to his personal qualification to hear and act upon the same. Our conclusion upon this branch of the case is that the board of education and the members thereof were not disqualified to hear, entertain, and determine the charges presented against the plaintiff, or to enter the order for her dismissal from the school department based thereon.

We do not deem it necessary to discuss the other points presented by the appellant upon this appeal.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

(104 Kan. 708)

KENNEDY et al. v. ATCHISON, T. & S. F. RY. CO. (No. 21872.)

(Supreme Court of Kansas. May 10, 1919.)

(Syllabus by the Court.)

1. CARRIERS ⇐218(6), 229(1) — INJURY TO LIVE STOCK.

In an action against a carrier for damages on account of injury to an animal in transit, where delivery was made at the point of destination, the plaintiff cannot recover for freight charges paid, although the animal was so injured as to be entirely worthless, and the amount of recovery was limited by the value stated in the bill of lading.

2. CARRIERS ⇐229(1)—KILLING OR INJURY OF ANIMALS IN TRANSIT—RECOVERY.

Where an animal has been killed or rendered entirely worthless by such an injury, a recovery may sometimes be had in excess of its value by reason of money spent in an unsuccessful, but reasonable, effort to restore it to usefulness, but this can be true only of expenditures made in a just expectation of reducing the carrier's liability by the amount expended; and where the recovery is based upon the valuation placed on the animal in the shipping contract, the expectation must be that the recoverable damages will be reduced below that amount.

Johnston, C. J., and Mason, J., dissenting in part.

Appeal from District Court, Wilson County.

Action by Max J. Kennedy and another against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiffs, and defendant appealed; judgment being reversed, with directions (179 Pac. 314). On motion to amend mandate, motion allowed, judgment reduced in amount, and plaintiff given option to elect a new trial upon a single issue.

W. R. Smith, O. J. Wood, and A. A. Scott, all of Topeka, for appellant.

J. T. Cooper, of Fredonia, and Farrelly & Evans, of Chanute, for appellees.

MASON, J. In this case it was held that, because the value of three horses shipped by rail was stated in the bill of lading to be $150 each, the shipper was precluded from asserting that they were worth more than that in an action for damages on account of their being injured in transit. In reversing the judgment the direction was given "to deduct therefrom all that was allowed in excess of $450 on account of the injury to the horses." A difference of opinion has arisen between the parties as to whether or not certain items of the amount recovered are to be regarded as having been allowed "on account of the injury to the horses" within the meaning of the phrase as used in the opinion and mandate. The defendant has filed a motion, upon which counsel have been heard, asking that the language be made more definite, so that a further appeal may be avoided. The broad question argued and determined on the appeal was whether the plaintiff's recovery was limited by the value stated in the bill of lading; and, having decided this in the affirmative, the court overlooked the fact that there was room for a difference of opinion as to the exact effect the decision should have on the various items entering into the amount allowed by the trial court—a matter which was fairly involved, although it had not been specifically discussed. The mandate ought not to remain in such form as to give occasion for controversy as to its meaning, and will be made definite in accordance with the defendant's request.

The district court awarded the plaintiff $4,600 on account of the diminution in the value of the horses resulting from their injuries. This, of course, should be reduced to $450. An allowance of $26.50 was made for injury to other property, and is not affected by the reversal. The items over which the present dispute has arisen are: For freight paid, $33.94; for the services of a veterinary, medicine and treatment of horses, $48; for the expense of caring for the horses for a period of about two months following the accident, $237.50.

[1] 1. The court is of the opinion (which the writer does not share) that the plaintiff was not entitled to any recovery on account of what he paid for the transportation, since the service was actually performed, although the value of two of the animals was found to have been entirely destroyed, and that of the third reduced to $100.

[2] 2. The defendant maintains that nothing should be allowed on account of the services of a veterinary or other treatment of the horses, because the fixing of their value at $150 each in the shipping contract made

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that amount the absolute limit of the plaintiff's recovery by reason of any injury to them. The stipulation did not in so many words restrict the plaintiff's right of recovery to any specific sum. It merely stated a value which fixed the freight charges, thereby estopping him to assert that the horses were worth more than $150 each. The question presented therefore is this: Can he recover by reason of the injury to them more than their full value? The rule as commonly formulated seems to preclude this, although the usual statement may be affected by the fact that a reference to compensation for loss of the use of the property is included. 2 Thompson on Negligence, § 2211; note 5 Ann. Cas. 416, foot of first column. If expenditures made in an effort to restore to usefulness an injured animal are to be charged against the person whose negligence caused the injury on the ground that he has been benefited by them through a reduction of damages, it is obvious that the total recovery should not exceed the value of the animal. But, if the plaintiff may recover for money spent in an honest, but unsuccessful, effort to improve the condition of his injured animal, not because the defendant actually derives any benefit therefrom, but because the expenditure was made in good faith in hopes of such an effect, then an allowance on that account would seem permissible, even although it resulted in a recovery in excess of the full value of the animal. And the courts which have directly passed upon the question have taken that view, holding that, where death results, the owner may recover, in addition to the full value of the animal, whatever he has expended in a reasonable effort to save it. 1 R. C. L. 1195; note 5 Ann. Cas. 416, second column; Ft. Worth & D. C. Ry. Co. v. Jordan (Tex. Civ. App.) 155 S. W. 676. But, while such an expenditure, to be chargeable against the defendant, need not have actually inured to his benefit, it must have been incurred in a reasonable effort to accomplish a result that would have that effect. Here no expenses for the care of any of the injured animals can be charged against the defendant unless they were made in the reasonable expectation, not merely of improving the condition of the horse, but of improving it so much that the impairment in its value would be less than $150, since otherwise the defendant would have no concern in the matter. The allowances made by the trial court were obviously based on the full value of the horses, and cannot be permitted to stand in view of the $150 limitation. It seems improbable that the plaintiff would wish to undertake to show that any part of the expense of the care of the horses was justified by a reasonable belief that the amount for which the defendant was liable could thereby be reduced below $150 each, but, if he shall so desire the opportunity will be offered. The judgment will be reduced to $476.50, and, if the plaintiff shall so elect, a new trial may be had upon the single issue whether he shall also recover a further judgment for expenditures incurred in caring for the horses, under the test just laid down.

BURCH, PORTER, WEST, MARSHALL, and DAWSON, JJ., concurring.

MASON, J. (dissenting in part). The general rule is well settled that, where animals are killed or property is lost in transit, in an action against the carrier the measure of damage is the market value at the point of destination, less the freight if it has not been paid; no recovery being allowed for freight if it has been paid. I understand that the basis of this rule is the theory that the amount of the freight charged is deemed to enter into the valuation at destination, so that, if the owner were allowed freight as such, he would recover it twice. Merriam, Claims between Shippers and Carriers, §§ 568, 569. Here two of the horses were found to have been so injured as to become entirely worthless, and the amount of the recovery is, not the value of the horses at destination, but the agreed value at the point of shipment. The plaintiff as to these animals gained no benefit from the transportation, and, as the freight did not enter into the amount he recovered, I think he should be reimbursed on account thereof.

JOHNSTON, C. J., concurs in the partial dissent.

(104 Kan. 740)

SCHAEFER v. ARKANSAS VALLEY INTERURBAN RY. CO. (No. 21972.)

(Supreme Court of Kansas. May 10, 1919.)

(Syllabus by Editorial Staff.)

1. RAILROADS ⟸350(17)—DEMURRER TO EVIDENCE.

A demurrer to plaintiff's evidence cannot be invoked to summarily dispose of an issue of fact as to whether on roadway near a crossing a view of the railway and interurban car was obscured by trees, where plaintiff's oral testimony does not harmonize with the facts portrayed by the defendant's photographs.

2. NEW TRIAL ⟸110—GROUNDS.

If the trial judge believes that the verdict has been secured through perjury of witnesses, or through the insincerity or prejudice of the jury, he is bound to grant the motion for new trial, and to set aside such a verdict on his own motion.

3. TRIAL ⟸143 — DIRECTED VERDICT — EVIDENCE.

Where the evidence in an action involved issuable and contested facts with evidence pro

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and con adduced thereon, defendant's motion for directed verdict was properly overruled.

Appeal from District Court, Sedgwick County.

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On petition for rehearing. Denied.

For former opinion, see 179 Pac. 323.

DAWSON, J. Appellant's petition for a rehearing urges that its demurrer to plaintiff's evidence and its motion for a directed verdict were not sufficiently discussed in our original opinion. Schaefer v. Railway Co., No. 21972, 179 Pac. 323.

[1, 2] On one side was the oral evidence, perhaps of dubious worth, that on the roadway near the crossing a view of the railway and interurban car was obscured by trees; on the other side were photographic exhibits, whose accuracy was either conceded or scarcely disputed, and which tended to show, perhaps positively, that the trees did not shut off the view. Appellant says the facts portrayed by the photographs were admitted, and that the ordinary rule as to admissions should govern. But the plaintiff's other evidence, the oral testimony, stood in the way of a demurrer. It was not in harmony with the facts portrayed by the photographs. A demurrer cannot be invoked to summarily dispose of an issue of fact under that state of the evidence. Matassarin v. Wichita R. & Light Co., 100 Kan. 119, 121, 163 Pac. 796. That situation does not substantially differ from that presented in any case where the evidence adduced is partly false and partly true. The question on which side is the truth, or what part of the evidence is true, cannot be settled by demurrer; it is still an issue of fact, and, if through prejudice and insincerity on the part of the jury that issue does miscarry, the only practical remedy is the one of appealing to the sound discretion of the trial court by a motion for a new trial. If the judge believes that the verdict has been secured through perjury of witnesses, or through the insincerity or prejudice of the jury, he is bound to grant the motion for a new trial, and he has the power to set aside such a verdict on his own motion.

[3] Touching defendant's motion for a directed verdict, it scarcely needs to be observed that since this lawsuit involved issuable and contested facts, with evidence pro and con adduced thereon, that motion was properly overruled.

A criticism is made because no controlling significance is given in the opinion to the cases of Bush v. Railroad Co., 62 Kan. 709, 64 Pac. 624, and Railway Co. v. Bussey, 66 Kan. 735, 71 Pac. 261. Appellant contends that those cases should either be followed or overruled. Those decisions have often been cited in crossing accident cases, and still more often urged upon our attention in other cases where the facts were not quite similar. Not infrequently the court has had some trouble in distinguishing pending cases from the Bush and Bussey Cases. But the court has at no time indicated a disposition either to ignore or overrule them. The doctrine they announce was recognized in our opinion. But the law of the Bush and Bussey Cases does not cover all the law on the subject involved in the present case. A rehearing would serve no purpose, and it is therefore denied.

All the Justices concurring.

(104 Kan. 712)

GRISHAM v. UNION TRACTION CO.
(No. 21893.)

(Supreme Court of Kansas. May 10, 1919. Rehearing Denied June 11, 1919.)

(Syllabus by the Court.)

CARRIERS ⟸327 — CONTRIBUTORY NEGLIGENCE OF INTENDING PASSENGER AT CROSSING.

A woman who is killed while attempting to cross an electric interurban railroad track, in front of a rapidly approaching car, which she sees, or can see if she looks, and which she intends to board as a passenger, is guilty of contributory negligence as a matter of law, and her husband cannot recover the damages sustained by him on account of her death.

Appeal from District Court, Labette County.

Action by Fred Grisham against the Union Traction Company. From a judgment for defendant, plaintiff appealed. Affirmed.

Ben Neale, of Greenfield, Mo., Chas. Stephens, of Columbus, E. L. Burton, of Parsons, and Paul MacCaskill, of Columbus, for appellant.

Chester Stevens, of Independence, and John J. Jones, of Chanute, for appellee.

MARSHALL, J. Nora Grisham, the plaintiff's wife, was killed by one of the defendant's cars. The plaintiff brought this action to recover damages for her death. The court sustained a demurrer to the evidence of the plaintiff, and he appeals. The sufficiency of the evidence to compel its submission to the jury is the question presented.

There was evidence which tended to prove the following facts: The defendant operated an electric interurban railroad in Montgomery county. Mrs. Grisham was killed at a regular stop known as stop 14, where a public road crossed the railroad. There the railroad ran northwest and southeast, and the public road ran north and south across the

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railroad. To board a car, passengers intending to travel to the southeast would go to the south side of the track, and those intending to travel to the northwest would go to the north side. West of the public road and north of the railroad, there was a pile of dirt, which for some distance near the track prevented a person, when walking in the public road, from seeing a car approaching from the northwest but from 50 to 200 feet north of the railroad such person could see an approaching car for a distance of from 600 feet to about one-half mile. Closer to the track, on account of the pile of dirt, the car could not be seen by the person walking, until he was about 5 feet from the track. When cars stopped, they usually extended clear across the public road. Mrs. Grisham was familiar with the crossing. The car that struck her was one that had just been repaired. It was not carrying passengers, but was on a trial trip in charge of two employés who were not thoroughly acquainted with the operation of cars on the railroad. The car came from the northwest, at about 30 miles an hour, on approximately the time of a regular passenger car coming from the same direction. Mrs. Grisham started from her home about a half mile away to take the regular passenger car; and, when about 200 feet from the crossing, she commenced to run toward it. She could then see the car. On regular passenger cars, the custom of the defendant was to sound two blasts of the whistle at stations at which the car would stop to take on waiting passengers, and to sound two long and two short blasts of the whistle when it would not stop. A young man was waiting at stop 14 to take the passenger car to the southeast. When the repaired car approached that stop, two blasts of the whistle were sounded, and when still closer, two more blasts were sounded. About 100 yards northwest of the crossing, the motorman turned off the power and let the car coast, but he did not apply the brakes until the car struck Mrs. Grisham. The motorman saw her all the time, and she could see the car all the time except when it was concealed by the pile of dirt. The motorman thought that she was running to catch his car. Mrs. Grisham attempted to run across the track in front of the car, but was struck by it and instantly killed. There was a dispute in the evidence between the motorman and the young man that was waiting. The motorman testified that, when Mrs. Grisham was near the track, she stopped and hesitated for an instant; the young man testified that she never stopped, but kept on running.

There was sufficient evidence to warrant submitting to the jury the question of the defendant's negligence. The real point of controversy is the contributory negligence of Mrs. Grisham.

The plaintiff contends that this is not a crossing case; that Nora Grisham was not a traveler on the highway trying to beat the car, but that she was an intending passenger going to the proper place to board the defendant's car; that she saw the car coming, heard the usual signal of the car indicating that it would stop, saw another intending passenger at the station, and was hurrying to the station to board the car; and that, therefore, the stop, look, and listen rule has no application in this case. These contentions are the foundation of the plaintiff's argument, but in a number of them he is mistaken. It is a crossing case. Nora Grisham was a traveler on the highway, and was trying to beat the car to the station; and, although she was an intending passenger, her intention did not absolve her from the consequences of her own negligence.

This is not a street car case, and the rules applicable to the contributory negligence of a person crossing in front of a street car do not control. The defendant's line of railroad extended from some point in Oklahoma through Montgomery county into Labette county. Nora Grisham was killed in the country at a crossing of a public highway and a railroad. The rules that control in this action are those that apply to injuries at country crossings of highways and steam railroads. Snow v. Indianapolis, etc., R. Co., 47 Ind. App. 189, 195, 93 N. E. 1089; Electric St. Railroad Co. v. Lohe, Adm'r, 68 Ohio St. 101, 67 N. E. 161, 67 L. R. A. 637; note in 4 Ann. Cas. 451; note in Ann. Cas. 1913C, 583; 22 R. C. L. 745.

These rules have been followed by this court in Burzio v. Railway Co., 102 Kan. 287, 171 Pac. 351, L. R. A. 1918C, 997; Schaefer v. Railway Co., 104 Kan. 394, 179 Pac. 323, 181 Pac. 118, and in cases involving crossing an electric interurban railroad on the streets of a city. Williams v. Electric Railroad Co., 102 Kan. 268, 170 Pac. 397.

In Kirkland v. Atchison, T. & S. F. R. Co., 104 Kan. 388, 179 Pac. 362, this language was used:

"This court has often said that a person about to cross a railroad track must use his senses, and if he does not, and by reason thereof injury results to him from a moving train, he cannot recover from the company, even if the company was negligent."

In the last case the person killed was attempting to cross a steam railroad track on a street in Ottawa.

This court has often said that a person who is injured while attempting to cross a railroad track in front of an approaching train which he sees, or can see if he looks, is guilty of contributory negligence, and cannot recover for that injury. Jacobs v. Ry. Co., 97 Kan. 247, 154 Pac. 1023, L. R. A. 1916D, 783, Ann. Cas. 1918D, 384; Wehe v. Railway

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Co., 97 Kan. 794, 156 Pac. 742, L. R. A. 1916E, 455; Pritchard v. Railway Co., 99 Kan. 600, 162 Pac. 315; Bunton v. Railway Co., 100 Kan. 165, 163 Pac. 801.

In 10 C. J. 1111, this language is found:

"Reasonable care is required of a passenger in going on or crossing a railroad track for the purpose of reaching or leaving his train, and if he fails to exercise such care, whereby he is injured, he is guilty of contributory negligence."

Numerous cases from 24 states are there cited to support that rule. Those cases have not been examined, but in McDonnell v. Osborne, 191 Ill. App. 450, the appellate court of Illinois said:

"Where a person intending to become a passenger upon an interurban train was struck by the train while attempting to cross the tracks in front of it, and her own evidence disclosed that she knew of the approach of the train and signaled it before she reached an intervening track which she was obliged to cross, and continued to look at it up to the time she was struck, having misjudged its distance and speed, it was held that contributory negligence was shown as a matter of law."

That rule was followed in Derring's Adm'r v. Virginia Railway & Power Co., 122 Va. 517, 95 S. E. 405.

Mrs. Grisham saw the car, or she could have seen it if she had looked, while she was running to catch it. The plaintiff says that she saw the car and heard the whistle, and was hurrying to the station to board the car. Mrs. Grisham was negligent. If she had not been negligent, she would have not been injured. Her negligence precludes the plaintiff's recovery.

The demurrer to the evidence was properly sustained, and the judgment is affirmed.

All the Justices concurring.

(104 Kan. 785)

CANADAY et al. v. HULL et al. (No. 22134.)

(Supreme Court of Kansas. May 10, 1919.)

(Syllabus by the Court.)

1. HIGHWAYS ⟸28(2)—PETITION FOR PUBLIC ROAD—"RESIDING IN VICINITY."

In section 8756 of the General Statutes of 1915, the statute which provides that a petition for a public road shall be "signed by at least twelve householders of the county residing in the vicinity where said road is to be laid out," the words "residing in the vicinity" may comprehend those residing 15 miles away from a proposed road in the sparsely settled western counties of the state.

2. HOLIDAYS ⟸6 — ACTION OF BOARD OF COUNTY COMMISSIONERS.

A board of county commissioners can, on the first Monday of September, Labor Day, legally consider and act on a petition for a public road.

3. HIGHWAYS ⟸62—LAYING OUT OF PUBLIC ROAD—ATTACK ON PROCEEDINGS—APPEAL.

Parties cannot question the validity of proceedings for laying out a public road, after they have appealed to the district court from an allowance for damages, and the appeal has been tried and determined.

Appeal from District Court, Scott County.

Action for injunction by A. J. Canaday and another against Bert Hull and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

R. W. Hoskinson and Robert S. Field, both of Garden City, for appellants.

H. A. Russell, of Scott, for appellees.

MARSHALL, J. Judgment was rendered in favor of the defendants in an action to enjoin them from opening a public highway. The plaintiff appeals.

The board of county commissioners of Scott county, on a petition signed by 15 householders of that county and by 1 householder of Logan county, established a road in the former county, 15 of 18 miles from Scott City. Of the 15 petitioners from Scott county, 11 lived in Scott City. The petition was first heard on September 4, 1916, which was a legal holiday. Section 5077, Gen. St. 1915. There were a number of postponements, but final action was taken on December 9, 1916, when the road was established and ordered opened. The county commissioners found that the petition was a legal one. Damages were awarded to the plaintiffs and they appealed from that award to the district court, where the matters involved therein were determined. Subsequently this action was brought, and on the trial the court made findings of fact and conclusions of law as follows:

"Findings of Fact.

"The court finds that prior to the bringing of this action the plaintiffs, and each of them, had made claim for damages by reason of the laying out and establishing of the road involved in this action, said claims for damages being regularly made to the board of county commissioners of Scott county, Kan.; that afterwards the plaintiffs herein, being dissatisfied with the damages allowed by the board of county commissioners of Scott county, Kan., appealed therefrom to the district court.

"Conclusions of Law.

"The plaintiffs having filed claim for damages, and having appealed from the award of damages under said claims, they are as a mat-

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ter of law estopped from bringing this action to enjoin the laying out and opening of said road."

[1] 1. The plaintiffs question the validity of the petition on which the board of county commissioners acted. It is argued that the petition did not comply with the law, because it was not signed by 12 householders of the county residing in the vicinity of the road to be established. Section 8756, Gen. St. 1915. Eleven of the petitioners lived in Scott City. The road was 15 or 18 miles away. Did the petitioners reside in the vicinity of the road? The court must take judicial notice of the fact that a number of the western counties of this state, including Scott county, are sparsely populated. It follows that in that county the vicinity of the road may be a number of miles therefrom. Vicinity does not mean a fixed area; it is a relative term, and what is the vicinity of a particular place under one set of circumstances may not be such under other circumstances. While the number of miles may be many, present-day methods of transportation make the time used in traveling over them comparatively short. This court cannot say that a householder living 15 miles away from a proposed road in Scott county does not live in the vicinity thereof.

[2] 2. The plaintiffs contend that the action of the board of county commissioners was void, for the reason that the board first acted on the petition on a legal holiday, Labor Day. This contention is based on the assumption that courts and officers cannot legally act on that day. The assumption is unwarranted. The designation by statute of a day as a legal holiday does not invalidate official or judicial acts performed on that day, unless the statute expressly or by clear implication prohibits the performance of those acts. Note in 19 L. R. A. 320; note in 10 L. R. A. (N. S.) 791; note in Ann. Cas. 1916E, 847; 21 Cyc. 440, 445; Selders v. Boyle, 5 Kan. App. 451, 49 Pac. 320. The statute making the first Monday in September a legal holiday neither expressly nor impliedly prohibits any court or officer from acting on that day.

[3] 3. The plaintiffs cannot question the validity of the proceedings for laying out the road for the reasons stated in Wilson v. Cloud County, 90 Kan. 107, 132 Pac. 1176, where this court said:

"Where a landowner appeals to the district court from the allowance of a claim for damages for the laying out of a road through his land, he thereby affirms that his land has been taken and damaged by the laying out of the road, and he cannot afterward be heard to say that the road was not in fact laid out."

The judgment is affirmed.

All the Justices concurring.

(66 Colo. 540)

BOARD OF COM'RS OF SAN MIGUEL COUNTY v. FLOATEN. (No. 9366.)

(Supreme Court of Colorado. May 5, 1919.)

TAXATION ⟸821(2)—TAX SALES—RIGHTS OF PURCHASER UNDER ILLEGAL SALE — "ASSESSOR."

Rev. St. 1908, § 5747, providing that, when by mistake of the treasurer, clerk, or assessor land has been sold on which no tax was due, the county shall repay the purchaser principal and interest, applies to an erroneous assessment by the state tax commission; the word "assessor" meaning the assessing power, and not merely the county assessor.

Department 2.

Error to District Court, San Miguel County; Thomas J. Black, Judge.

Action by A. H. Floaten against the Board of County Commissioners of the County of San Miguel. Judgment for plaintiff, and defendant brings error. Affirmed.

E. B. Adams, of Telluride, for plaintiff in error.

Catlin & Blake, of Montrose, for defendant in error.

DENISON, J. The state tax commission assessed certain property in San Miguel county not subject to taxation. It was sold for taxes to Floaten, defendant in error, plaintiff below. Afterwards these taxes were abated by the order of the Colorado tax commission, and the plaintiff then demanded the purchase money of the county, which was refused. He then brought this suit and recovered judgment, and the county brings the case here on error. There is no error.

Rev. St. 1908, § 5747, provides:

"When, by mistake * * * of the treasurer, clerk or assessor, * * * land has been sold on which no tax was due at the time, the county shall hold the purchaser harmless by paying him the amount of the principal and interest. * * *"

The county's argument is that the word "assessor" means the county assessor. The plaintiff replies that it means the assessing power, whoever that may be. We think the plaintiff is right. The tax commission was the assessing power, the tax commission made the mistake, and so the matter comes within the terms of the statute. The statute should be construed according to its spirit to effect its purpose. Aggers v. People, 20 Colo. 348, 38 Pac. 386.

The judgment is affirmed.

Judgment affirmed.

GARRIGUES, C. J., and SCOTT, J., concur.

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(66 Colo. 219)

INTERSTATE TRUST CO. v. MONTEZUMA VALLEY IRR. DIST. et al. (No. 9153.)

(Supreme Court of Colorado. May 5, 1919.)

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1. WATERS AND WATER COURSES ⟸231—IRRIGATION DISTRICTS — ASSESSMENTS — NATURE.

Irrigation district taxes levied under the Irrigation District Act are only local improvement of special assessment taxes, and not general taxes, though levied annually throughout the life of the district; no direct benefit to the public ensuing, but only to each particular landowner supplied with water.

2. CONSTITUTIONAL LAW ⟸49—DETERMINATION OF CONSTITUTIONAL QUESTIONS — SCOPE OF INQUIRY.

In determining the constitutionality of the Irrigation District Act, with reference to assessment, the court also necessarily determined the character of tax imposed.

3. WATERS AND WATER COURSES ⟸231—IRRIGATION ACT—TAXATION—POWER OF DISTRICT.

The words, "such additional amounts as may be necessary to meet any deficiency in the payment of said expenses theretofore incurred," found in the Irrigation District Act, do not confer any power upon the district to levy a cumulative tax for this purpose, but refer only to prior general expenses; the act providing for payment of unforeseen expenses for which no estimate had been made.

4. MANDAMUS ⟸3(8)—IRRIGATION DISTRICTS —COMPELLING ADDITIONAL TAX—EXISTENCE OF OTHER REMEDY.

A holder of warrants of an irrigation district cannot compel the directors to levy a cumulative tax on a claim of repudiation owing to nonpayment of the warrants from the assessments levied; the law providing such holder a remedy by tax sale of the land, and a cumulative tax being inapplicable, as it would charge a landowner for benefits conferred on his neighbor's land.

En Banc.

Error to District Court, Montezuma County; W. N. Searcy, Judge.

Mandamus by the Interstate Trust Company against the Montezuma Valley Irrigation District and William B. Ebbert and others, its directors. From an order denying the writ, plaintiff brings error. Affirmed.

Melville & Melville, of Denver, for plaintiff in error.

W. F. Mowry, of Cortez, for defendants in error.

BAILEY, J. In these proceedings, plaintiff below, The Interstate Trust Company, sought by writ of mandamus to compel the board of directors of the Montezuma Valley Irrigation District to certify an additional tax by cumulative levy to the County Commissioners of that county, for the purpose of paying off some $25,000.00 in warrants of that district and held by it, amounting with interest to approximately $38,000.00. There was a demurrer to the writ on the ground that it did not state sufficient facts to constitute a cause of action. The demurrer was sustained, and plaintiff electing to stand by its case as made a judgment of dismissal was entered. The trust company brings the cause here for review.

It is admitted that sufficient levies have been made to pay the warrants in question in full, and that such levies are also sufficient to cover in addition a margin of fifteen per cent. for deficiencies. It appears, however, that many taxpayers are delinquent, and that for this reason the warrants have not been discharged. Therefore plaintiff claims that it is the clear legal duty of the defendant officers to levy and collect an additional tax to pay and discharge these warrants.

It is urged that the words: "such additional amount as may be necessary to meet any deficiency in the payment of said expenses theretofore incurred," found in the statute (Laws 1905, p. 259, § 18), confer the power upon, and make it the duty of, the district officials to levy a cumulative tax for this purpose. The outcome of this suit, therefore, depends wholly upon the construction to be given the irrigation district act.

[1] It is clear that the claim of plaintiff can be upheld only upon the theory that the clause above quoted gives the board of directors of the district general taxing powers, and that the taxes levied under the act are in the nature of general taxes, and are not local or special in character. The question is whether irrigation districts are organized for the purpose of making local improvements, with the power to levy local improvement taxes only, or whether they are so closely akin to municipal corporations in their nature and objects as to give them general taxing powers.

The statute in question was taken in substance from the Wright Act, of California (St. 1887, p. 29, as amended), and under the familiar rule we adopted the construction theretofore given to it by the courts of the state from which it is borrowed. McCord v. McIntyre, 25 Colo. App. 376, 138 Pac. 59. In San Diego v. Linda Vista Irr. Dist., 108 Cal. 189, 193, 41 Pac. 291, 292 (35 L. R. A. 33), the court in determining whether irrigation assessments levied under the Wright Act were a tax within the meaning of a provision of the State constitution providing that all property in the State, not exempt from taxation by federal provisions, should be taxed in proportion to its value, said:

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"But the assessment, to satisfy which the lands in question were sold, is not a tax within the meaning of said provisions of the constitution. The act under which the Linda Vista District was organized authorizes the formation of districts where the lands of the different owners are 'susceptible of one mode of irrigation from a common source, and by the same system of works.' The district, when formed, is a local organization to secure a local benefit to be derived from the irrigation of lands from the same source of water supply, and by the same system of works. It is, therefore, a charge upon lands benefited * * * by a single local work or improvement, and from which the state, or the public at large, derives no direct benefit, but only that reflex benefit which all local improvements confer."

In Irrigation District v. Williams, 76 Cal. 360, 370, 18 Pac. 379, 380, in discussing the nature of irrigation districts, and the relation of irrigation assessments to general taxation, it was said:

"And in no sense can it be said that under the act in question the assessment to pay the bonds is to be levied or collected in order that one man may take another's property for his own exclusive use. * * * Nor does it follow that the method of assessments and their collection adopted must be assimilated to and follow exactly the mode provided in the constitution for the assessment and collection of taxes for general state purposes. The nature of the assessment is one for local improvements, which, however, eventuate in the advancement of the public good, and such assessments and collections can be lawfully made."

Cases in other jurisdictions holding that irrigation district taxes are in reality local improvement or special assessment taxes are: Board of Directors v. Peterson, 4 Wash. 147, 29 Pac. 996; Lundberg v. Green River Irr. Dist., 40 Utah, 83, 119 Pac. 1039; Oregon Short Line R. R. v. Pioneer Irr. Dist., 16 Idaho, 578, 102 Pac. 904; Pioneer Irr. Dist. v. Bradley, 8 Idaho, 310, 68 Pac. 295, 101 Am. St. Rep. 201; Nampa Dist. v. Brose 11 Idaho, 474, 83 Pac. 499; Alfalfa Dist. v. Collins, 46 Neb. 411, 64 N. W. 1086; In re Gallatin Dist., 48 Mont. 605, 140 Pac. 92; and Little Walla Dist. v. Preston, 46 Or. 5, 78 Pac. 982.

In Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369, the Supreme Court upheld the constitutionality of the Wright Act upon the ground that since the power given under the act was to assess special improvement taxes only, that therefore it was constitutional.

This court, in Anderson v. Grand Valley Irr. Dist., 35 Colo. 525, 533, 85 Pac. 313, 316, in passing upon the validity of the district irrigation act of this State, in effect approved the construction given the Wright Act in the Fallbrook Case and in the California cases, in the following language:

"The so-called Wright Act, which, in all substantial particulars, is the same as the one now under consideration, has repeatedly been construed and upheld by the supreme court of California and the supreme court of the United States in the following, among other cases that might be cited: Irrigation Dist. v. Williams, 76 Cal. 360 [18 Pac. 379]; Irrigation District v. De Lappe, 79 Cal. 351 [21 Pac. 825]; Board of Directors v. Tregea, 88 Cal. 334 [26 Pac. 237]; In re Madera Irr. Dist., 92 Cal. 296 [28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106]; In re Central Irr. Dist., 117 Cal. 382 [49 Pac. 354]; Merchants' Bank v. Irr. Dist., 144 Cal. 329 [77 Pac. 937]; Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112 [17 Sup. Ct. 56, 41 L. Ed. 369]; Tregea v. Modesta Irr. Dist., 164 U. S. 179 [17 Sup. Ct. 52, 41 L. Ed. 395]; Tulare Irr. Dist. v. Shepard, 185 U. S. 1 [22 Sup. Ct. 531, 46 L. Ed. 773]."

[2] It is urged, however, that those cases determined simply the constitutionality of the statute and not the character of the assessments. While it is true that the question was primarily one as to the constitutionality of the act, the courts in determining that question were obliged also to determine the character of the tax imposed. The Fallbrook Case, supra, specifically upheld the constitutionality of the act upon the ground that such tax is akin to local improvement assessments and not a general tax. Indeed, it appears that the courts of all jurisdictions which have passed upon irrigation district laws have either expressly or by necessary implication held the assessments levied thereunder to be local improvement taxes.

Plaintiff contends, however, that irrigation district assessments, being levied annually throughout the life of the district, are for that reason inconsistent with the theory that the taxes are for local improvements. From a legal viewpoint this circumstance does not affect the character of the assessments. The difference between the assessments for the paving of streets and one for the irrigation of land is physical and not legal. In the first instance the result is accomplished and the benefit conferred when the paving is completed; in the second, in order to render the benefit a continuing one the assessments in the very nature of things must also be continuous. But this fact cannot be held to change that which is in fact a local improvement assessment into a general tax.

In Dillon on Municipal Corporations, section 1447, it is said:

"Not only the general power to tax, but the power to make local improvements at the expense of the property benefited is like all other legislative power * * * a continuing one unless the contrary appears, and hence it is not exhausted by being once exercised."

Irrigation district assessments are distinguished from taxes levied by a municipality for water works, and taxes levied for

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maintenance of schools because of the public nature of the latter. In the latter cases there is a direct public benefit, general in character, for which the public at large, through general taxes levied for that purpose, must pay. But in the construction and maintenance of an irrigation system there is obviously no direct general benefit. The direct advantage is to the particular landowner whose land is supplied with water, and he pays in proportion to the benefits received, the land itself being held for such payment.

[3] The meaning of the phrase: "such additional amounts as may be necessary to meet deficiency in the payment of said expenses, theretofore incurred," refers to prior general expenses. The act provides, the law at that time permitting such liabilities to be incurred, for the payment of unforeseen or emergency expenses, for which no estimate had been made, levy certified or warrants issued. No other or different construction as to the purpose and meaning of this clause, if the constitutionality of the statute is to be upheld, is possible.

[4] The views herein expressed in no manner give support to the claim of repudiation. The liabilities of the district are a charge upon the land ratably, with the acre as the unit, on which basis assessments are determined according to benefits. Back of each dollar of debt stands ratably the irrigable land of the district, the extent of which has been carefully and exactly ascertained. The law provides the method whereby warrant holders may take the land itself at tax sale in lieu of warrants if they so desire. This is the letter of their contract and this is the remedy they must have understood was provided for them, in the event of failure of payment of the warrants, when they assumed the relationship of creditor to the district. This manifestly is not repudiation since the debtor stands ready to fulfill to the utmost the provisions of the contract according to its precise terms.

Upon principle and authority, therefore, we conclude that the taxing power given irrigation districts is the power to levy local or special improvement assessments only. Under this construction the phrase "deficiency in the payment of said expenses theretofore incurred," does not empower, and does not purport to empower, the district to add to the yearly expenses, by cumulative levies, an amount sufficient to cover unpaid warrants for the expenses of preceding years. To strain the intent of the statute to this construction would be in effect to compel a portion only of the landowners, perhaps but one of them, to bear the whole burden of the district. This is not only inconsistent with and contrary to the theory of special assessments, which is that assessments shall be in proportion to the benefits conferred, but amounts to confiscation in the guise of taxes for local improvements.

Neither the clause relied upon by plaintiff, nor the act taken as a whole, viewed from any angle, contemplates that the property of one landowner shall become liable for the assessments upon other lands where the owners fail or refuse to pay. The assessment is not based upon the value of the land in the district as a whole, but is apportioned ratably upon irrigable land only, according to benefits, in conformity with the law of special assessments, under which the district, through a majority, may include land against the will of its owner. To hold that one owner is liable for the assessments due for benefits conferred upon the land of his neighbor would be violative of both state and federal constitutions, and for this reason alone the argument against the contention of plaintiff should be conclusive. A construction of this act which charges the property of a faithful few with the payment of the entire cost of the project is manifestly contrary to the purpose and spirit of the act and cannot be legally upheld on any theory. Such a rule would be fundamentally wrong, and subversive of every legal principle governing assessments for local improvements.

It is admitted that all assessments required by law to be made have been levied. If the assessments have not been collected the fault does not lie with the system of levying the tax, but in the collection thereof. Under these circumstances plaintiff has the same remedy now which it originally had, and which it is conclusively presumed to have known was its only remedy when it became the owner of the warrants herein involved. To overthrow the system of levying assessments according to benefits, and substitute cumulative levies upon the authority of a clause in an act which has been held by the courts of many jurisdictions and by the Supreme Court of the United States to bestow no such power, would be not only contrary to natural justice, but in direct conflict with the clear purpose and intent of the act itself.

In reaching this conclusion we are not unmindful of the decision of the U. S. Circuit Court of Appeals, of the Eighth Circuit, reported in Norris v. Montezuma Valley Irr. Dist., 248 Fed. at page 369, 160 C. C. A. 379. That opinion, while persuasive, is not controlling, and was by a divided court, with a strong logical and convincing dissenting opinion. In any event, it is the province of the courts of this State to interpret its own statutes and we are convinced, for the reasons herein before stated, that the act under consideration confers no such power as is indicated in the prevailing opinion to which reference is above made.

It is manifest that to command the defendants to make the proposed levy would

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be to enjoin upon them the doing of a thing which they are not only not required by law to do, but which they in fact have no legal right to do. The judgment of the trial court is sound and should be affirmed.

Judgment affirmed.

All concur.

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(66 Colo. 525)

INTERSTATE TRUST CO. v. SMITH, County Treasurer. (No. 9154.)

(Supreme Court of Colorado. May 5, 1919.)

TAXATION ⟸527½ — COLLECTION — INJUNCTION—SPECIAL TAXES.

A county treasurer may accept general state, county, and school taxes levied against lands in an irrigation district, without at the same time requiring the payment of the irrigation district assessments; such assessments being special taxes levied for local improvements only.

En Banc.

Error to District Court, Montezuma County; W. N. Searcy, Judge.

Suit by the Interstate Trust Company to restrain Charles R. Smith, as Treasurer of Montezuma County, Colo., and ex officio Treasurer of the Montezuma Valley Irrigation District, from accepting certain taxes. From a judgment of dismissal, plaintiff brings error. Affirmed.

Melville & Melville, of Denver, for plaintiff in error.

W. F. Mowry, of Cortez, for defendant in error.

BAILEY, J. Plaintiff in error, plaintiff below, The Interstate Trust Company, brought this action to restrain defendant, as county treasurer of Montezuma County, from accepting and giving receipts for the general county, state and school taxes levied against lands in The Montezuma Valley Irrigation District, without at the same time requiring the payment of The Montezuma Valley Irrigation District taxes. The defendant interposed a demurrer to the complaint, which was sustained. Plaintiff elected to stand upon its complaint and a judgment of dismissal followed. Plaintiff brings the cause here for review.

The case of Interstate Trust Co. v. Montezuma Valley Irr. Dist. et al., decided by this court at this term 181 Pac. 123, determines that irrigation district assessments are special taxes levied for local improvements only. A refusal therefore of the county treasurer to accept general state, county and school taxes unless and until the taxpayer had also paid his irrigation district assessments in our opinion finds no support either in reason or law, statutory or otherwise. The judgment of the trial court is right and should be affirmed.

Judgment affirmed.

(66 Colo. 306)

NEW ALBANY HOTEL CO. v. DINGMAN. (No. 9219.)

(Supreme Court of Colorado. June 2, 1919.)

1. INNKEEPERS ⟸11(1) — "FOR SAFE-KEEPING."

Where guest upon leaving hotel arranged to have her baggage transferred to her residence, the baggage was not left "for safe-keeping" within Rev. St. 1908, § 3012 (Mills' Ann. St. 1912, § 3447), making innkeeper liable merely as a gratuitous bailee for baggage left with him for safe-keeping after guest has left inn, but was left to be removed at the earliest possible time.

[Ed. Note.—For other definitions, see Words and Phrases, Safe-keeping.]

2. INNKEEPERS ⟸11(1) — INNKEEPERS' LIABILITY—REMOVAL OF GOODS.

The innkeeper's liability does not cease at the very instant a guest leaves the inn, but guest has a reasonable length of time, dependent on the circumstances of the case, in which to remove the goods, during which period the extraordinary liability of the innkeeper continues.

3. INNKEEPERS ⟸11(1) — INNKEEPERS' LIABILITY—"UNFORESEEN CAUSE."

Ordinarily a loss of baggage as the result of a theft or burglary is not a loss "by any unforeseen causes" within Rev. St. 1908, § 3013 (Mills' Ann. St. 1912, § 3448), providing that innkeeper shall not be liable for loss to guest's property "by any unforeseen causes," since innkeeper is bound to foresee or foreknow that thefts and burglaries are liable to happen.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Unforeseen Cause.]

4. APPEAL AND ERROR ⟸931(4)—REVIEW—PRESUMPTIONS.

In guest's action against innkeeper for loss of baggage stolen from baggageroom, where judgment was rendered for guest, it will be presumed on appeal, where there was no specific finding as to whether the loss was due to an unforeseen cause, that the loss was not occasioned by an unforeseen cause, and that court found all those facts which are essential to judgment rendered.

5. APPEAL AND ERROR ⟸1012(2)—REVIEW—JUDGMENT.

A judgment which is not manifestly against the weight of the evidence, but is well supported by the evidence, cannot be disturbed.

6. EVIDENCE ⟸588—CONTRADICTION BY CIRCUMSTANCES.

The court is not bound to take as true testimony contradicted in some degree by some circumstances disclosed by other evidence.

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En Banc.

Error to County Court, City and County of Denver; E. J. Ingram, Judge.

Action by Mrs. R. D. Dingman against the New Albany Hotel Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. W. Kelley and John Horne Chiles, both of Denver, for plaintiff in error.

Harry G. Saunders, of Denver, for defendant in error.

ALLEN, J. This is an action brought by the plaintiff, who had been a guest at the defendant's hotel, against the defendant hotel company, as an innkeeper, to recover damages occasioned by the loss of a part of the plaintiff's baggage from the hotel. The case was originally instituted in a justice court, and there are therefore no pleadings. On appeal to the county court, and upon trial before the judge thereof, without a jury, the court found the issues generally for the plaintiff, and further found specially that the plaintiff "was a guest of the defendant company, and that her baggage was stolen from the baggageroom of the hotel during the time she was a guest of the hotel." Judgment was entered for plaintiff in the sum of $300. To review the findings and judgment of the trial court, the defendant brings the cause here upon writ of error.

It is conceded that two pieces of baggage, the same being a suit case and a traveling bag, belonging to the plaintiff, were stolen from the baggageroom of the defendant's hotel.

The plaintiff in error, defendant below, contends that, at the time the baggage was stolen, the plaintiff had ceased to be a guest of the hotel. In other words, the contention is that the defendant was not liable as an innkeeper for the loss of the baggage, but, if liable at all, then only as a gratuitous bailee, as provided by section 3012, R. S. 1908 (section 3447, M. A. S. 1912), which reads as follows:

"In case any person who has been the guest or patron of any hotel or public inn shall cease to be such guest or patron, and shall leave with the landlord or keeper of such hotel or public inn any baggage or other personal property, for safe-keeping, and the landlord or keeper shall accept and receive the same for safe-keeping, and shall make no charge for services or storage in keeping such property, then such landlord or keeper of a hotel or public inn shall be liable only as a gratuitous bailee and as such shall be liable for no sum greater than fifty dollars ($50.00)."

The contention, above mentioned, cannot be sustained. The evidence clearly shows that, at the time the baggage was stolen, the plaintiff was a guest of the hotel in the sense that the relationship of innkeeper and guest still existed between the parties, so far as the defendant's liability as an innkeeper for the loss or theft of the baggage of a guest is concerned. The plaintiff became a guest at the defendant's hotel on November 15, 1916, and remained such guest until some time in the forenoon of November 20th. On the morning of the day last mentioned, the plaintiff checked out, received a statement from the defendant's bookkeeper, and paid her hotel bill. At the same time, the plaintiff asked the bookkeeper if she could arrange to have her "baggage transferred" to her residence. The defendant's employé at once answered in the affirmative, and called a porter from some place in the lobby of the hotel and informed him of the plaintiff's request or desire to have her baggage removed. The evidence shows that the porter then went to the room which had been occupied by the plaintiff, "to get her baggage," and, as he further testified, "took the baggage to the baggageroom, and went and notified an expressman." The testimony fairly shows that the plaintiff's suit case and traveling bag were stolen from the baggageroom of the hotel within a very few minutes after they were taken there.

[1, 2] Under the circumstances above described, the statute relied on by the defendant can have no application. The facts hereinbefore noted do not show that the plaintiff left her baggage with the defendant landlord "for safe-keeping," within the meaning of the statute in question. The plaintiff merely left her goods at the hotel, to be removed at the earliest possible time, and for this purpose the baggage was taken, with the defendant's knowledge and consent, to the baggageroom of the hotel, and it was there placed and left under circumstances indicating that it would be removed forthwith. It was not contemplated by any one that the baggage would remain at the hotel any longer than it would take to find and notify an expressman, and for him to arrive and remove the same. In the meantime the defendant hotel company remained liable as an innkeeper, not as a gratuitous bailee, and it was while this liability attached that the baggage in question was stolen. The law in this respect is as stated in 14 R. C. L. 532, § 31, as follows:

"The innkeeper's liability does not, however, cease at the very instant a guest leaves the inn, but the latter has a reasonable length of time, dependent on the circumstances of the case, in which to remove his goods, during which period the extraordinary liability of the innkeeper continues."

The same rule has been laid down by this court in Murray v. Marshall, 9 Colo. 482, 13 Pac. 589, 59 Am. Rep. 152, and approved in Clark v. Ball, 34 Colo. 223, 82 Pac. 529, 2 L. R. A. (N. S.) 100, 114 Am. St. Rep. 154. The Murray Case is cited in 22 Cyc. 1088, in

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support of the text, which reads as follows:

"After a guest pays his bill and departs, leaving goods to be at once removed, the innkeeper's liability for the goods continues for a reasonable time pending removal."

The record shows that the two pieces of the plaintiff's baggage were stolen from the defendant's baggageroom before an expressman could or did arrive to remove the same. The baggage was stolen while the defendant's liability with respect to the same was yet that of an innkeeper. The trial court committed no error in finding that the baggage was stolen "during the time" the plaintiff "was a guest of the hotel." The statute, above cited, having no application in the instant case, the trial court properly refused to limit defendant's liability to $50 as provided by the statute in cases where the baggage is left with the landlord "for safekeeping."

The defendant further contends, in effect, that the loss of the plaintiff's baggage was due to an "unforeseen cause," and that it, the defendant hotel company, is, on this account, relieved of all liability by section 3013, R. S. 1908 (section 3448, M. A. S. 1912), which reads as follows:

"The landlord or keeper of any hotel or public inn shall not be liable for loss of or damage to the property of any guest or patron of such hotel or public inn by fire or by any unforeseen causes or by inevitable accident, unless such loss or damage shall occur on account of his negligence or the negligence of his servants or employés."

This statute precludes the application or adoption, in this state, of the strict rule, relating to an innkeeper's liability, sometimes referred to as the "doctrine of absolute liability." See 14 R. C. L. 514, § 18. This rule is referred to in 22 Cyc. 1081, as one by which "he (the innkeeper) is liable, like the carrier, for all goods of the guest lost in the inn, unless the loss happens by the act of God, or a public enemy, or by the fault of the owner." Under our statute, the keeper of any hotel or public inn is not liable if it is shown that the loss of the goods or baggage was due to "unforeseen causes," and happened without fault or negligence on his part.

[3] "Unforeseen causes" are causes which are not foreknown. 39 Cyc. 685. They may be said to be causes which could not have been foreseen as likely to arise or occur. See Viterbo v. Friedlander, 120 U. S. 707, 7 Sup. Ct. 962, 30 L. Ed. 776.

It is a matter of common knowledge that losses of baggage by theft are likely to occur. It is clear that such losses cannot be said to be due to an unforeseen cause. Even an ordinary burglary is not an "unforeseen cause," within the meaning of the statute, since it is not unlikely to happen, and it is the recognized duty of an innkeeper to guard against the same as well as against larceny. The following language is found in the opinion in McDaniels v. Robinson, 26 Vt. 316, 62 Am. Dec. 574:

"It must be obvious to all that an ordinary burglary, such as might have been expected to happen upon proper temptation, should have been provided against by the host, and the omission to do so is itself negligence. * * * And following the general rule of diligence, on the part of innkeepers, of 'uncommon care,' as laid down by Lord Holt, or, as some of the books, have it, 'the extremest care,' it would certainly be incumbent upon them so to fasten the inn itself, where their guests lodge, that it would not be liable to be broken by common force or art."

An innkeeper is bound to foresee or foreknow that thefts and burglaries, if not guarded against, are liable to happen within his inn. Ordinarily, therefore, a loss of baggage as the result of a theft or burglary is not a loss "by any unforeseen causes," within the meaning of the statute.

[4, 5] The trial court made no specific finding as to whether or not the loss of the plaintiff's baggage was due to an unforeseen cause, and it must therefore be assumed that the court found all those facts which are essential to the judgment rendered, including the fact that the loss of the property was not occasioned by any unforeseen cause. In this connection, the judgment is not manifestly against the weight of the evidence, but is well supported by the evidence, and therefore cannot be disturbed.

The defendant requested the court to find that—

"The outer rear door of the hotel was forced open, and the property of the plaintiff taken and carried away by thieves, without any negligence on the part of the employés of the hotel, or on the part of the defendant."

[6] The request was refused; and, the court having found that "the baggage was stolen from the baggageroom," it may be assumed that the court refused the request to find that "the outer rear door of the hotel was forced open" because the evidence, including all reasonable inferences which could be drawn from the testimony, was not sufficient to justify such a finding. There was some testimony that the outer door of the baggageroom "was pried open some way," and that "the hinges were broken off," but in some degree this testimony was contradicted by circumstances disclosed by other evidence, and the court was not therefore bound to take this testimony as true. As said in Gregory v. Filbeck's Estate, 20 Colo. App. 131, 134, 77 Pac. 369, 370, quoting from a New York case (Elwood v. W. U. Tel. Co., 45 N. Y. 549, 554, 6 Am. Rep. 140):

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"He [the witness] may be contradicted by circumstances as well as by statements of others contrary to his own. In such cases, the courts and juries are not bound to refrain from exercising their judgment and to blindly adopt the statements of the witness, for the simple reason that no other witness has denied them, and that the character of the witness is not impeached."

The record discloses some circumstances from which the trial court might have inferred that no burglary attended by unexpected or unforeseen force, or other unforeseen circumstances, was committed at the hotel, but that the baggage was lost as the result of a larceny or of an ordinary burglary, "by common force or art," which, for reasons above stated, would not be a loss due to an "unforeseen cause," within the meaning of the statute.

We find no error in the trial court's failure to render judgment for defendant on the ground that the loss of the plaintiff's goods was due to an unforeseen cause.

Other points are discussed in the briefs, but we do not deem them of sufficient importance, in this case, to require an opinion thereon. We find no reversible error in the record, and the judgment is therefore affirmed.

Affirmed.

(66 Colo. 515)

COLORADO SPRINGS & I. RY. CO. v. HUNTLING. (No. 9073.)

(Supreme Court of Colorado. May 5, 1919.)

1. RELEASE ⟸57(2) — PERSONAL INJURIES — FRAUD—EVIDENCE.

In personal injury action, plaintiff's release, given to defendant upon settlement, cannot be disregarded on ground of fraud, in absence of some clear and convincing evidence of fraud.

2. RELEASE ⟸55 — MISREPRESENTATIONS — PERSONAL INJURIES—BURDEN OF PROOF.

Plaintiff in personal injury action, who alleges that release was executed under undue influence and misrepresentations as to extent of injuries by defendant's physicians, must prove that such physicians were in defendant's employ.

3. RELEASE ⟸57(1)—VALIDITY—ADVICE OF PHYSICIANS—SUFFICIENCY OF EVIDENCE.

Evidence *held* to show that physicians who advised plaintiff to settle for her injuries and execute release, and informed her as to the extent of her injuries, were not in defendant's employ, but were plaintiff's advisers, acting in her behalf and at her request.

4. RELEASE ⟸16 — VALIDITY — PHYSICIANS' ADVICE—MISTAKE AS TO EXTENT OF INJURIES.

Release executed by injured person upon advice of her physicians, where there is nothing to impugn the good faith of such advice, is valid, though physician may have been mistaken as to extent of her injuries, and although plaintiff's legal adviser advised against release.

5. RELEASE ⟸17(2) — VALIDITY — PERSONAL INJURIES—ADVICE—MISREPRESENTATIONS.

Injured person is not entitled to rescind release because she was advised by physician and claim agent of railroad responsible for accident, unless such advice was coupled with false representations, on which injured person relied.

6. TRIAL ⟸252(17)—INSTRUCTION—APPLICABILITY TO CASE.

In personal injury action, instruction that plaintiff was not entitled to rescind release, ever if she had been advised to execute it by defendant's physician and claim agent, unless advice had been coupled with false representations, upon which she relied, was inapplicable to case, where plaintiff had testified that she had not relied upon defendant's physician.

7. RELEASE ⟸16—PERSONAL INJURIES—MISTAKE AS TO EXTENT OF INJURIES.

That injured person was mistaken as to extent of injuries does not invalidate release, in absence of proof of actual fraud in procuring release.

8. RELEASE ⟸21 — RATIFICATION — USE OF MONEY.

Injured person ratified release procured from her by misrepresentations as to extent of injuries, where she deposited check four months after execution of release, after she had left hospital and realized extent of injuries, and for two years thereafter continued to use the money.

9. RELEASE ⟸21—VOIDABLE RELEASE—RATIFICATION.

Ratification must be predicated upon an actual and existing purpose to approve the act.

10. RELEASE ⟸21—RATIFICATION—DELAY IN RESCINDING.

Delay in rescinding voidable release does not take away the right to ratify it.

11. RELEASE ⟸21 — RATIFICATION — ELECTION.

Party who may rescind release may either rescind or ratify it, so long as no election has been made.

12. RELEASE ⟸21 — FRAUD — RESCISSION — REASONABLE DILIGENCE.

Release procured by fraud must be rescinded by injured person with reasonable diligence after discovery of the fraud.

Department 1.

Error to District Court, El Paso County; John E. Little, Judge.

Action by Jennie M. Huntling against the Colorado Springs & Interurban Railway Company. Verdict for plaintiff, and defendant brings error. Reversed, with directions to enter judgment of dismissal.

This was an action for damages, brought by Jennie M. Huntling against the Colorado Springs & Interurban Railway Company for injuries sustained in a street railway acci-

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dent in the city of Colorado Springs. The parties are hereinafter designated as in the trial court.

The accident occurred August 25, 1912. Plaintiff was immediately removed from the place of her injury to a nearby drug store, where she was attended by Dr. Hanford, the company's physician and surgeon, under whose directions she was taken to the place of her temporary residence, and two days later transferred to Bethel Hospital, stopping on the way for an X-ray of her injuries at the office of Dr. Brown. Plaintiff was 49 years old, and her former home was in Beatrice, Neb. About a week prior to the accident she came to Colorado, accompanied by her brother and other relatives, on a sightseeing expedition. These relatives remained with her until about a week after the accident. For 18 years her occupation had been that of clerk in a dry goods store. Her average wages for some time prior to her injury had been $50 per month. Up to that time her health had always been good. Since then it has been broken, and her crippled condition, resulting from the accident, required her to use crutches down to the date of the trial. Dr. McClenahan was called in by Dr. Hanford and examined the plaintiff on the evening following the injury. After the plaintiff had been for some time in the hospital, she consulted with Judge Orr, one of her attorneys in the trial in the court below and in this court. She says she was not satisfied with the way she was getting along, so sent for Judge Orr and advised with him, and as a result thereof he sent Dr. Lloyd R. Allen to examine her; that she did not think Dr. Allen was one of the company's physicians, but now believes he was employed by them. Dr. Allen examined the plaintiff first about September 15th. He testified that she became his patient on that day, and so continued until November 23d. When he first saw her, he talked to her about the advisability of having some other than the company's surgeon see her. It is perfectly evident that she acquiesced in this arrangement, and Dr. Allen, who did not practice surgery, called in Dr. Lewis H. McKinnie, who usually worked with him, and who, at his request, visited the plaintiff once or twice; the first time being on September 20th. On November 9th John O. Henry, claim agent for the company, visited plaintiff at the hospital and talked with her, as he had several times prior thereto, about a settlement. Plaintiff says Dr. Allen had told her she would probably not be able to work that winter. She says that on November 9th, when the claim agent called, he tendered her a check for $900 and told her that was all the company would pay, and she could take that or nothing, provided she had not employed an attorney; if she had, the company would pay nothing; that he had settled her hospital and other expenses. Thereupon she asked to see Dr. Allen, who was in the building and was sent to her. Upon consultation, he gave her his opinion as to her condition, stated that he thought the settlement offered was fair, and advised her to accept it, but requested her not to tell Judge Orr that he had made that recommendation. Thereupon Mr. Henry returned to her room, delivered her the check for $900, and the following release and receipt were executed:

"Release.

"Know all men by these presents that I, Jennie M. Huntling, now of Bethel Hospital, and Beatrice, Neb., for and in consideration of the sum of nine hundred dollars and Dr. McKinnie, and $20 to Dr. Lloyd Allen and other valuable considerations to me this day in hand paid by the Colorado Sprihgs and Interurban Railway Company, a corporation, have released, remised, and forever discharged, and by these presents do release, remise, discharge, and acquit the said company, its successors and assigns, from and of all claims and demands of every kind, nature, and character whatsoever, which I ever had or now have against said company from the beginning, and especially from and of all claims, demands, damages, and causes of action which I ever had or now have, or which I or my heirs, executors, or administrators hereafter shall, can, or may have for, upon, or by reason of that certain accident occurring on, to wit, the 25th day of August, 1912, at or near North Tejon and Bijou in the town or city of Colorado Springs, state of Colorado, wherein I suffered various personal injuries.

"Dated at Colorado Springs, Colorado, this 9th day of Nov., 1912.

"Jennie M. Huntling.

"Witnesses to Signature:

"Mrs. T. Duckless,

"J. O. Henry, Claim Agent."

"The Colorado Springs and Interurban Railway Company, to Jennie M. Huntling, Dr.

"Date, Nov. 9, 1912.

"Settlement in full for accident of Aug. 25, 1912.

"Received Nov. 9, 1912, from the Colorado Springs & Interurban Railway Co. nine hundred dollars, in full payment of the above account. Jennie M. Huntling.

"Note.—The above receipt must be dated and signed by the party in whose favor this voucher is made, or, where signed by another party the authority for doing so must, in all cases, accompany it. Where receipted for by any corporation, the party signing will please designate his official title and name of corporation."

Plaintiff remained in the hospital some two weeks after the settlement under the care of Dr. Allen. She then left the institution and has since resided in Colorado Springs. She carried the check for $900, with which settlement was made, until March 4, 1913, when she deposited it to her checking account and continued to check against it from that time until about March 1, 1915, when it was exhausted.

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The original complaint in the present action was filed May 14, 1914; the amended complaint June 14, 1914. Plaintiff claimed damages in the sum of $30,000, due solely to the negligence of the company. The first defense is in substance a general denial; the second, a plea of contributory negligence on the part of the plaintiff; the third, the settlement above referred to. Plaintiff by her replication denied contributory negligence, and as to the settlement alleged that from the time of the accident until the date of the settlement she was in charge of "the physician employed, directed, and controlled by defendant"; that said physician misrepresented to her the extent of her injuries, represented to her that she had practically recovered, kept her under the influence of drugs and opiates, so that she felt little pain, and advised her to accept the tender of the defendant; that the claim agent of the company co-operated with the physician to deceive her and mislead her into such settlement; and that she was under the influence of drugs at the time she signed the release and receipt.

The cause was tried June 27, 1916, and the verdict of the jury was for plaintiff in the sum of $9,100, being $10,000 less the $900 already paid.

Chinn & Strickler and J. Alfred Ritter, Jr., all of Colorado Springs, and Robert G. Argo, of Washington, D. C., for plaintiff in error.

Orr, Robinett & Mason and Louis W. Cunningham, all of Colorado Springs, and Clarence M. Hawkins, of Denver, for defendant in error.

BURKE, J. (after stating the facts as above). [1] The trial court very properly instructed the jury that the orderly method of procedure for it to pursue in arriving at its verdict would be to determine first the validity of the release. This is likewise the "orderly method" here. The validity of this release depends, first, upon the fairness and good faith of its original execution; if these be wanting, or if there be sufficient evidence thereof to justify the submission of that question to the jury, then, second, upon plaintiff's ratification. It has been said by this court in Jessey v. Butterfield, 61 Colo. 256, 157 Pac. 1, that the proof of fraud must be "clear and convincing," and this is admitted by counsel for plaintiff to be the rule. It is the rule which was given by the trial court in this case in instruction No. 7, but the mere giving of such a rule does not furnish such proof. There must have been some evidence before the jury which it would be entitled to consider as "clear and convincing." There is none in this case.

Plaintiff's allegation of having been drugged to such an extent as to prevent her from comprehending the extent of her injuries at the time of the settlement, or the nature and extent of the settlement, is wholly unsupported by proof.

[2, 3] Her allegations of fraud, misconduct, and undue influence on the part of defendant's physician, Dr. Hanford (if it was to Dr. Hanford such allegations were intended to apply) are very unsatisfactorily shown. If intended to apply to Drs. Allen and McKinnie, they are without force until sufficient evidence be adduced to justify the jury in finding that these doctors were in the employ of the company. The proof here not only fails, but conclusively shows the contrary. Plaintiff's first employment of an adviser was that of Judge Orr, her attorney. Through him she employed Dr. Allen. Through Dr. Allen she employed Dr. McKinnie. These were her advisers acting in her behalf and at her request. There is absolutely nothing in this record to impeach their good faith, or their loyalty to her interests. Under such circumstances, it would be difficult to establish her right to rely upon representations made to her by the company's agents and employés; but we have her own uncontradicted testimony that she did not so rely.

[4] Dr. Allen gave her his best judgment as to the nature and extent of her injuries and the probable time required for her recovery. There is nothing to impugn the good faith of his advice, though he may have been mistaken in some of his conclusions. Apparently she saw fit in the matter of settlement to rely upon her doctor rather than her lawyer. That was her own affair, and settlement made under such circumstances is just as binding as though it were made under the guidance and advice of her attorney. The whole theory of Drs. Allen and McKinnie representing the defendant company, as well as the theory that this settlement was procured by fraud and misrepresentation, is without foundation save in the unwarranted inference and argument of counsel.

[5, 6] By instruction No. 8 the jury was told that—

"Even if the physician or claim agent, or both of them, advised the plaintiff to execute said release, this would not entitle her to rescind it, unless they coupled this advice with false representations on which she relied."

The instruction was correct, but had no application to the case. If "the physician" referred to therein was Dr. Hanford, plaintiff testifies she did not rely upon his representations, but expressly called Dr. Allen and acted upon his advice. If the physician referred to is Dr. Allen, then no advice given by him and no reliance placed upon his representations can form any basis for the recovery, because he was her physician, and for his representations and advice the company is not responsible.

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The case of Guldager v. Rockwell, 14 Colo. 459, 24 Pac. 556, so far as the receipt and the release are concerned, was similar to the instant case. The plaintiff there, as here, acted with the full knowledge of her rights. The document signed was, in effect, similar to the one here in question. The court held that "there was no evidence upon which fraud or mistake could be predicated," and held the contract a bar to the action. There is no such evidence here.

If there were no actual fraud perpetrated in procuring the release, must it, nevertheless, be held a settlement for such injuries only as plaintiff says she was told by the physicians, and believed, she had sustained?

[7] One of the principal cases relied upon by plaintiff is Lumley v. Wabash R. Co., 76 Fed. 66, 22 C. C. A. 60. In the absence of proof of actual fraud, this authority is sufficient to defeat any recovery by plaintiff in the present case. The court there said (76 Fed. 70, 22 C. C. A. 64):

"The case is not one where it was sought to compromise and settle a general claim for all the injuries resulting from a particular accident, known and unknown. If one agrees that he will receive a given amount in satisfaction and settlement of his damages sustained through a particular accident, it is not essential that every possible consequence of the tort shall be mentioned, considered, or enumerated. The subsequent discovery by one giving such a release that he was worse hurt than he had supposed, would not, in and of itself, be ground for setting aside the settlement or limiting the release. * * * If a release is given specifically mentioning the particular injuries known and considered as the basis of settlement, general language following will be held not to include a particular injury then unknown to both parties of a character so serious as to clearly indicate that, if it had been known, the release would not have been signed."

The court held that to be a case in which a release had been given "specifically mentioning the particular injuries known and considered as the basis of settlement," whereas the instant case is clearly one "where it was sought to compromise and settle a general claim for all the injuries resulting from a particular accident," and there is not to be found in the release now under consideration a single word relating to particular injuries.

[8] Even if the correctness of the foregoing conclusion were in doubt, still the plaintiff was barred from recovery in this action because she had clearly ratified the settlement in question.

[9-11] It cannot be disputed that ratification must be predicated upon an actual and existing purpose to approve the act, as said in Manning v. Heidelbach, 153 App. Div. 790, 138 N. Y. Supp. 750, 754; nor that mere delay in rescinding does not take away the right, as held in Wicks v. Smith, 21 Kan. 412, 30 Am. Rep. 433; nor that, so long as no election is made, a party retains the right to determine it either way, as held in Clough v. Ry. Co., 7 Law Rep. Ex. Cases, 26–35.

But some acts are such a clear evidence of purpose as to admit of no contradiction. Delay may be so great, considering all the circumstances of the case, as to be equivalent to decision, and election is sometimes better evidenced by conduct than language.

It is argued that plaintiff spent the money before she discovered the fraud. The claim of fraud is predicated upon the theory that the doctors whom she believed to be hers, and hence relied upon, were in fact the company's. If this contention is true, there is no evidence or allegation as to the date of her discovery thereof, and the only inference is that she discovered it when they appeared as witnesses and testified contrary to her expectation. Although she long had in her possession the money paid her by the company under this settlement, there is no evidence of any attempt on her part to settle with those whom she thought to be her physicians, or of their refusal to accept payment from her. The conclusion is inevitable that she knew these were her servants and that she understood their bills, as well as hospital expenses, were being paid by the company, in addition to the $900, as a part of the settlement.

If plaintiff were not in the full possession of her faculties and competent to contract, when this settlement was made, that knowledge must have come to her at least within a short time after she left the hospital late in November, and, with this check for $900 in her possession, she must have been cognizant of the fact that something unusual had occurred. If, as she says, she had been told, and believed, that her injuries were slight and temporary, and that she could walk without her crutches if she only thought so, she knew the contrary when she cashed this $900 check in March following. If she were misled on any other matter relating to her injuries, except as to the exact location and nature of the fracture (which she claims to have discovered by the X-ray examination of March, 1915), she knew the contrary prior to the filing of her complaint March 14, 1914, yet she took no steps to rescind the settlement and continued to check on the proceeds thereof for almost a year thereafter.

By instruction No. 11 the jury was told that—

"Even though you should find from the evidence that there were false representations made to the plaintiff, and that she was induced by them to accept the money and execute the release, yet if you should further find from the evidence that she failed to rescind the release with reasonable diligence after discovery of the fraud and to notify the defendant of such rescission, she cannot now set aside said release, and on such a state of facts your verdict must be for the defendant."

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[12] This is a correct statement of law, but inasmuch as this record conclusively shows that plaintiff did not rescind with reasonable diligence after she discovered, or ought to have discovered, the truth, there was no evidence upon which the jury could find for her under this rule.

"After she had recovered her health and usual mental condition so as to render her capable of comprehending the settlement made, she was bound either to affirm or disaffirm, and if she did not elect to disaffirm at once, that is, within a reasonable time, she must be considered as having elected to abide by the settlement. And having once, by her conduct, affirmed it, she could not afterwards disaffirm it." Chicago, St. P. & K. C. Ry. Co. v. Pierce, 64 Fed. 293, 296, 12 C. C. A. 110, 113.

At the close of the evidence defendant moved for a directed verdict upon several grounds, among others that there was no proof tending in any manner to avoid the bona fides of the release, and that the evidence conclusively showed that the plaintiff had fully ratified it. This motion was overruled. For the reasons given, it should have been sustained. The judgment is accordingly reversed with directions to the trial court to enter judgment of dismissal herein at the costs of plaintiff.

GARRIGUES, C. J., and TELLER, J., concur.

(43 Nev. 61)

LOVE et al. v. MT. ODDIE UNITED MINES CO. (No. 2313.)

(Supreme Court of Nevada. May 26, 1919.)

APPEAL AND ERROR ⟸697(4), 907(4) — EXCEPTIONS—CERTIFICATE.

A trial court's certificate that statement and bill of exceptions contained all material evidence, except documentary evidence, is insufficient to authorize review of evidence, which will be presumed to support findings and judgment.

Appeal from District Court, Nye County; Mark R. Averill, Judge.

Action to quiet title by Frank Love and another against the Mt. Oddie United Mines Company. Judgment for plaintiffs and defendant appeals. Affirmed.

H. R. Cooke, of Toropah, for appellant.

Frank T. Dunn, of Toropah, and Geo. B. Thatcher, of Carson City, for respondents.

Hoyt, Gibbons, French & Springmeyer, of Reno, as amici curiæ.

COLEMAN, C. J. This is an action to quiet title to certain mining claims. Judgment was rendered in favor of the plaintiffs, from which, and from an order denying a motion for a new trial, an appeal has been taken.

Counsel for respondent object to our considering the merits of the case, for the reason that the bill of exceptions does not contain all of the evidence material and essential to a correct determination thereof.

Before proceeding further, it may not be out of place to say that at different stages of the proceedings in the lower court, including the preparation of the record upon this appeal, three attorneys who are not now connected with the case participated at different times in its management.

We think the objection urged to a consideration of this case upon its merits is well taken. The bill of exceptions contains only about 1½ typewritten pages of the direct testimony of the witness Love, who testified in behalf of plaintiffs, and is confined solely to that portion of his testimony showing his experience as a prospector and miner. It does not contain one word of testimony given by the witness mentioned on direct examination concerning the material and vital issue in the case, but it does contain about 25 pages of his cross-examination upon the vital issue. The bill of exceptions is in substantially the same condition as to the testimony of the witness Evensen.

Following the first 36 pages of the testimony contained in the so-called "statement on appeal and bill of exceptions" is found a statement by the court reporter as follows:

"I hereby certify that I am the duly appointed, qualified, and acting official reporter of the district court of the Fifth judicial district of the state of Nevada, in and for the county of Nye; that I acted as official reporter upon the trial of the above-named cause, and that at such trial I took verbatim shorthand notes of all testimony and proceedings given and had; that the foregoing 36 pages constitute a partial transcription of said shorthand notes, and, so far as this particular portion of the testimony goes, is a correct statement thereof."

On page 205 of the statement is found another certificate of the court reporter, which we quote:

"I hereby certify that I am the duly appointed, qualified and acting official reporter of the district court of the Fifth judicial district of the state of Nevada, in and for the county of Nye; that I acted as such official reporter upon the trial of the above-named cause, and that at such trial I took verbatim shorthand notes of all testimony and proceedings given and had; that the foregoing is a full, true, and correct transcription of certain designated testimony, and is in all respects a full, true, and correct statement of said designated testimony and proceedings given and had at such trial."

The certificate of the trial judge is as follows:

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"I, the undersigned, the judge who tried said action, do hereby certify that the foregoing statement on appeal and bill of exceptions has on due notice been settled and allowed by me, and the same is correct, and that it contains a full, true, and correct transcription of all of the proceedings upon the trial of said cause and of all the evidence admitted at said trial (with the exception of documentary evidence) material and pertinent to the issue of whether the work on the Verne and on the New York claim was of such a character that the same tended to develop the adjoining claims and which were in controversy between plaintiffs and defendants in this case."

It will be seen from the two certificates of the official reporter that the purported transcript is but a partial transcript of the evidence, while the certificate of the trial judge shows that the statement and bill of exceptions is a correct transcript of all of the evidence admitted at the trial material and pertinent to the issues, with the exception of documentary evidence. We do not feel that it is necessary that we determine whether or not the bill of exceptions shows upon its face that all of the material evidence given on direct examination of the witnesses Love and Evensen is not embodied therein. We are clearly of the opinion, however, that the certificate of the trial judge does not show that all of the evidence material to the issue presented upon this appeal is contained in the bill of exceptions, as contended by counsel for appellant (who relies upon the rule laid down in the case of Bailey v. Papina, 20 Nev. 177, 19 Pac. 33). Eliminating from consideration the certificates of the court reporter, which are not necessary at all, it appears from the certificate of the trial judge that documentary evidence material to the issues is not embodied in the statement and bill of exceptions. This being true, we cannot consider the evidence at all, and it must be presumed that the findings and judgment are supported by the evidence. Gammans v. Roussell, 14 Nev. 171; County of White Pine v. Herrick, 19 Nev. 311, 10 Pac. 215; Bailey v. Papina, 20 Nev. 177, 19 Pac. 33.

It may be asked: What documentary evidence could possibly exist which could have aided the trial court in arriving at a conclusion as to the real question of fact involved in the case? Of course, we need not determine that question, though we think it possible that there might have been reports of mining engineers, or signed statements impeaching the testimony of some, or all, of the witnesses who testified in behalf of appellant. Suffice it to say that, since it appears that there was documentary evidence material to the issue, which is not embodied in the bill of exceptions, we could only speculate as to its character and weight, which we are not called upon to do.

Since it is not contended that any error appears from the judgment roll, it follows that the judgment appealed from must be affirmed; and it is so ordered.

DUCKER, J., concurs.

SANDERS, J., being disqualified, did not participate in the consideration of this case.

(42 Nev. 451)

McCONE v. ECCLES. (No. 2357.)

(Supreme Court of Nevada. May 23, 1919.)

1. LIMITATION OF ACTIONS ⟸87(4)—NONRESIDENT DEFENDANT — PERSONAL PROPERTY WITHIN STATE.

In action to recover personal property, where defendant was a nonresident and rarely visited the state, the plea of the statute of limitations was not available, though property was situated in state.

2. SALES ⟸200(4)—PASSING OF TITLE—COMPLIANCE WITH CONDITIONS.

Where buyers enter into contract whereby title is to pass upon compliance with certain conditions imposed by seller, the conditions must be fully complied with before title passes.

3. APPEAL AND ERROR ⟸1010(1)—REVIEW—FINDINGS.

Findings of the trial court are reluctantly disturbed, and will not be interfered with where there is substantial evidence to sustain them.

4. CONTRACTS ⟸23 — QUALIFIED ACCEPTANCE.

Where the terms of a letter of proposal are accepted with certain qualifications, contract is not complete until terms imposed by letter of acceptance are agreed to.

5. SALES ⟸22(2)—OFFER AND ACCEPTANCE—REVOCATION OF OFFER.

Seller, having offered to transfer title upon receipt of buyer's notes for unpaid purchase price, has the right to revoke such offer at any time prior to receiving such notes.

6. SALES ⟸22(3) — PASSING OF TITLE — AGREEMENT TO TRANSFER TITLE.

Seller's offer to transfer title upon receipt of buyer's notes for unpaid purchase price did not ripen into a complete contract until receipt by seller of buyer's notes.

Appeal from District Court, Elko County; E. J. L. Taber, Judge.

Action by A. J. McCone against David C. Eccles. From judgment for plaintiff and from order denying new trial, defendant appeals. Affirmed.

James Dysart, of Elko, and Boyd, Devine, Eccles & Woolley, of Ogden, Utah, for appellant.

Carey Van Fleet and J. M. McNamara, both of Elko, for respondent.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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COLEMAN, C. J. On October 25, 1916, respondent commenced this action in claim and delivery to recover the possession of certain specific personal property. To the complaint an answer was filed denying ownership of the property in the plaintiff, and pleading title thereto in defendant. Defendant also pleaded the statute of limitations. This is an appeal from a judgment in favor of plaintiff, and from an order denying a motion for a new trial.

The facts are these: On June 1, 1912, the Nevada Engineering Works, a corporation (hereafter designated the company), entered into a written contract of sale with one George H. Davis of the property in question for the sum of $4,040, one-third payable upon the execution of the contract, one-third upon delivery of the property, and the balance when the mill was erected upon certain mining property owned by the said Davis. It was further agreed that the title to the property was to remain in the company until the full purchase price was paid. The sum of $948 on account of the purchase price of the property was never paid. Prior to the institution of this suit the company, in writing, assigned its claim to the plaintiff. On September 7, 1912, negotiations were opened by Davis with the company, with a view on his part of executing his notes for the balance due, and taking title to the property. On September 13, 1912, the company wrote to Davis as follows:

"Dear Mr. Davis: We are inclosing herewith two notes for you to sign, with statements attached, showing the accounts settled by each. This is in accordance with your letter of September 7th.

"The first note is for $958.48, due October 10, 1912, and covers the balance due on the contract for the stamp mill machinery, allowing you credit for your two cash payments of $1,346.66 each, and for the freight paid by you on the battery guides from San Francisco, $36.75, and on the oil engine, $331.45.

"The second note is for $1,052.69, due November 10, 1912, and covers the balance due on your account for supplies furnished as per our statement attached.

"We hope you will find both notes in order, and upon their return, properly executed, will attend to the matter of a bill of sale. * * *"

This letter was received by Davis at Salt Lake City, Utah, on September 15th. He executed the notes and mailed them to the company at Reno. As to the foregoing facts, it may be said there is no dispute. On the 17th of September, 1912, the company sent a telegram to Davis at Salt Lake City as follows:

"Will allow extension on your notes, but will not relinquish ownership of machinery,"

—and on the same day sent a letter of like purport to him. It is contended that the company did not receive the notes, properly executed, until four days thereafter.

[1] The first question which we will consider is the alleged error of the trial court in overruling the plea of the statute of limitations. It appears from the evidence in the record that the defendant was at all times mentioned in the case a resident of the state of Utah, and rarely came to Nevada between the date of the transfer of the property to him and the commencement of the suit. This question was under consideration by this court in Robinson v. Imperial Silver Mining Company, 5 Nev. 44, and in Todman v. Purdy, 5 Nev. 258, resulting in laying down a rule adverse to the contention of counsel for appellant. It is insisted that, since the question involved in this case relates to personal property which was at all times within the state, the rule established in the cases mentioned does not apply. In the case first mentioned the question affected realty, and the court dealt with the point here raised at some length, giving it careful and painstaking consideration. It is not insisted here that the reasoning of the court in that case is not sound; it is rather contended that this case does not fall within the rule there laid down, since the proposition of possession of personalty was not discussed. There is no force in this contention. The court did discuss the question with reference to the applicability of the statute to realty when the defense was sought to be made by a foreign corporation, and what was said as to realty applies with equal force to personal property, because in that case, as well as in the case at bar, the property in question was within the jurisdiction of the court, and could have been reached by the process of the court at any time prior to the institution of the suit.

[2] The next question which we will consider is the contention that the title to the property in question passed from the company to Davis before he transferred his interest to Eccles, and prior to plaintiff's assignment from the company. This contention grows out of the correspondence between the parties relative to the acceptance of notes by the company in settlement of Davis' indebtedness. The letter written by Davis to the company, of date September 7, 1912, we are unable to find in the record, but we think the fair inference to be drawn from the letter of September 13th is that the title should not pass until the notes, properly executed by Davis, were received by the company. If this is true, it would seem that the company had the legal right to withdraw its offer at any time prior to its receipt of the notes properly executed. This it did by the letter and telegram of September 17th in which it was stated that the company would refuse to accept the notes in payment of the indebtedness and transfer the title which it then had. We think it is the law that, when parties seek to enter into a contract to procure the transfer of title to

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property in the manner by which Davis sought to procure the transfer to him of the title to the property in question, it cannot be said that the title passes until after all of the conditions which have been imposed by the party from whom the title is to pass are complied with. The condition imposed by the company in this instance was the receipt by it, properly executed, of the notes in question. These notes it received four days after it had written Davis that it would not relinquish title to the property.

[3] In this connection two points are urged by counsel for appellant. It is first asserted that the telegram sent by the company to Davis, in which it is said, "Will allow extension on your notes, but will not relinquish ownership of machinery," shows that the notes were already received by the company at the time the telegram was sent. The trial court found to the contrary, and we cannot say that it was not justified in so finding. Findings of a trial court are reluctantly disturbed, and where there is substantial evidence to sustain a finding, as in the case here, there can be no justification for interfering with it.

[4-6] It is further contended in this connection that the contract between the parties was consummated, and that the title passed to Davis, upon the execution by him of the notes and the mailing of the same to the company, in reliance upon the general rule laid down in 6 R. C. L. at page 605. There can be no doubt as to the correctness of the general rule of law contended for by counsel, but we cannot agree that it applies to the facts of this case. The general rule is based upon an offer or proposal being made in one letter and of the unqualified acceptance of such offer in a letter in reply thereto. On the other hand, it is an equally well-established rule that, where the terms of a letter of proposal are not accepted without qualification, but the offer is accepted with certain qualifications, no contract is complete until the terms proposed in the second letter are agreed to. This rule is based upon the idea that there is a lack of mutuality up to that time. 6 R. C. L. p. 608. Upon the same theory, the contract in the case at bar could not be complete until the terms imposed by the company, namely, that the title should not pass until receipt of the notes properly executed, had been complied with. This was a condition imposed by the company and accepted by Davis without protest, so far as the record shows. The contract could not be complete until the company received the notes, and it had the right to revoke its offer at any time before the negotiations had ripened into a perfect contract. As to the correctness of these views there can be no doubt. The company could impose such reasonable conditions (and possibly unreasonable ones) as it might see fit; and in view of the fact that mail is sometimes lost in transit, we think it not an unreasonable condition which was imposed by the company prior to the passing of the title. Nor are we without authority to sustain this view. In Wald's Pollock on Contracts (Williston, 3d Ed.), on page 41, it is said:

"The practical conclusion seems to be that every prudent man who makes an offer of any importance by letter should expressly make it conditional on his actual receipt of an acceptance within some definite time. It would be impossible to contend that a man so doing could be bound by an acceptance which either wholly miscarried or arrived later than the specified time."

Denio, J., in Vassar v. Camp, 11 N. Y. at page 451, says:

"The defendants' counsel, however, maintains that, by a fair construction of the proposition made by the defendants in their letter of the 30th of August, it was made a condition that the contract should not become operative until the plaintiffs' assent had actually come to the knowledge of the defendants. Notwithstanding the rule of law which I have considered as settled by the judgment of the Court of Errors, I do not doubt but that a party proposing to contract may make it a condition that no bargain shall arise or be consummated until the affirmative answer of the other party shall be actually received by the party proposing."

Gray, C. J., in Lewis v. Browning, 130 Mass. 173, lays down the rule as follows:

"But this case does not require a consideration of the general question; for, in any view, the person making the offer may always, if he chooses, make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance. Thesiger, L. J., in Household Ins. Co. v. Grant, 4 Ex. D. 223; Pollock on Con. (2d Ed.) 17; Leake on Con. 39, note. And in the case at bar the letter written in the plaintiff's behalf by her husband as her agent on July 8, 1878, in California, and addressed to the defendant at Boston, appears to us clearly to manifest such an intention. After proposing the terms of an agreement for a new lease, he says: 'If you agree to this plan, and will telegraph me on receipt of this, I will forward power of attorney to Mr. Ware,' the plaintiff's attorney in Boston. 'Telegraph me "Yes" or "No." If "No," I will go on at once to Boston with my wife, and between us we will try to recover our lost ground. If I do not hear from you by the 18th or 20th, I shall conclude "No."' Taking the whole letter together, the offer is made dependent upon an actual communication to the plaintiff of the defendant's acceptance on or before the 20th of July, and does not discharge the old lease, nor bind the plaintiff to execute a new one, unless the acceptance reaches California within that time. Assuming, therefore, that the defendant's delivery of a dispatch at the telegraph office had the same effect as the mailing of a letter, he has no ground of exception to the ruling at the trial."

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See, also, 6 R. C. L. p. 615; 9 Cyc. 296; 13 C. J. 302.

In Morrill v. Tehama M. & M. Co., 10 Nev. 125, it was held that, in order to make a valid contract, an offer must be accepted according to its terms. The facts in the instant case are substantially the same as those in the case of Lewis v. Browning, supra. In that case a power of attorney was to be executed upon the receipt of a telegram, while in the case at bar the deal was to be consummated upon the receipt of notes properly executed. When Davis signed the notes and mailed them, it must be presumed that he accepted the offer of the company as embodied in its letter, according to its terms, and hence it cannot be said that a contract could have been in force until the notes were received, duly executed; and, the offer having been withdrawn before they were received, no contract was in fact consummated.

While there are several other errors discussed in the briefs, we think they are disposed of by what has been said, or else turn upon questions of fact concerning which it may be said that there is sufficient evidence in the record to justify our refusal to disturb the findings of the court.

The judgment is affirmed.

SANDERS and DUCKER, JJ., concur.

(26 Wyo. 160)

HUNT et al. v. CITY OF LARAMIE.
(No. 962.)

(Supreme Court of Wyoming. June 2, 1919.)

1. WATERS AND WATER COURSES ⟸133 — PROCEEDINGS TO APPROPRIATE — APPEAL — TO STATE BOARD OF CONTROL—NECESSARY PARTIES.

The state board of control was not a necessary party to an appeal taken by a city from an order of the board of control granting the application of one desiring to appropriate water which the city claimed, notwithstanding Comp. St. 1910, § 733, providing that the Attorney General shall represent the board of control on such an appeal.

2. APPEAL AND ERROR ⟸151(2)—APPROPRIATION PROCEEDINGS—APPEAL FROM BOARD OF CONTROL—"AGGRIEVED PARTY."

A city which appeared before the state board of control and contested an application to appropriate waters which the city claimed to own, the application to appropriate being granted, was an "aggrieved party" within the contemplation of Comp. St. 1910, § 733, and could take an appeal to the district court (citing Words and Phrases, First and Second Series, Aggrieved Party).

3. PLEADING ⟸422—WANT OF VERIFICATION —WAIVER OF OBJECTION.

A motion to make petition more definite and certain operates as a waiver of a lack of verification, and an order of court permitting the movant to withdraw his motion does not operate or relieve him of the consequences of the waiver.

4. APPEAL AND ERROR ⟸931(4) — PRESUMPTION—IMPLIED FINDINGS.

Where a motion to strike a petition, on the ground that it was not verified, was accompanied by affidavit which raised a question of fact as to whether the petition had been sworn to, it will be assumed on appeal, as consonant with action of trial court in overruling the motion, that the ground therefor was a finding that the petition was in fact verified, although the record fails to disclose what determination was made of such question of fact.

5. APPEAL AND ERROR ⟸970(3)—TRIAL ⟸63(2) — REVIEW — DISCRETION — REBUTTAL EVIDENCE.

In the matter of allowing evidence to be admitted in rebuttal which should have been offered in plaintiff's case in chief, the trial court is vested with a sound discretion, and an appellate court will not interfere, unless there has been a manifest abuse of that discretion, and the opposing party was taken by surprise or deprived of an opportunity of meeting it.

6. WATERS AND WATER COURSES ⟸133 — PROCEEDINGS TO APPROPRIATE — BOND ON APPEAL BY CITY.

On appeal by a city from an order of the state board of control granting an application of third person to appropriate waters claimed by the city, an appeal bond naming the city as the contracting party, or the party assuming the obligations imposed therein, was not vitiated by failure to write the words "the city of L." at the end of the bond, where signed by the mayor and clerk after attestation clause reciting, "In witness whereof the city of Laramie has caused these presents to be executed by its mayor, attested by its clerk, and sealed with its corporate seal."

7. APPEAL AND ERROR ⟸1010(1)—MATTERS REVIEWABLE—FINDINGS OF FACT.

An appellate court will not disturb a finding of fact made by a trial court, when there is evidence upon which the finding may reasonably be based.

8. WATERS AND WATER COURSES ⟸130 — PERCOLATING WATERS—APPROPRIATION.

Percolating waters developed artificially by excavations and other artificial means belong to the owner of the land upon which they are developed, and are not waters of the state, and cannot be appropriated, under Const. art. 8, §§ 1 and 2.

Error to District Court, Albany County; W. C. Mentzer, Judge.

Application by James Hunt, as executor of the last will and testament of Alice Hunt, deceased, for a permit to divert and appropriate waters. There was an order of the

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State Board of Control reversing a rejection of the application by the State Engineer, and the City of Laramie appealed to the district court, where judgment was rendered in its favor, and the petitioner and the Board of Control bring error. Affirmed.

S. C. Downey, of Laramie, for plaintiff in error Hunt.

W. L. Walls, Atty. Gen., for plaintiff in error Board of Control.

Corthell, McCollough & Corthell, of Laramie, for defendant in error.

BURGESS, District Judge. On June 5, 1913, James Hunt, as executor of the last will and testament of Alice Hunt, deceased, caused to be filed in the office of the state engineer of the state of Wyoming an application for a permit to divert and appropriate, through the means of a ditch, for irrigation and stock purposes, the waters of a certain spring situated in Albany county, Wyo., and known as "Pope spring." On June 30, 1914, the state engineer rejected the application and indorsed thereon as the reason therefor, "owing to insufficient water supply, the proposed ditch is not feasible." From this action of the state engineer Hunt appealed to the state board of control of the state of Wyoming, which, on January 19, 1915, entered an order sustaining the action of the state engineer in rejecting the application, for the reason, as stated in the order, "that the source of supply is underground and artificially developed." A rehearing of the matter having been granted by the board, the proceedings finally resulted in an order and determination November 17, 1915, setting aside its order dated January 19, 1915, reversing the action of the state engineer, and requiring that the application be granted. In this final order the board found that the waters of Pope spring were subject to appropriation. In the proceedings before the board resulting in the order and determination of November 17, 1915, the city of Laramie appeared and participated therein.

On December 10, 1915, the city of Laramie filed in the district court of Albany county, Wyo., its notice of appeal and appeal bond, and on December 17, 1915, its notice of perfecting appeal. On May 11, 1916, it filed in said court its petition on appeal, which was superseded by an amended petition filed March 29, 1917. In its amended petition the city of Laramie alleged, among other things, that the waters of Pope Spring, which were sought to be appropriated under the application of Hunt, were not the waters of any natural stream, spring, lake, or other collection of still water, but were waters wholly discovered and developed artificially by excavation and other artificial means by one Pope, who was the owner of the lands upon which the spring in question was and is situated. and that the waters of said spring were the absolute property of said Pope; that by an agreement in writing dated February 14, 1915, between it and Pope and others whom he had associated with him in the ownership and control of these waters, the city acquired the right to purchase said waters and to enter into the possession thereof, and, further, to explore and develop the same, and that it became obligatory upon the city to make such purchase upon the conditions set forth in the agreement; that thereafter it had entered into the possession of said waters and was using the same; that Hunt, assuming to act under and by virtue of the authority of the permit of appropriation approved by the board of control, had gone upon the land upon which said spring was situated and constructed ditches and other conduits and waterways, and had seized and led away the waters of said spring.

An answer was filed admitting many of the allegations of the petition, but denying, among other things, that the waters of the spring were developed artificially or that the waters were the property of the said Pope.

The cause having come on for trial, the district court rendered judgment on November 27, 1917, and found generally in favor of the city of Laramie.

Hunt, as executor, and the board of control, having filed motions for new trial, which were overruled, have brought the case here by proceedings in error.

The plaintiffs in error, in seeking a reversal of the judgment, contend:

[1] First. That the board of control was a necessary party to the appeal taken by the city of Laramie in this case to the district court from the order of the board of control granting the application of Hunt, and that it was not made a party.

There is no statute requiring in appeals of this nature from the state board of control to the district court that the board be made a party. Section 733 of the Wyoming 1910 Compiled Statutes provides, last sentence, that—

"The Attorney General shall in such cases (that is, appeals of this character) represent the state board of control."

The board of control, however, voluntarily appeared in this proceeding in the district court, and was represented by the Attorney General, acting through a special assistant. It filed in the district court a motion to dismiss the appeal of the city. It participated in the trial, filed a motion for new trial, and joined in the petition in error in this case. Its appearance was, in legal effect, a general appearance, and it was, in fact, a party to the proceeding in the district court.

[2] Second. That the city of Laramie was not an aggrieved party as contemplated by section 733 of the Wyoming 1910 Compiled Statutes, which provides that—

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"Any person or persons feeling himself or themselves aggrieved by any order or determination of the board of control * * * may * * * take an appeal to the district court. * * *"

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The city had appeared before the board of control and contested the right of Hunt to the allowance of his application. It was the contention of the city that the waters of Pope spring were not subject to appropriation, but that they were artificially developed waters, and had become the absolute property of Barton D. Pope, who, with others, by contract, had vested the city with the right to acquire by purchase these waters, together with land upon which the spring was located, and to enter into possession of the same. In pursuance of its rights under this contract the city had taken possession of the Pope spring, and was using the water at the time the order of the board appealed from was made. The city therefore had an interest in the subject of the controversy, and was adversely affected by the order of the board appealed from. Says Corpus Juris, vol. 3, p. 625:

"As a rule an appealable interest in the subject-matter exists whenever the interest of the party may be enlarged or diminished, or his rights or liabilities affected, by the result of the appeal."

See, also, definitions of "aggrieved party" in Words and Phrases, vol. 1, p. 273.

[3] Third. That the district court should have sustained the motion of Hunt to strike the original petition of the city because it was not verified.

The affidavit verifying the original petition was in proper form, and was signed by one of the attorneys for the city, but it did not appear therefrom that the affidavit was sworn to; there being absent from the jurat the name and seal of the officer.

To this petition Hunt first filed a motion to make it more definite and certain. The filing of this motion operated as a waiver of the lack of verification, if any. Hershiser v. Delone, 24 Neb. 380, 38 N. W. 863. It is true Hunt made an application later to withdraw his said motion, which application was granted by the court, and thereupon he moved to strike the petition because it was not verified, which was denied. The order of the district court, however, in permitting Hunt to withdraw his motion to make more definite and certain did not operate to relieve him of the consequences of the waiver he had already made by filing his first motion. His motion to strike the petition was therefore too late.

[4] Moreover, the presentation of the motion to strike was accompanied by affidavits which raised a question of fact as to whether the petition had not really been sworn to, and, though the record fails to disclose what determination was made of this question of fact, yet it may well be assumed, as consonant with the action of the trial court in overruling the motion, that the ground therefor was a finding that the petition was in fact verified.

An amended petition was subsequently filed, which was duly verified beyond question, and it was upon this amended petition that the case was tried.

[5] Fourth. That the district court erred in admitting in evidence in rebuttal over the objection of Hunt the contract between Pope and his associates and the city of Laramie.

It is perhaps true that the contract in question properly belonged to the case of the city in chief, and should have been offered in its case in chief. However, in such matters a trial court is vested with a sound discretion, and an appellate court will not interfere unless there has been a manifest abuse of that discretion. An examination of the record fails to disclose that the admission of the contract in rebuttal took the appellants by surprise, or deprived them of an opportunity of meeting it, or prejudiced them in any way.

[6] Fifth. That the bond filed by the city in the district court on its appeal from the state board was insufficient as an appeal bond, in that it was not signed by the city of Laramie.

In the body of the bond the city of Laramie is named as the contracting party, or the party assuming the obligations imposed therein, and the attestation clause of the bond recites:

"In witness whereof the city of Laramie has caused these presents to be executed by its mayor, attested by its clerk, and sealed with its corporate seal this 10th day of December, 1915."

The bond is then signed by the mayor as such and attested by the city clerk as such, and the seal of the city affixed. It is also signed by the surety. In executing a bond of this character the city could act only through its proper officers, which were the mayor and the clerk. It was executed for and on behalf of the city by them. It was plain on the face of the instrument that the city was incurring the obligation, and, as executed, the failure to write the words "the city of Laramie" at the end of the bond would not vitiate it. See Gottfried v. Miller, 104 U. S. 521, 26 L. Ed. 851.

[7] Sixth. That the judgment of the district court is contrary to the evidence.

The vital question in the case was a question of fact as to whether Pope spring was a natural spring or a spring artificially developed by means of excavations by Pope, upon whose land it was situated. From the evidence it appears the spring was developed by digging into a subsurface stratum or formation through which and from which the waters percolated and found their way out to the surface at the point where the exca-

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vation was made. The contention of the appellants in the court below was that Pope spring was a natural spring, but the trial court found against them, and found it to be a spring artificially developed by Pope, and that its waters were private waters and the property of Pope, upon whose land it had been developed, and who, with others associated with him, had given the city the right to purchase the same by the contract heretofore referred to. These findings by the trial court are supported by ample evidence, and are binding upon this court; for it is a uniform rule that an appellate court will not disturb a finding of fact made by a trial court when there is evidence upon which the finding may reasonably be based. Saratoga L. & I. Co. v. Jensen, 20 Wyo. 323, 123 Pac. 415.

[8] Hunt, as executor, could, of course, appropriate only public waters of the state, and, as the spring in question was not a natural spring, he could acquire no rights by his application.

"The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state." Section 1, art. 8, Const. Wyo.

Supervision of "the waters of the state" is vested in the board of control, subject to review by the courts. Section 2, art. 8, Id.

"A water right is the right to use the water of the state." Wyo. 1910 Compiled Statutes, § 724.

Any person intending "to acquire the right to the beneficial use of the public water of the state" shall make an application to the state engineer for a permit. Id. § 727.

That percolating waters developed artificially by excavation and other artificial means, as was done in this case, belong to the owner of the land upon which they are developed, is supported by abundant authority. Long on Irrigation, §§ 93, 95 (2d Ed.); Howard v. Perrin, 8 Ariz. 347, 76 Pac. 460; Ryan v. Quinlan et al., 45 Mont. 521, 124 Pac. 512; Vanderwork (Territory of New Mexico, Intervener) v. Hewes et al., 15 N. M. 439, 110 Pac. 567; Metcalf v. Nelson, 8 S. D. 87, 65 N. W. 911, 59 Am. St. Rep. 746; Willow Creek Irrigation Co. v. Michaelson, 21 Utah, 248, 60 Pac. 943, 51 L. R. A. 280, 81 Am. St. Rep. 687.

Other matters are referred to in the brief of plaintiffs in error, but they are not, in our opinion, under the facts of this case, of sufficient importance to justify extended discussion.

We are of the opinion that the judgment of the court below should be affirmed, and it will be so ordered.

Affirmed.

POTTER, J., and WINTER, District Judge, concur.

CHARLES E. WINTER and JAMES H. BURGESS, District Judges, were called in to sit in place of BEARD, C. J., and BLYDENBURGH, J., who were unable to sit by reason of illness.

(26 Wyo. 210)

BUDD v. ROY. (No. 945.)

(Supreme Court of Wyoming. June 4, 1919.)

1. APPEAL AND ERROR ⟸345(1) — RECORD — FILING.

Where judgment was rendered January 30th, filed January 31st without any showing as to when it was entered, and the record, including the specifications of error filed April 4th, was certified to by the clerk of the district court on the following day, and by the district judge on April 9th, and filed in the Supreme Court on April 25th, the appeal cannot be dismissed on the ground that the record was not filed within time, the statute providing that if the district judge fails to grant a new trial within 20 days from the filing of specifications of error, the clerk of the district court shall transmit the record to the clerk of the Supreme Court, etc.

2. APPEAL AND ERROR ⟸773(2) — BRIEFS — FILING.

Where the record was filed in the Supreme Court April 25th, but appellant failed to file briefs within the 60 days required, and no action was taken upon an application for extension of time, the appeal will be dismissed for want of briefs; no briefs having been filed before the filing of motion to dismiss.

Appeal from District Court, Lincoln County; V. J. Tidball, Judge.

Action by Charles P. Budd against Sarah Roy. Judgment for plaintiff, and defendant appeals. On motion to dismiss. Motion granted.

Reuel Walton and P. W. Spaulding, both of Evanston, for appellant.

Ivan S. Jones and R. R. Rose, both of Kemmerer, for respondent.

PER CURIAM. [1] This case was brought to this court by direct appeal, and has been submitted on motion to dismiss the appeal, filed March 5, 1919, the motion stating two grounds: (1) That the record on appeal was not filed in this court within the time required by law; (2) that no brief has been filed by the appellant, and the time therefor has expired. There is no merit in the first ground, for it appears that the judgment was rendered on the 30th day of January, 1918, and filed January 31, 1918, without any showing, however, as to the date when it was entered, and the record, including the specifi-

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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cations of error filed April 4, 1918, was certified to by the clerk of the district court on April 5, 1918, and by the district judge on April 9, 1918, and the record was filed in this court on April 25, 1918. The statute provides that if the district judge shall fail to grant a new trial within 20 days from the date of filing the specifications of error, the clerk of the district court shall thereupon transmit the record to the clerk of this court with the specifications of error. The record was therefore promptly filed in this court, and even earlier than required. And it is at least doubtful if a delay of the clerk in transmitting the record to this court would be ground for dismissal. We are not prepared to hold that it would.

[2] But the motion must be sustained on the ground of the failure of the appellant to file briefs. The record having been filed in this court on April 25, 1918, the briefs of appellant should have been filed and served within 60 days thereafter, unless within that period the time therefor was duly extended. Such time was not extended. An application for such extension was filed in this court on October 3, 1918, long after the time for filing the briefs had expired, but no action was taken upon such application, evidently for the reason that the time had expired before the filing or presentation of the application. And no briefs have since been filed.

For the reasons stated an order will be entered dismissing the appeal.

(32 Idaho, 240)

VIRGINIA MINING CO. et al. v. HAEDER et al.

(Supreme Court of Idaho. May 12, 1919.)

1. MINES AND MINERALS ⟸58 — CONTRACT FOR PURCHASE AND SALE—LEASE WITH OPTION TO PURCHASE—CONSTRUCTION.

A contract which binds the owner of mining property to deliver a deed upon the receipt of a certain consideration, within a specified time, but which leaves it optional with the purchaser either to make the payments or to forfeit any payments made, and under the terms of which the latter is authorized to enter into possession of the property and mine and extract ores therefrom, and ship the same upon paying to the owner a fixed per cent. of the net smelter returns, to be applied upon the purchase price, is not a contract of purchase and sale, nor governed by the legal principles applicable to vendor and vendee, but is merely a lease, with an option to purchase.

2. VENDOR AND PURCHASER ⟸18(2)—OPTION CONTRACT—EXTENSION OF TIME FOR PAYMENTS — TIME AS ESSENCE OF CONTRACT — WAIVER.

A written agreement, for a valuable consideration, extending the time within which payments upon an option contract may be made to a definite date, does not operate as a waiver of the provision in the contract making time of the essence thereof.

3. VENDOR AND PURCHASER ⟸18(3)—OPTION CONTRACT—TIME AS ESSENCE.

If the purchaser under an option contract, containing a provision making time of the essence thereof, fails to make the payments within the time therein specified, or within the time to which such contract may have been definitely extended, his rights under the contract expire, and the owner of the property is under no further obligation either to accept the final payment or to give a deed.

Appeal from District Court, Shoshone County; Wm. W. Woods, Judge.

Action for specific performance of an option contract by the Virginia Mining Company and another against Barbara Haeder and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Fred L. Tiffany, of Mason City, Iowa, and Joseph F. Morton, of Spokane, Wash., for appellants.

James A. Wayne and H. E. Worstell, both of Wallace, for respondents.

BUDGE, J. This action was brought by appellants to enforce the specific performance of an option to purchase an undivided interest in the Virginia lode mining claim, situated on Carbon creek, Beaver mining district, in Shoshone county. After appellants had introduced their evidence, the court sustained a motion for nonsuit and entered judgment accordingly. This appeal is from the judgment. The assignments predicate error upon the granting of the nonsuit.

[1] Many of the cases cited by appellants relate to contracts of purchase and sale, which are governed by the legal principles applicable to vendor and vendee. That the contract in question is not such a contract, but is merely a lease with an option to purchase, clearly appears from the pleadings, from statements of counsel during the trial, and from the following provision of the contract:

"And it is mutually agreed that in the event the party of the second part shall fail or neglect to keep or perform his part of this contract, this option shall be forfeited and all previous payments made shall be forfeited as well as all machinery, tools and appliances placed thereon by the party of the second part. Time is of the essence of this agreement."

"It is mutually understood and agreed that the party of the second part may enter into possession of said premises and mine and extract ores therefrom, and ship such ores upon paying to the party of the first part twenty-five per cent. of the net smelter returns from said ores, and that said royalties shall be applied upon the purchase price hereinbefore named."

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See Smith v. Beebe, 31 Idaho, 469, 174 Pac. 608; Nicholson v. Smith, 31 Idaho, 544, 174 Pac. 1008.

Under the contract, $1 was paid down, the balance to be paid as follows, to wit: 40 per cent., or $1,481.48, on or before May 14, 1914; 30 per cent., or $1,111.11, on or before November 14, 1914; and 30 per cent., or $1,111.11, on or before May 14, 1915. The time within which payments should be made was extended from time to time by written agreement. The last one, and the only one material to the questions involved herein, was dated April 17, 1915, and provided that:

"This is to agree that we, the part owners of the Virginia mining claim, located on Carbon creek, in Beaver mining district, in Shoshone county, Idaho, do this day give an extension of time for the payment of the money coming to us on the option held by Patrick Burke, on said claim, until 90 days from the 14th day of May, 1915. The payment is extended on the following condition: That said Burke and associates agree to pay each of us $1,000.00 on or before May 14, 1915, together with all interest then due, and also interest for the 90 days in advance, on the said 14th day of May, 1914, on the balance owing on said option. Interest at the rate of 10 per cent. per annum on deferred payments for said 90 days' extension."

The $1,000 mentioned therein, together with the accrued interest, was paid, and this controversy arises over the final payment of something over $2,200, which was to be made, as expressed therein, 90 days from the 14th day of May, 1915. It will be noticed that this extension carried the time of the last payment to August 12, 1915.

[2] It is not contended that the final payment was either made or tendered by August 12, 1915. There is evidence tending to show a tender some days thereafter. Appellants' main argument is that by the granting of the various extensions of time the provision in the contract making time of the essence thereof was waived. It is not contended that there was any express waiver of this provision. Appellants' position is untenable. There is nothing in the contract of the parties with reference to the granting of the various extensions of time which savors of any intention to waive the provision that time was of the essence of the contract. The most that can be said of these extensions is that the parties agreed in writing to change the date upon which the purchase price should become due. A written agreement, for a valuable consideration, extending the time within which payments upon such a contract may be made to a definite date, does not operate as a waiver of the provision in the contract making time of the essence thereof. A similar contention was discussed by this court in an early case, in the following language:

"Is it not significant that, after appellants had elected to purchase said two-thirds interest, they should pay the defendants a valuable consideration for extending the time in which to elect to purchase? Is it not also significant that, after electing to purchase the two-thirds interest and to incorporate, they should pay a valuable consideration for time in which to elect to purchase, and not also have the time extended in which to elect to incorporate? As it was contended in the argument by counsel for appellants that the time had arrived on September 1, 1888, for them to elect whether they would incorporate or not. If time was not of the essence of this contract, and so considered by the appellants, why pay a valuable consideration for an extension of the time, and have it extended to a fixed date?" Durant v. Comegys, 3 Idaho, 204, at page 214, 28 Pac. 425, at page 429; Machold v. Farnan, 14 Idaho, 258, 94 Pac. 170; Prairie Development Co., Ltd., v. Leiberg, 15 Idaho, 379, 98 Pac. 616.

[3] Since appellants were merely the holders of an option to purchase, under the terms of which time was of the essence thereof, and since they failed to make the payment within the time to which the contract had been definitely extended, their rights under the contract expired (Smith v. Beebe, supra), and respondents were under no obligation, either to accept the final payment or to give a deed. The court, therefore, did not err in granting a nonsuit. The judgment is affirmed. Costs are awarded to respondents.

MORGAN, C. J., concurs.

RICE, J., did not sit with the court nor participate in the opinion in this case.

(75 Okl. 10)

MISSOURI, K. & T. RY. CO. v. MINOR. (No. 6972.)

(Supreme Court of Oklahoma. Dec. 4, 1917. On Petition for Rehearing, May 27, 1919.)

(Syllabus by the Court.)

1. NEGLIGENCE ⟸134(1, 2) — BURDEN OF PROOF—CIRCUMSTANTIAL EVIDENCE.

In a civil case, all that the plaintiff is required to do in order to establish his case is to make it appear to be more probable that the injury came in whole or in part from the defendant's negligence than from any other cause, and this fact may be established by circumstantial evidence and the reasonable inferences to be drawn therefrom.

2. RAILROADS ⟸411(3)—FENCES—LIABILITY.

Under sections 1435 to 1438 of the Revised Laws 1910, a railroad company is liable for injuries to stock, resulting by its failure to construct and maintain a lawful fence as provided for therein.

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Commissioners' Opinion, Division No. 3. Error from County Court, Payne County; W. H. Wilcox, Judge.

Action by J. D. Minor against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Clifford L. Jackson, W. R. Allen, and M. D. Green, all of Muskogee, for plaintiff in error. Thos. A. Higgins and Sylvester J. Berton, both of Cushing, for defendant in error.

HOOKER, C. This is an action instituted by Minor against the company to recover damages alleged to have been caused to him by the killing of one mare and injury to another by one of the company's trains, and it was claimed that the company is liable because it had failed to construct and maintain a lawful fence, as provided by the statute, along its right of way at the place where the injury was alleged to have been caused.

The evidence here clearly establishes that the fence on the right of way which it was the duty of the company to maintain was not a lawful fence, and was maintained insufficiently to prevent stock from gaining access thereto, and the evidence is sufficient to support the finding of the jury that plaintiff's stock had strayed upon the right of way of the company on account of this defective condition of its fence, and that injury resulted to them by reason of that fact. The evidence of the plaintiff below was largely circumstantial, but, in our judgment, sufficient to take the case to the jury upon the question as to whether the mare killed and the one injured were upon the right of way of the company at the time thereof, and got there by reason of the defective condition of this insufficient fence. And there being evidence to support the finding of the jury, we cannot disturb the same upon appeal here.

[1] The following authorities announce the rule in this jurisdiction, that in a civil case all that the plaintiff is required to do is to make it appear to be more probable that the injury came in whole or in part from the defendant's negligence than from any other cause, and this fact may be established by circumstantial evidence and the reasonable inferences to be drawn therefrom.

In the case of Weleetka Cotton Oil Co. v. Brookshire, 166 Pac. 408, not yet officially reported, it is said:

"It is the settled rule of this state that negligence may be established by circumstantial evidence and the reasonable inferences to be drawn therefrom, and that the proximate cause of an injury may be determined from circumstantial evidence."

And in St. L. & S. F. R. Co. v. Clampitt, 154 Pac. 43, it is said:

"The question is not presented that the happening of an accident, in case of an employé, raises a presumption of negligence, * * * for while there is no direct evidence showing what caused the deceased to fall, there was evidence showing the condition of the platform, from which the jury might draw the inference that it was the condition of the platform that was the proximate cause of the death of the plaintiff's intestate."

And in Waters-Pierce Oil Co. v. Deselms, 18 Okl. 107, 89 Pac. 212, it is held:

"Where an accident has occurred resulting in the death of all the persons immediately connected therewith and there is no direct proof as to how the accident occurred, the manner of its occurrence may be shown by circumstantial evidence from which the jury may infer the manner and cause of the accident if the inference is a reasonable, although not a necessary resulting fact [one]."

And in Booker Tobacco Co. v. Waller, 38 Okl. 47, 131 Pac. 537, it is held:

"It is only when the evidence, with all the inferences the jury could * * * draw from it, will be insufficient to support a verdict for plaintiff * * * that the court is authorized to direct a verdict for defendant; and, unless the conclusion follows, as matter of law, that no recovery can be had upon any view that can be properly taken of the facts which the evidence tends to establish, the case should be left to the jury under proper instructions. * * *"

And in Reed v. Scott, 151 Pac. 484, it is held:

"If there is any evidence, including every reasonable inference the jury could have drawn from the same, reasonably tending to support the verdict, this court will not reverse a case for insufficient evidence. A jury may, if they so decide, accept circumstantial evidence upon one side, and reject positive testimony presented on the same point by the other side."

See, also, St. L. & S. F. R. Co. v. Darnell, 42 Okl. 394, 141 Pac. 785; Coalgate Co. v. Hurst, 25 Okl. 597, 107 Pac. 657; C., R. I. & P. R. Co. v. Ashlock, 36 Okl. 706, 129 Pac. 726; Petroleum Co. v. Wantland, 28 Okl. 481, 114 Pac. 717.

Applying the principle announced in the cases named above, it was competent for the jury to determine the liability of the company here by circumstantial evidence, and we cannot say that the evidence here is insufficient to support the verdict of the jury fixing liability upon the company for the stock injured.

[2] It is asserted by the plaintiff in error that under sections 1435, 1436, 1437, 1438, of the Revised Laws of 1910, that it cannot be held liable for animals injured by reason of its failure to construct a fence as provided therein. In other words that the duty to construct a fence is a statutory one, and that the penalty fixed by the Legislature for a failure to comply with these provisions of the statute is exclusive of all other penalties, and, inasmuch as the Legislature has pre-

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scribed that the company shall be liable only when stock is killed, that no other penalty can be added, and hence, under this statute, it could not be liable for injury thereto when death does not result.

With this contention of the plaintiff in error we cannot agree. The object of this statute was in part to compel the railway company to fence its right of way so as to afford protection to the landowner from injury to his stock, or, in the event the company failed and refused to construct a fence as provided in the statute, to pay all damage caused by such failure. A construction of this statute which would relieve the company from liability on account of injury to animals, and only impose liability when death ensued, would not accomplish the purpose of its enactment. It is axiomatic that the whole includes all the parts, and if the company, under this statute, is liable for the death of stock, it unquestionably should be held for injury thereto.

This court, in the case of St. L. & S. F. R. Co. v. Steele, 37 Okl. 542, 133 Pac. 209, in construing sections 1439, 1440 and 1441, Revised Laws of 1910, said:

"Although defendant says the fence statute is penal, yet it argues that, since no penalty is provided therein for a failure to fence against hogs, none can be recovered, and plaintiff is not entitled to a judgment. * * * In Parish v. Louisville & N. R. Co., 78 S. W. 186, 25 Ky. Law Rep. 1524, affirmed in 126 Ky. 638, 104 S. W. 690, 31 Ky. Law Rep. 1020, the contrary rule is so aptly expressed that we quote at length. There it was held that, where a railroad company was required by statute to fence its right of way and neglected to do so, it was liable for injury to cattle resulting from such failure, though the statute did not in terms impose a liability. * * * The fact, therefore, that the statute failed to impose in terms a liability does not detract from the responsibility of the railroad company for all damages proximately caused thereby. Plaintiff's evidence showed that he was the owner of the land abutting on the railroad; that he had built a fence around his land as provided by statute; and given the defendant notice to construct their portion thereof; that he was the owner of the hogs injured; that defendant company had failed and neglected to construct the fence; and that as a result of such failure and neglect the plaintiff's hogs wandered on the track of defendant company and there were killed. This was sufficient to fix the liability of defendant, under the great weight of authorities, which hold that a railroad, not having fenced its line as provided by statute, is liable for all damages resulting therefrom."

Likewise this court, in the case of C., R. I. & P. Co. v. Westheimer & Daube, 44 Okl. 287, 144 Pac. 356, held:

"It is the duty of every person or corporation owning or operating a railroad in Oklahoma to build and maintain a lawful fence along its right of way, 'except at public highways and station grounds.' Sections 1435 and 1438, Rev. Laws 1910. Where stock goes upon the right of way and is injured on account of the failure of the company to maintain such lawful fence, it is liable for stock killed or injured by its trains regardless of negligence in the running or management thereof."

We do not regard the case of M., O. & G. R. Co. v. Brown, 46 Okl. 735, 148 Pac. 1040, in conflict with the opinion here rendered. In the instant case, the jury heard the evidence and reached the conclusion that the mare of the defendant in error, on account of a failure of the company to maintain its fence as by law required, strayed upon the right of way of the company and while there was injured.

[A portion of the opinion of the Commissioner, referred to in the rehearing opinion set out below, is omitted in accordance with the direction of the court on rehearing.]

PER CURIAM. Adopted in whole.

On Petition for Rehearing.

PER CURIAM. Petitions for rehearing the opinion of Mr. Commissioner HOOKER, reversing the judgment of the court below, have been filed on behalf of both the plaintiff in error and the defendant in error; the former being based upon the ground that the opinion is wrong in holding that the plaintiff was entitled to recover for the animal injured, and the latter upon the ground that the instruction which the Commissioner held constitutes reversible error, states the law correctly. As these are the only questions presented for rehearing, they are the only ones we will notice in the further consideration of this cause by the court.

We are of the opinion that the authorities cited by the learned Commissioner support the conclusion reached by him that the plaintiff was entitled to recover for the animal injured, and that M., O. & G. Ry. Co. v. Brown, 46 Okl. 735, 148 Pac. 1040, and Box v. C., R. I. & P. Ry. Co., 56 Okl. 243, 155 Pac. 1144, relied upon by counsel for plaintiff in error are not in point to the contrary.

It is true, as counsel contends, that the common law did not impose upon railways the duty of fencing their right of way, but section 1435, supra, does this in the most clear and explicit language. The plaintiff charges the defendant with a violation of this statute, and that this violation resulted in injury to his horse by coming in contact with the company's locomotive. As the violation of a statute constitutes actionable negligence, where, as here, it is alleged and proven that the violation of the statute was the proximate cause of the injury complained of, the plaintiff is entitled to recover. In these circumstances the most that can be claimed for section 1438, supra, is that it constitutes a limitation upon the general language of section 1435, and we do not believe that such was the intention of the Legislature.

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Inasmuch as the instruction which the Commissioner holds was erroneous was objected to solely upon the ground that it stated in effect that the plaintiff in proper circumstances would be entitled to recover for the animal injured, of course, in view of our holding on that point, it was not error to give it. The part of the Commissioner's opinion dealing with this question will be stricken out, and the balance of the opinion, as thus modified and hereby supplemented, will be approved.

For the reasons stated, the judgment of the court below is affirmed.

All the Justices concur.

(75 Okl. 1)

FIRST NAT. BANK OF BLANCHARD v. RICHBURG. (No. 8062.)

(Supreme Court of Oklahoma. March 25, 1919. Rehearing Denied May 27, 1919.)

(Syllabus by the Court.)

1. EVIDENCE ⟸441(1) — PAROL EVIDENCE—WRITTEN CONTRACT.

As a general rule, parol evidence is not admissible to contradict or vary the terms of a written instrument, either by attempting to show prior negotiations, or by a contemporaneous oral agreement, such written instrument having been executed, delivered, and acted upon by the parties interested therein, subsequent to all oral agreements and negotiations in reference to what it should contain.

2. ASSIGNMENTS FOR BENEFIT OF CREDITORS ⟸342—ACCEPTANCE OF BENEFITS—FRAUD—ESTOPPEL.

Where a creditor elects to accept, and does accept, the benefits of provisions favorable to him in a deed of assignment, and avails himself of the provisions favorable to him, he cannot thereafter attack the instrument on the ground of fraud, because of other provisions favoring all creditors alike.

3. ASSIGNMENTS FOR BENEFIT OF CREDITORS ⟸171 — EVIDENCE ⟸441(3)—PAROL EVIDENCE—QUESTION FOR JURY.

Where the creditors and assignors have orally discussed and negotiated in reference to the conditions which a deed of assignment should contain, and subsequent to all oral agreements and negotiations a written instrument or deed of assignment is executed, delivered, acquiesced in, and acted upon, and the creditors receive and avail themselves of the benefits provided for in such instrument, and where such instrument is plain and unambiguous in its terms, it is not error for the court, in the absence of fraud or mistake, to reject oral testimony as to conditions orally agreed upon prior to the execution and delivery of such instrument, nor error for the court in such case to take the case from the jury and construe the legal effect of the plain, unambiguous terms of the instrument.

Error from County Court, McClain County; Geo. F. Johnson, Judge.

Action by J. W. Richburg, trustee, against the First National Bank of Blanchard, Okl. Judgment for plaintiff, and defendant brings error. Affirmed.

L. T. Cook, of Purcell, and Shartel, Dudley & Shartel, of Oklahoma City, for plaintiff in error.

Barefoot & Carmichael, of Chickasha, for defendant in error.

HARRISON, J. This appeal comes from the county court of McClain county. It was an action by J. W. Richburg, as trustee for the Blanchard Grocery Company of Blanchard, Okl., assignor, against the First National Bank of Blanchard, Okl.

The facts are that said firm on October 28, 1908, being in failing circumstances, transferred its entire stock of groceries, notes, accounts, etc., to H. G. Cook, in trust for its creditors. Cook at the time, was indorser of the grocery firm's note to the First National Bank of Blanchard for $400. In December 1908, the defendant in error, J. W. Richburg, then representing the Williamson-Halsell-Fraiser Grocery Company, a creditor of said grocery firm, induced said firm to make an assignment, which it did, naming Richburg as trustee. One condition in the written assignment, which condition appears to have been agreeable to all creditors, was that the balance of $298 due the First National Bank of Blanchard be a preferred claim, and be paid as such, which condition was also agreeable to Cook, the indorser of the note.

Another condition was that Richburg, the trustee, should take charge of the business, replenish the stock, and pay dividends to creditors with money collected, and that the money be kept on deposit with the First National Bank, and dividends to creditors be paid through said bank.

Upon such conditions Richburg took charge of the stock of goods, proceeded to sell same out in the course of ordinary retail trade, and to replenish the stock from time to time, and to keep the money on deposit in said First National Bank, and to pay bills and dividends through said bank, and, pursuant to the condition in the instrument of assignment, paid the balance of $298 due on the $400 note, on which Cook was indorser. The bank accepted such payments, and applied them to the satisfaction of said note. Richburg, as trustee, continued thereafter to deposit such amounts as he collected from said grocery business with the said First National Bank of Blanchard.

On January 28, 1909, said bank, without any notice to Richburg, the trustee, charged the trustee's account with the sum of $292.15, an amount which the bank claimed was due it from the grocery company for over-

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draft. Richburg, the trustee, having no knowledge of such charge against his trustee account, thereafter drew a check, as he had authority to do under the conditions of said instrument of assignment, against his trustee's account in said bank, payment of which check was refused by said bank, and the check went to protest, the protest fees amounting to $1.38. The trustee objected to the bank's refusal to pay his check, and to the bank's applying his trust funds to the payment of said overdraft, and demanded of the bank that the amount applied in payment of said overdraft be paid back to him as trustee; and, upon refusal of the bank to pay back to him the amount applied on said overdraft, Richburg, as trustee for all creditors, brought this suit to recover the amount applied by the bank on the overdraft and the additional sum of $1.38 protest fees charged on the trustee's check, which the bank had refused to pay.

The bank answered the plaintiff's petition, claiming that it had the right to charge the trustee's account with the amount of said overdraft on the ground that one of the conditions upon which it, as one of the creditors of the Blanchard Grocery Company, had given its consent to the assignment, and agreed to the execution of the instrument of assignment, was that the overdraft be treated as a preferred claim. The decisive issue, therefore, was whether such overdraft be treated as a preferred claim; the bank claimed that said claim was to be so treated; the trustee denied this, and claimed that he had heard nothing about the overdraft, except that it was to be taken care of, and that there was no condition in the trust deed that such overdraft should be a preferred claim; that the only preferred claim mentioned in the instrument of assignment or trust deed was that the balance of $298 due on the $400 should be a preferred claim. The trust deed contains the following conditions, to wit:

"It is further agreed between the parties hereto that the claim of the First National Bank of Blanchard, Oklahoma, for the sum of $298.00, balance due on the note of $400.00, which is indorsed by H. G. Cook of Norman, Oklahoma, is a preferred claim against said stock of merchandise, and the same is to be first paid out of the proceeds of the sale of said stock as provided herein."

This is the only provision in the instrument which in any manner refers to the preferred claim. The instrument itself, as appears from the record, was executed and became effective subsequent to all oral agreements and conversations in regard to what its provisions should contain.

It appears, further, that said instrument of assignment was acknowledged before W. H. Alkire as notary public, who was also vice president and bookkeeper for said First National Bank. It appears further that said First National Bank acquiesced in and assented to such assignment to the extent that it kept on deposit the trust funds and paid the trustee's checks issued in payment of bills in the course of business and accepted without objection the trustee's checks in payment of the balance due on said $400 note, and applied same on the payment of said balance as a preferred claim, thereby availing itself of all conditions in the assignment favorable to itself. It appears also that one of said checks, for $125, was issued on November 27, 1908, and the last one, for $174, issued January 9, 1909, both being applied by said bank in payment of the preferred claim mentioned in the instrument of assignment, without any protest or objection on the part of said bank, and without any mention to Richburg, the trustee, as to the overdraft being understood to be a preferred claim. It further appears that, after the execution and delivery of the instrument of assignment, no mention was ever made to Richburg as to the overdraft being a preferred claim until after the bank, without authority of the trustee, had applied trust funds on deposit with the bank to the payment of said overdraft, and that the trustee never knew of said transaction until his check against the trustee's account was turned down and allowed to go to protest by said bank.

The court heard testimony on the question as to whether the bank gave its consent to the assignment upon condition that the overdraft be a preferred claim. The cashier of the bank and the vice president of the bank testified that the bank gave its consent upon the express condition that the overdraft be paid as a preferred claim. Richburg, the trustee, denied this, and the court, after hearing the testimony on this point, decided that as the instrument of conveyance was executed and delivered after everything had been said in reference to the conditions that should be set forth in such instrument and that therefore any testimony as to oral agreements made prior to the execution and delivery of the written instrument which tended to change or vary the terms or conditions of such instrument was not admissible, and that the written instrument itself being executed and delivered subsequent to all oral agreements, and being plain and unambiguous in its terms, there was no question of fact for the jury to determine, but that it was a plain question of law, to be determined by the court as to what were the conditions in the written instrument. The court, therefore, withdrew the case from the jury, and construed the written instrument to refer only to the balance due on the $400 note, and rendered judgment in favor of the trustee, Richburg, for the amount of trust funds which the bank had applied to the payment of said overdraft, with interest thereon at the rate of 6 per cent. per annum.

[1, 3] It is an undisputed fact that the instrument of assignment was executed and de-

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livered after all oral agreements, stipulations, and conversations in reference to its conditions had been had; that it was executed and acknowledged before the vice president of the bank, and, so far as the record shows, all parties to the instrument and all creditors of the firm assented and consented, and acted upon such instrument until the bank, without any authority of the trustee, and without the knowledge of such trustee or of any other creditor, applied the trust funds to the payment of the overdraft. Therefore we think the trial court, in withdrawing the case from the jury and rendering judgment against the bank, did not err.

It is a settled principle of law that parol evidence is not admissible to contradict or vary the terms of a written instrument either by attempting to show prior negotiations or by a contemporaneous oral agreement.

See Elliott on Contracts, vol. 8, Supp., § 1621.

And it has long been settled by this court that—

"The execution of a contract in writing supersedes all the oral negotiations or stipulations concerning its terms and subject-matter which preceded or accompanied the execution of the instrument, in the absence of accident, fraud, or mistake of fact; and any representation made prior to or contemporaneous with the execution of the written contract is inadmissible to contradict, change, or add to the terms plainly incorporated into and made a part of the written contract." McNinch v. Northwest Thresher Co., 23 Okl. 386, 100 Pac. 524, 138 Am. St. Rep. 803.

Also National Bank of Durant v. Ardmore Wholesale Grocery Co., 33 Okl. 769, 127 Pac. 1071; and Leasure v. Hughes, 178 Pac. 696, rendered February 11, 1919, not yet officially reported; and also Reinheimer v. Mays, 182 Pac. 230, rendered March 4, 1919, and not yet officially reported; and the authorities relied upon in the latter two cases.

[2] It is also a settled principle of law that where a creditor elects to accept, and does accept, the benefits of a provision favorable to him in a deed of assignment, he cannot thereafter attack the provisions contained in it in favor of other creditors on the ground of fraud; he must accept or reject it unequivocally. 2 R. C. L. § 32, p. 676; Alliance Milling Co. v. Eaton, 86 Tex. 401, 25 S. W. 614, 24 L. R. A. 369; McLaughlin v. Parks City Bank, 22 Utah, 473, 63 Pac. 589, 54 L. R. A. 343; Frierson v. Branch, 30 Ark. 453; Adler-Goldman Commission Co. v. People's Bank, 65 Ark. 380, 46 S. W. 536; 4 Cyc. 277, 278.

It is undisputed that the bank received and kept the deposit of the trustee, and that it accepted and applied the checks issued by the trustee in payment of the balance due on the $400 note, thereby availing itself of the conditions favorable to itself, and we might say availing itself of the one condition in the instrument more favorable to one creditor than another. This it cannot be permitted to do under the facts in the record before us.

The judgment of the trial court is therefore affirmed.

All the Justices concur, except SHARP, J., not participating.

(75 Okl. 21)

PERRY v. SNYDER et al. (No. 8565.)

(Supreme Court of Oklahoma. May 3, 1919. Petition for Rehearing Denied May 27, 1919.)

(Syllabus by the Court.)

1. TAXATION ⟸656, 734(10)—TAX SALE—TAX DEED—VALIDITY.

A sale of land for delinquent taxes at a time not authorized by statute is void, and a tax deed based thereon is a nullity.

2. JUDGMENT ⟸101(2)—TITLE OF PLAINTIFF—DEFAULT JUDGMENT—REVERSAL.

Where a petition in ejectment shows on its face that plaintiff has no title to the premises sued for, a judgment by default in plaintiff's favor is erroneous, and will be reversed.

3. APPEAL AND ERROR ⟸193(9)—SUFFICIENCY OF PETITION—OBJECTION.

An objection that a petition does not state a cause of action may be urged for the first time on appeal.

4. TAXATION ⟸800(2)—INVALID TAX DEED—GRANTEE'S ACTION FOR POSSESSION—PAYMENT OF TAXES.

Where a tax deed is void, it is not necessary to pay or tender the taxes, interest, and costs which have been paid by the grantee in said deed in order to defeat an action by such purchaser for possession of the property described therein.

Error from District Court, Pontotoc County; George C. Crump, Judge.

Ejectment by H. R. Snyder against Elizabeth Perry and others. Demurrer to amended answer sustained, and default judgment for plaintiff, and defendant Elizabeth Perry brings error. Reversed and remanded with directions to enter judgment for defendant.

C. F. Green, of Ada, for plaintiff in error.
J. F. McKeel, of Ada, for defendants in error.

HARDY, C. J. H. R. Snyder sued Elizabeth Perry and others in ejectment for certain lands in Pontotoc county. Demurrer was sustained to defendant's amended answer, after which defendants were adjudged to be in default, and judgment was rendered for plaintiff and defendant Elizabeth Perry prosecutes error.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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[1] Plaintiff claims title to the premises by virtue of a tax deed issued to him by the county treasurer of Pontotoc county, bearing date of July 23, 1914. The deed is attached to and made a part of the petition. It appears from the recitals in the face of the deed that the premises were sold on September 6, 1910. By section 4, c. 73, Sess. Laws 1910, which went into effect June 17, 1910 (Rev. Laws 1910, § 7398), it is provided that tax sales shall commence on the first Monday in November in each year between the hours of 9 o'clock a. m. and 4 o'clock p. m., and be continued from day to day between the same hours until all the lands subject to taxation, upon which taxes remain unpaid shall be sold. The sale in the case at bar was at a time not provided by statute, and was therefore unauthorized, and said sale and the deed based thereon were void. Holt v. Spicer, 162 Pac. 686; Blaine Co. Bank et al. v. Noble et al., 55 Okl. 361, 155 Pac. 532.

[2] The petition showed on its face that the deed under which plaintiff claimed was void, and therefore conveyed no interest in or title to the premises therein described. Spalding v. Hill, 47 Okl. 621, 149 Pac. 1133. The petition therefore, failed to state a cause of action in favor of plaintiff and the judgment by default in plaintiff's favor was erroneous, and will be reversed. Clark v. Holmes, 31 Okl. 164, 120 Pac. 642, Ann. Cas. 1913D, 385.

[3] An objection that the petition does not state facts sufficient to constitute a cause of action is not waived by failing to urge such objection in the trial court, but may be urged for the first time in the Supreme Court. Section 4742, Rev. Laws 1910; Zahn v. Obert, 159 Pac. 298.

[4] Defendant was not required to pay or tender the taxes, interest, and costs which had been paid by plaintiff in order to defeat his action, because the deed under which plaintiff claimed was void. Davenport et al. v. Doyle, 157 Pac. 110; Holt v. Spicer, 162 Pac. 686.

The judgment is reversed, and the cause remanded, with directions to enter judgment for defendant.

SPRADLING v. SPRADLING. (No. 7553.)

(Supreme Court of Oklahoma. Jan. 21, 1919. Rehearing Denied May 27, 1919.)

(Syllabus by the Court.)

1. DIVORCE ⟸331—SUIT FOR ALIMONY AFTER DECREE—STATUTE.

A suit against a former husband for alimony may be maintained by a former wife, who has obtained a decree of divorce from him, upon constructive service, in a court of another state having jurisdiction over neither his person nor property; such decree not being res judicata of the subject of alimony, and the marital status, under the circumstances, being held not indispensable to cognizance of alimony in this state.

2. DIVORCE ⟸284—ALIMONY PENDING DECREE—JURISDICTION OF SUPREME COURT.

In an action pending on appeal to review a judgment awarding alimony in a proceeding independent of divorce, the Supreme Court, under its appellate jurisdiction in cases of equity, as an incident to such jurisdiction has authority to grant alimony pending a determination of such appeal, and also the necessary counsel fees and suit money for the prosecution of such proceeding.

3. DIVORCE ⟸287—AWARDING OF ALIMONY —APPEAL—DISMISSAL.

Where an appeal is taken without supersedeas, from a judgment awarding alimony and a sum for the maintenance and education of minor children, and plaintiff in error refuses to comply with the order of this court to pay to the clerk, for the benefit of an indigent defendant in error, certain counsel fees, etc., and, having disposed of his property, goes and remains without the confines of the state and beyond process of the court, the appeal may be dismissed.

4. CONSTITUTIONAL LAW ⟸328—JURY ⟸28 (9)—RIGHT TO JURY TRIAL.

The dismissal of an appeal under such circumstances is not a denial of any constitutional right of the plaintiff in error.

(Additional Syllabus by Editorial Staff.)

5. DIVORCE ⟸331—DECREE—ALIMONY—JURISDICTION OF FOREIGN COURTS.

Where a foreign divorce was granted wife on statutory grounds for fault of defendant, while he was a nonresident, served only by publication, the court had jurisdiction of nothing except the marriage status, and, without jurisdiction of the husband's person or property, any attempt to render a decree against him in personam for payment of alimony would be void.

6. DIVORCE ⟸326—JUDGMENT IN ANOTHER STATE—FULL FAITH AND CREDIT.

Where decree in a Kentucky divorce suit to the extent of dissolving a marriage was conceded to be valid, the Supreme Court of Oklahoma, under the full faith and credit clause of the federal Constitution, may properly give force to it only as determinative of their marital status.

Commissioners' Opinion, Division No. 3.

Error from District Court, Osage County; R. H. Hudson, Judge.

Suit by Nannie Spradling against S. S. Spradling for alimony and allowance for the support of the minor children of parties after divorce. There was an order making allowance for temporary support, counsel fees, etc., and restraining defendant from disposing of

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his property pending action, and a further allowance for maintenance and for permanent alimony, and defendant brings error. Appeal dismissed.

See, also, 158 Pac. 900.

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Leahy & MacDonald, of Pawhuska, for plaintiff in error.

Noffsinger & Broome, of Muskogee, for defendant in error.

BLEAKMORE, C. On March 10, 1913, suit for alimony and an allowance for the support of the minor children of the parties was commenced in the district court of Osage county against S. S. Spradling, by Nannie Spradling, who, by decree of the Wolfe circuit court of Wolfe county, Ky., had obtained a divorce from him in an action in which she was plaintiff and he was defendant, but wherein, by reason of his having removed with his property from that state and acquired a residence elsewhere, constructive service only was had upon him.

At the beginning of the suit the district court of Osage county made an allowance for the temporary support of the plaintiff and her minor children and for attorney's fees and suit money, and issued an order restraining the defendant from disposing of his property pending the action.

Defendant sought by writ of prohibition to prevent the trial court from entertaining jurisdiction, enforcing its orders, and proceeding to a determination of the cause. The writ was denied by this court. Spradling v. Hudson, District Judge, 45 Okl. 767, 146 Pac. 588. Thereupon defendant paid a small portion of the allowance, but subsequently disregarded the order of the district court by refusing to pay the balance, contemptuously disposed of all of his property, and removed from this state. Upon further proceedings in the trial court plaintiff was awarded $5,000 for the maintenance and education of the minor children, and $2,500 as permanent alimony. From this judgment the defendant, S. S. Spradling, without supersedeas, appealed.

Thereafter, on June 6, 1916, Nannie Spradling, upon proper application to this court, was allowed $500 as suit money necessary to her defense here, counsel fees, and the maintenance of herself and children pending the determination of such appeal, and the defendant was ordered to pay same to the clerk of this court within 30 days from that date. Spradling v. Spradling (not yet officially reported) 158 Pac. 900.

Although amply able to do so, he has refused to comply with this order, and is now shown to be without the state, a fugitive from justice, and beyond the jurisdiction of this court.

The case is now before us on motion of defendant in error to dismiss the appeal for failure of the plaintiff in error to comply with the order of this court.

For convenience the parties are referred to as they appeared in the trial court.

It is contended (1) that the order of June 6, 1916, was in excess of the jurisdiction of this court, and therefore void, for the reason that alimony pendente lite, counsel fees, and suit money are cognizable only in cases where the marital relation and obligation subsist between the parties; and (2) that to dismiss the appeal under the circumstances would be to convict defendant of contempt without a hearing, and close to him the courts of justice of this state, in violation of his rights under section 25 and section 6, art. 2, of our Constitution.

[5, 6] We do not regard either contention as tenable. The Kentucky court granted plaintiff a divorce on statutory grounds for the fault of the defendant. He was a nonresident of that state, and service of process was had upon him by publication only. The court took jurisdiction of nothing except the marriage status; and under these circumstances, in the absence of jurisdiction of either the person or property of defendant, any attempt to render a decree against him in that suit, essentially in personam, for the payment of alimony would have been void. McDonald v. Mabee, 243 U. S. 90, 37 Sup. Ct. 343, 61 L. Ed. 608, L. R. A. 1917F, 458.

The decree of the Kentucky court, to the extent of dissolving the marriage between the parties, is conceded to be valid; and under the full faith and credit clause of the federal Constitution we may properly give force and effect to it only as determinative of their marital status. Haddock v. Haddock, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1. And this view in no respect conflicts with the principle announced in Thompson v. Thompson, 226 U. S. 551, 33 Sup. Ct. 129, 57 L. Ed. 347, in which case a decree of divorce had been granted the husband for the fault of the wife in a state where by misconduct she might forfeit her right to maintenance.

A review of the authorities, and an expression of opinion as to whether, independently of legislative enactment, alimony is cognizable only in proceedings ancillary or incidental to divorce, would seem inapposite, as our statute recognizes an action for alimony alone.

And it is doubtless true that, where the defendant is personally served with process, a decree of divorce may ultimately determine the property rights as well as the marital status of the parties; but with such a judgment we are not concerned in the instant case.

[1] The primary question before us for decision seems to be the right to maintain a suit for alimony in this state against a former husband by a woman who has obtained a divorce from him upon constructive service in a court in another state having jurisdiction over neither his person nor property. The precise question does not appear to have

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been determined by this court; but upon consideration of decisions from other jurisdictions, we are persuaded that, numerically and by the better reasoning, modern authoritative cases sustain the conclusion that such an action is maintainable independently of statutory authorization.

In Cox v. Cox, 19 Ohio St. 502, 2 Am. Rep. 415, it is held:

"A husband deserted his wife in this state, where both parties, up to the time of the desertion, were domiciled. To a petition filed by the wife for divorce and alimony the husband appeared and answered, setting up a decree of divorce obtained by him in another state, in a proceeding in which there was no jurisdiction of the person of the wife except by constructive service, and of which proceedings she had no actual notice. Held, that the domicile of the wife remained unaffected by the desertion of the husband, and that the decree of divorce was no defense to her petition for alimony."

In Thurston v. Thurston et al., 58 Minn. 279, 59 N. W. 1017, it was held that while a decree of divorce obtained by a husband against his wife in another state on constructive service was valid, yet "such judgment determined nothing but that the parties were divorced, and, being in rem, is neither res judicata nor an estoppel as to the question of alimony, and the wife, remaining domiciled in this state, may maintain an action for alimony to be awarded out of his property in this state, and the fact that the marriage relation is dissolved will not defeat such action."

In Turner v. Turner, 44 Ala. 437, in which alimony was awarded the wife, it was held:

"A suit for divorce, commenced by the wife in the courts of this state, who is herself resident in this state at the time she sues, is not to be affected by another suit, subsequently commenced by the husband, for a divorce against her in the courts of another state, to which he has removed, and to which the wife did not accompany him, and to which suit the wife was not a party, except by publication, although the husband's suit may be terminated by a decree in his favor against the wife, before her suit against him is terminated here. The jurisdiction of the court of this state having attached in favor of the wife here, it will continue to be entertained, until its powers are fully enforced in her favor, regardless of the decree in favor of the husband rendered by the court of such other state."

And in the body of the opinion it is said:

"The Indiana divorce in favor of the husband, Matthew Turner against his wife, the complainant, may protect him upon a charge of bigamy, should he marry again in this state. * * * If it is valid, it unmarries him, and sets him free from his marital vows to her. He is no longer the complainant's husband. But it does not settle her right to alimony; it does not settle her right to dower in his lands, and her statutory right to distribution of his property in this state, in the event she should survive him, nor any other interest of a pecuniary character she may have against him."

In Wright v. Wright, 24 Mich. 180, it is held:

"Where the husband resides in Indiana and the wife resides in Michigan, either state has authority, in respect to the marriage relation, to determine upon its validity or to dissolve it, so far as the party resident within its limits is concerned; and if one proceeds in one state such proceeding is no legal impediment to the other's taking like steps in the other state, where it is necessary to the protection of any property or other rights."

"A bill for divorce, * * * on the ground that the defendant had obtained a divorce from the complainant in the state of Indiana, on appeal by the defendant from the decree below to this court, does not differ, as regards the granting of alimony, from any other divorce suit."

See, also, Cook v. Cook, Imp., 56 Wis. 195, 14 N. W. 33, 443, 43 Am. Rep. 706.

In Toncray v. Toncray, 123 Tenn. 476, 131 S. W. 977, 34 L. R. A. (N. S.) 1106, Ann. Cas. 1912C, 284, it is held:

"A wife remaining at the matrimonial domicile may maintain against her former husband in the courts of that state a suit for alimony after a decree of divorce has been granted to him in another state upon mere publication of process, without actual notice to her of the suit, or her appearance therein; where, under the statute, the courts may decree either divorce or alimony without the other, at least, where the foreign decree is silent upon the subject of alimony."

In Rogers v. Rogers, 15 B. Mon. (54 Ky.) 292, it is held:

"On bill filed in Kentucky the husband was divorced from his wife. Subsequently, in Ohio, a court, having jurisdiction of the subject-matter and persons, decreed alimony. Held, that the decree of the court of Ohio could not be questioned in this court in a suit to recover its amount."

In Adams v. Abbott, 21 Wash. 29, 56 Pac. 931, it is held:

"Ballinger's Ann. Codes & St. § 5723, requiring the court, on dissolving a marriage, to make such decree with respect to the property of the parties as will appear just, does not make such decree a necessary part of the decree of divorce; and where a decree of divorce obtained by a wife in a foreign state, on constructive service, and without personal jurisdiction of defendant, makes no provision for alimony or with respect to the property of the parties, and the husband thereafter becomes a resident of Washington, the parties having community property there, the wife may maintain an action in such state for alimony and for the adjudication of her property rights."

In Woods v. Waddle, 44 Ohio St. 449, 8 N. E. 297, it is held:

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"A. and P. were married in West Virginia, at their domicile, where A. retained his domicile, but P. went to Tennessee, where, in ex parte proceedings, she obtained a divorce a vinculo from A.; but, as there was no personal service upon A., her application for alimony was dismissed without prejudice and to enable her to sue for it elsewhere. She then brought suit here for alimony alone, and to reach certain property in Ohio belonging to A., in which case she obtained service upon A., who also appeared and filed pleadings in the case, and on trial the court found sufficient cause, and allowed her alimony. Held, P. had a right thus to bring her action for alimony alone, and she could have her claim therefor determined, and, if sustained upon trial, the court could allow her reasonable alimony out of the property of A."

In Bodle v. Bates, 95 Neb. 757, 146 N. W. 1002, L. R. A. 1915E, 421, it was held:

"Where it clearly appears that in a suit for divorce in a sister state, under the statutes of which the court did not have jurisdiction to take cognizance of real estate then owned by the husband in this state, nor, without consent of the parties, to consider the same in fixing the amount of alimony, and no such consent is affirmatively shown to have been given, and it also clearly appears that the court in allowing alimony to the wife did not take cognizance of or consider such real estate in fixing the amount of such allowance, but allowed the wife a reasonable sum only, based upon the property owned by the husband situated within the jurisdiction of that court, the judgment so rendered is not a bar to an independent suit in this state by the wife, after divorce, to recover a reasonable amount of alimony out of the real estate of the husband situated in this state; nor will the fact that she accepted and has retained the allowance made to her by the judgment of the other court, out of the property of her husband situated within the jurisdiction of that court, estop her from prosecuting such suit."

Determining, as we do, that the Kentucky divorce was not res judicata as to the matter of alimony, and, under the circumstances of the instant case, that the subsistence of the marital status is not indispensable to cognizance of alimony, we hold that the action was properly maintainable between the parties in the trial court; which leaves for inquiry the question of the authority of this court, on appeal, to make the order of June 6, 1916, relative to suit money, attorney's fees, and maintenance of defendant in error and the children of the marriage pending an appeal.

By section 4967, Revised Laws 1910, it is provided:

"After a petition has been filed in an action for divorce and alimony, or for alimony alone, the court, or a judge thereof in vacation, may make and enforce by attachment such order to restrain the disposition of the property of the parties or of either of them, and for the use, management, and control thereof, or for the control of the children and support of the wife or husband during the pendency of the action, as may be right and proper; and may also make such order relative to the expenses of the suit as will insure an efficient preparation of the case. * * *"

Manifestly, by virtue of the foregoing statutory provision, the trial court would have been authorized to make such an order.

The very gist of the present action is the enforcement of the natural and legal duty of a man to support his former wife and the children of his marriage although the marital tie has been severed, for his fault, in a prior action in which the performance of such duty could not be compelled. Such action is necessarily based upon the undischarged obligation of the marriage, and is as characteristically matrimonial as a suit for divorce and alimony or for the annulment of an alleged void marriage.

[2] It appears to us on principle that the same rules with respect to alimony ad interim, counsel fees, and suit money should govern upon appeal in such action as are applied by this court in the exercise of its jurisdiction in other matrimonial actions.

By section 2, art. 7, of the Constitution, it is provided:

"The appellate jurisdiction of the Supreme Court shall be coextensive with the state, and shall extend to all civil cases, at law and in equity. * * *"

This provision of our Constitution would seem sufficiently comprehensive to confer upon this court by implication, without specifically designating them, all the powers requisite and incidental to orderly procedure and practice in the making and enforcing of such orders as are essential to the demands of justice in the disposition of appeals.

In Hunt v. Hunt, 23 Okl. 490, 100 Pac. 541, 22 L. R. A. (N. S.) 1202, an action for the annulment of a marriage wherein this court directed the payment of suit money and counsel fees by the plaintiff in error, it is held:

"In a suit at the instance of a husband to annul such marriage, the court, at any stage of the proceedings where he is shown to have property sufficient, may make and enforce an order requiring him to pay a reasonable allowance for the maintenance and support of his wife and a child born of such marriage, and a reasonable allowance for suit money to enable her to defend."

In Kostachek v. Kostachek, 40 Okl. 744, 124 Pac. 761, wherein alimony pendente lite, counsel fee and suit money were awarded in this court, and the foregoing constitutional provision considered it is said:

"The exercise of such authority by the appellate court is based on the theory that the jurisdiction to review decrees in divorce cases carries with it by implication the incidental power to make such allowances, such authority being indispensable to the proper exercise of proper appellate jurisdiction."

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In Hartshorn v. Hartshorn (not yet officially reported) 155 Pac. 508, it is held:

"The Supreme Court under its appellate jurisdiction in cases in equity, as an incident to the exercise of such jurisdiction, has authority, in actions pending on appeal in said court, to review decrees in divorce proceedings, to grant alimony pending the determination of such appeal, and also the necessary counsel fees and suit money for the prosecution of such proceeding."

We are of opinion that the order of June 16, 1916, was made in the valid exercise of its judicial power by this court.

[3, 4] While it has been held that where jurisdiction of a defendant has been obtained by summons, a court is without power to strike his answer from the files, suppress testimony in his favor, and condemn him without consideration thereof and without a hearing on the theory that he has been guilty of contempt (Hovey v. Elliott, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215), it has never been judicially determined, so far as we are informed, that a plaintiff in error who, as in the instant case absents himself and keeps beyond the process of the court while invoking its jurisdiction to grant him affirmative relief, may refuse to obey its lawful orders, and consistently urge a constitutional right to a trial by a jury to determine his guilt or innocence of admittedly contemptuous conduct, before such court is empowered to decline consideration of his appeal. In Hovey v. Elliott, supra, it was said:

"Whether, in the exercise of its power to punish for a contempt, a court would be justified in refusing to permit one in contempt from availing himself of a right granted by statute, where the refusal did not involve the fundamental right of one summoned in a cause to be heard in his defense, and where the one in contempt was an actor invoking the right allowed by statute, is a question not involved in this suit."

Prior to the erection of the state the Supreme Court of the Territory of Oklahoma in Bennett v. Bennett, 15 Okl. 286, 81 Pac. 632, 70 L. R. A. 804, held:

"In this territory, in an action for divorce, the district court has power to punish a contempt of court in refusing to pay alimony awarded by it, by striking the defendant's answer from the record, or refusing to permit him to plead further in a case in which the defendant has voluntarily absented himself from the territory for the purpose of avoiding contempt proceedings for failure to pay such alimony, and punishment for contempt cannot be otherwise inflicted."

By section 25, art. 2, of the Constitution, it is provided:

"The Legislature shall pass laws defining contempts and regulating the proceedings and punishment in matters of contempt: Provided, that any person accused of violating or disobeying, when not in the presence or hearing of the court, or judge sitting as such, any order of injunction, or restraint, made or entered by any court or judge of the state shall, before penalty or punishment is imposed, be entitled to a trial by jury as to the guilt or innocence of the accused. In no case shall a penalty or punishment be imposed for contempt, until an opportunity to be heard is given."

Even if it could be consistently argued that a decision of the questions presented upon the motion to dismiss requires a determination of plaintiff's guilt or innocence of an indirect contempt of this court, and that dismissal of his appeal is a penalty within the purview of the foregoing constitutional provision, before the imposition of which he would be entitled to a trial by jury as to his guilt or innocence of such contempt, and an opportunity to be heard (a question unnecessary to decide), yet these rights, which are peculiarly for his benefit, he might waive.

"It is a well-settled principle of law, recognized by all appellate courts, that every one may waive a right intended for his own benefit if it can be relinquished without affecting the legal rights of others and without detriment to the community at large. * * * The right of waiver extends to and includes all descriptions of contractual, statutory, and constitutional rights, except such as are inalienable." State v. Frisbee, 8 Okl. Cr. 406, 127 Pac. 1091.

One of the ordinary methods of waiving a right is by acts or conduct indicating a purpose to relinquish the same. From the course of conduct pursued by plaintiff it may be conclusively inferred that he purposely prevented a jury trial, and avoided the opportunity to be heard personally relative to his refusal to comply with the order in question. His voluntary absence from the state, and refusal to submit his person to the jurisdiction of the court, renders such trial by jury, to which, by counsel, he asserts the right, a legal impossibility. At all times since his refusal to comply with the order of this court he has been afforded the claimed constitutional opportunity to be heard in regard thereto. However he has not seen fit, even through the medium of counsel, to offer any excuse for his contemptuous disobedience. The rights of which he might otherwise have availed himself by virtue of the Constitutional provision, supra, if applicable, he has waived.

Here the fundamental right of one summoned in a cause to be heard in his own defense is not involved. On the contrary, plaintiff is an actor invoking the jurisdiction of this court, seeking affirmative, progressive relief, while for seventeen months he has refused, and is still refusing, to comply with its lawful and reasonable orders, having fled from the confines of the state, and remained beyond the reach of its judicial process. This court has been at all times open to plaintiff in error for consideration of his appeal when he complied with its orders properly made

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in the progress thereof; but he may not rightfully insist upon an award of affirmative relief while willfully disregarding the rules of practice, reasonable orders, and methods of procedure made and adopted by this court. In order that the constitutional guaranty that "the courts of justice shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation, and right and justice shall be administered without sale, denial, delay, or prejudice," the courts of this state must be held to have inherent power to enforce all reasonable and lawful orders, for without such power an attempt to administer justice would inevitably result in failure to accomplish the purpose of the fundamental law.

The position of plaintiff in error that he may defy the court, frustrate the purpose of its lawful orders, and thus prevent his adversary from presenting her defense here, and yet compel consideration of his own plea for affirmative action by virtue of arrogated constitutional guaranties, is anomalous in the extreme.

The Criminal Court of Appeals of this state has frequently held that it will not consider an appeal unless the defendant is where he can be made to respond to any order or judgment which may be rendered in the case, and, where the defendant makes his escape from the custody of the law and is at large as a fugitive from justice, will dismiss his appeal. Tyler v. State, 3 Okl. Cr. 179, 104 Pac. 919, 26 L. R. A. (N. S.) 921; Tanner v. State, 5 Okl. Cr. 298, 114 Pac. 360; McGraw v. State, 7 Okl. Cr. 105, 122 Pac. 242; Belcher v. State, 9 Okl. Cr. 50, 130 Pac. 515. And such dismissal is held not a denial of due process of law.

In Reed v. Reed, 70 Neb. 779, 98 N. W. 73, the Supreme Court of that state said:

"We come now to the question as to whether or not the court erred in refusing to allow the plaintiff to proceed with the trial of his case without complying with the order for the payment of temporary alimony, and in dismissing the action because of an absolute refusal on plaintiff's part to comply with that order. This question seems to have been settled in the case of Brasch v. Brasch, supra [50 Neb. 73, 69 N. W. 392], where it was held that 'it was entirely within the discretion of the district court, when the sums allowed for temporary alimony should be paid, whether before the final hearing of the action, and as a condition precedent to the right of the husband to further prosecute or defend, or to postpone such payment until the final hearing.' It is contended, however, that the order of the court was a violation of the rights of the plaintiff as defined by section 13 of article 1 of the Constitution of 1875. An examination of that section convinces us that counsel has made a mistake in his citation, and that he intended to cite section 9 of article 1, which provides that 'all courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law and justice administered without denial or delay.' Counsel seems to think that this section of the Constitution guaranteed him a trial of his case, whether he complied with the reasonable orders and rules of the court or not. In this he is mistaken. Due process of law, as specified in this section, has been defined as follows: 'Law, in its regular course of administration, through courts of justice.' 'Due process of law in each particular case means such an exertion of the powers of the government as the settled maxims of law permit and sanction, under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.' Ex parte Ah Fook, 49 Cal. 402. 'Due process of law is a course of lawful proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.' South Platte Land Co. v. Buffalo County, 7 Neb. 253. Due process of law may be said to be satisfied whenever an opportunity is offered to invoke the equal protection of the law by judicial proceedings appropriate for the purpose, and adequate to secure the end and object sought to be attained. The court in this case was open to the plaintiff for the trial of his cause whenever he complied with its reasonable rules of practice and its orders properly made in the process of the litigation. It cannot be successfully contended that a plaintiff may have a trial of his cause without regard to rules of practice, to forms or precedents, or the reasonable methods of procedure adopted by the courts. In order to guaranty the plaintiff a speedy trial, and that justice should be administered to him without denial or delay, our courts must be held to have the inherent power to enforce their reasonable orders; for without such power an attempt to administer justice would inevitably result in a failure to accomplish the end sought. It was within the power of the court to require the plaintiff to comply with its order before permitting him to proceed with the trial, and his refusal to comply with this order was the only thing which prevented him from having his case adjudicated upon its merits. If he had complied with this order, or if he had shown to a reasonable certainty that he was unable to comply with it, no doubt the court would have permitted him to try his case, instead of dismissing it without a hearing.

"The plaintiff alone is to blame for the situation in which he finds himself, and we recommend that the judgment of the district court be affirmed."

In Brown v. Brown, 22 Wyo. 316, 140 Pac. 829, 51 L. R. A. (N. S.) 1119, it is held:

"Where a husband sued out a writ of error to review a judgment against him in divorce, and the Supreme Court entered an order requiring him to pay a specified sum to his wife's attorneys for preparing her defense, with which he failed to comply, such failure amounted to a civil contempt, and her remedy was to move to dismiss the proceedings in error, and not to punish him for contempt."

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In the body of the opinion it is said:

"While the method of enforcing its orders by citation and punishment as for contempt may, in a proper case, be resorted to in this court, yet upon the facts here there is, in our judgment, a more effective remedy. The plaintiff in error is guilty, if at all, of a civil but not a criminal, contempt. He has failed without excuse to comply with the order of this court, and by his petition in error is seeking affirmative relief at the hands of this court. It is elementary that such conduct is not favored. One cannot refuse to obey the lawful order of a court and expect relief at the hands of the court. This rule is a salutary one, and has been often applied by the courts. Casteel v. Casteel, 38 Ark. 477; Peel v. Peel, 50 Iowa, 521; McClung v. McClung, 40 Mich. 493; Waters v. Waters, 49 Mo. 385; Zimmerman v. Zimmerman, 7 Mont. 114, 14 Pac. 665; Walker v. Walker, 82 N. Y. 260; Williams v. Williams, 6 S. D. 284, 61 N. W. 38. The motion for a citation to issue as prayed is refused, but this court is of the opinion that, if the order remains uncomplied with on June 1st next, to wit, June 1, 1914, then a showing to that effect will support a motion to dismiss the proceedings in error."

In Bronk v. Bronk, 46 Fla. 474, 35 South. 870, 110 Am. St. Rep. 101, it is held:

"The appellate court will not determine the correctness of the action of the lower court in issuing an injunction and writ of ne exeat, and render a decree therein, while the appellant, who has escaped from custody, and in defiance of the court and its writs, remains beyond its jurisdiction and renders it powerless to enforce any decree upon this feature of the case which it might render."

In the body of the opinion it is said:

"This case having been reached for final disposition, it now appears by another sworn return of the sheriff that John P. Bronk has not returned to his custody, and is now out of the jurisdiction of this court. The appellant having, since he took appeal, voluntarily placed himself in contempt of the orders of the court below, and having gone beyond the jurisdiction of this court so that no order or decree it might make in the premises could be personally enforced against him, we are confronted with the question whether he has a right to a hearing on questions based on the injunction and ne exeat orders. Doubtless the general rule is that a party is not deprived of any strict legal right to be heard by placing himself in contempt of the court, especially if there be other means available by which the court may enforce its orders. Hovey v. Elliott, 167 U. S. 409, 428, 17 Sup. Ct. Rep. 841, 42 L. Ed. 215, and cases there cited. But the right to be heard upon appeal or writ of error has not been held to be one which a party cannot deprive himself of by his voluntary act of putting himself in contempt of the court by escaping from custody and evading the power and process of the law and the courts. It is distinctly held in the above-cited case [167 U. S.], on pages 443 and 444 [17 Sup. Ct. 841, 42 L. Ed. 215], that such a question was not involved in that suit. In this state it is decided that an appellate court will refuse to hear a criminal case on writ of error, where the plaintiff in error has escaped, and is not within the control of the court below, either actually by being in custody, or constructively by being out on bail. Woodson v. State, 19 Fla. 549. This case has been repeatedly followed in this court. The principle of those cases applies here. The court will not, at the instance of the appellant, determine the correctness of the action of the lower court in issuing the injunction and writ of ne exeat, and render a decree therein, while the appellant, in defiance of the court and of its writs, remains beyond its jurisdiction, and renders it powerless to enforce any decree upon this feature of the case which it might render. In the case of State v. Ackerson, 25 N. J. L. 209, the defendant had been arrested on a capias, and had suffered himself to be rescued, and had escaped from custody. It was held that he was in contempt, and had no standing in the court whose process he resisted and whose authority he contemns, and is not entitled to be relieved by that court, and that the appellate court would not interfere in a cause where the court below ought not and would not. Freese v. Swayze, 26 N. J. Eq. 437; Mussina v. Bartlett, 8 Port. (Ala.) 277; People v. Horton, 46 Ill. App. 434, 438."

In Wright v. Wright, supra, the Supreme Court of Michigan made the following order:

"We see no difference between this and any other divorce suit, so far as the question of alimony is concerned. An allowance of $75 is ordered to be paid within thirty days or the appeal will be dismissed."

In Peel v. Peel, 50 Iowa, 521, it is held:

"In an action for divorce by the wife, the failure of the husband to obey an order of the court directing the payment of alimony will only in extreme cases authorize the striking of his answer from the files."

"Where the wife is defendant, the failure or refusal to comply with the order may very properly be punished by striking the petition or dismissing the case."

In White v. White, 148 App. Div. 883, 132 N. Y. Supp. 1043, it is held:

"Where defendant in divorce, by his refusal to obey the orders of the court as to alimony and counsel fees, and to provide the expenses of plaintiff's opposition to his appeals, made it impossible for plaintiff to oppose such appeals, they will be dismissed."

And in the body of the opinion it is said:

"The defendant, by his insistent refusal to obey the orders of the court as to the alimony and counsel fee and for providing the expenses of the plaintiff in opposing his appeal, and his withdrawal from this state, has rendered it impossible for the plaintiff to oppose these appeals and sustain the judgment and orders appealed from. Certainly the court cannot allow a party to an action to treat the orders of the court with contumely and contempt, and at the same time allow him to prosecute an appeal, especially where it appears that a compliance with the order is essential to the respondent to sustain the judgment and orders appealed

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from. There is no question of inability of the defendant to comply with the judgment and orders. He has simply treated the orders of the court with contempt, and withdrawn from its jurisdiction, so that they cannot be enforced."

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See, also, Waters v. Waters, 49 Mo. 385; Tuttle v. Tuttle, 21 N. D. 503, 131 N. W. 460, Ann. Cas. 1913B, 1; Casteel v. Castéel, 38 Ark. 477; Buehler v. Buehler, 38 Nev. 500, 151 Pac. 44.

The appeal is dismissed.

PER CURIAM. Adopted in whole.

(16 Okl. Cr. 673)

McKINSTRY v. STATE. (No. A-3232.)

(Criminal Court of Appeals of Oklahoma. May 31, 1919.)

(Syllabus by Editorial Staff.)

1. ANIMALS ⟹36 — VIOLATION OF QUARANTINE RULE—OFFENSE—STATUTE.

In prosecution under Laws 1910-11, c. 115, § 8, making it an offense to violate certain rules of quarantine promulgated by state board of agriculture, which it is authorized to make by Rev. Laws 1910, § 28, as amended by Laws 1913, c. 228, § 1, a conviction cannot be sustained were there is no record proof that quarantine line had been established pursuant to rules of such board; proof of its establishment by state and federal inspectors not warranting a conviction.

2. ANIMALS ⟹36—VIOLATION OF QUARANTINE RULES — ESTABLISHMENT OF QUARANTINE.

In a prosecution for violating quarantine rules, the establishment of quarantine must be shown before the penal statute can be set in motion.

Appeal from County Court, Jefferson County; E. L. Dillard, Judge.

Albert McKinstry was convicted of a misdemeanor, and appeals. Reversed.

Sigler & Howard, of Ardmore, and E. E. Blake, of Oklahoma City, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error, Albert McKinstry, was convicted in the county court of Jefferson county upon an information charging "that he did willfully and unlawfully drive and cause to be driven about 80 head of cattle from Carter county, Okl., across the quarantine line established by the state board of agriculture, in violation of the rules and regulations as established by the board of agriculture."

In accordance with the verdict of the jury he was sentenced to pay a fine of $300. From the judgment he appealed by filing in this court, on December 11, 1917, petition in error with case-made.

The Attorney General has filed the following confession of error:

"This prosecution was commenced and carried on under section 3 of chapter 115, Session Laws of Oklahoma 1910-11. That section makes it a crime to violate certain rules of quarantine promulgated by the state board of agriculture—not a rule of an inspector in their employ.

"The most favorable view which we can attach to a statute like this one is that these rules have the force of statutes only when substantially pleaded and proven at the trial. Anyway, anything less than satisfactory proof of such rules of the board in establishing a quarantine would not possess color of proof of a violation of a penal statute.

"The record in this case fails to disclose any proof that the quarantine line established had been done in pursuance to the rules of the state board of agriculture. The inspector testified that he and a man by the name of Barnell, a federal inspector, established the quarantine line. The statute itself prescribes how a quarantine is to be established in respect to making it a crime under section 3, chapter 115, Session Laws 1910-11, for its violation.

"The law is section 28, Revised Laws Okl., 1910, as amended by section 1, chapter 228, Session Laws 1913, and reads as follows: 'The state board of agriculture shall have the power and authority to establish at any time quarantine lines in this state and make rules and regulations to maintain and enforce the same to prevent the communicating or conveying of any contagious or infectious diseases of live stock within this state, as provided by law. When the state board of agriculture shall have determined said quarantine line, or lines, the president of said board shall at once, issue his proclamation setting forth and proclaiming the boundary and location of said quarantine line or lines, the orders, regulations and rules so prescribed by said board, and the said president of said board shall at the earliest practicable date publish once in no less than three newspapers of general circulation within the state a notice of said proclamation and such publication shall be deemed full and sufficient legal notice of the proclamation of said board.'

"In a prosecution for violating quarantine rules, it is elementary that the establishment of the quarantine must be shown before the penal statute can be set in motion. This not having been done, or, at least, the record not disclosing it if it were done, we would not be justified in asking the appellate court to affirm the judgment in this case."

After a careful examination of the record, our conclusion is that the confession of error is well founded, and should be sustained. For the reasons therein stated, the judgment is reversed.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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(16 Okl. Cr. 149)

McDANIEL v. BROWN, District Judge.
(No. A-2336.)

(Criminal Court of Appeals of Oklahoma. May 31, 1919.)

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(Syllabus by the Court.)

CLERKS OF COURTS ⟸76 — CRIMINAL LAW ⟸93 — FAILURE TO PAY OVER FEES TO COUNTY — PROCEDURE—MISDEMEANOR—JURISDICTION.

Pen. Code (section 2092, Rev. Laws 1910) provides: "If there be in any other chapter of the laws of this state a provision making any specific act criminal and providing the punishment therefor, and there be in this Penal Code any provision or section making the same act a criminal offense or prescribing the punishment therefor, that offense and the punishment thereof shall be governed by the special provisions made in relation thereto, and not by the provisions of this Penal Code." *Held* that, in a prosecution against a district court clerk for failing and refusing to pay fees charged and collected as clerk's costs into the county treasury, the specific provisions of the fees and salary act (section 3213, Rev. Laws 1910) must govern as against provisions of the Penal Code. *Held*, further, that when the alleged amount of fees embezzled is $20 or less, the information charges only a misdemeanor of which the county court has exclusive jurisdiction.

Application by Ned McDaniel for writ of prohibition to Hon. G. A. Brown, District Judge of Jackson County. Writ awarded.

Robinson & Hamilton, of Altus, and Fain & Young, of Lawton, for petitioner.

The Attorney General, C. E. Hall, Co. Atty., of Holdenville, and S. B. Garrett, of Altus, for respondent.

PER CURIAM. This was an application for writ of prohibition, to prohibit the district court of Jackson county and Hon. G. A. Brown, specially assigned to preside over said court, from further proceeding in the trial of an information, wherein petitioner, Ned McDaniel, as clerk of the district court of Jackson county, was charged with the embezzlement of fees alleged to be received by him in the sum of $9.15, as costs, in civil action No. 709 in said district court, entitled Farmers' Bank of Olustee, Plaintiff, v. Mrs. Annie L. Scott, Defendant, the same being then and there the money and property of, due, payable, and unpaid to, the county of Jackson and the county treasury of said county.

It is averred in the petition: That the defendant interposed a demurrer to said information on the ground, among others, that said district court had no jurisdiction of the offense charged or attempted to be charged therein, which demurrer was overruled by the court. Thereupon the defendant entered a plea of not guilty, and the case proceeded to trial. The jury rendered their verdict finding the defendant Ned McDaniel guilty as charged and leaving his punishment to be fixed by the court. That motions for new trial and in arrest of judgment were duly filed, and that the court fixed the time for pronouncing judgment and sentence on the verdict.

It is further averred that upon the record attached and the undisputed facts it appears that the district court of Jackson county was and is without jurisdiction to try said information, and, unless prohibited by a writ of prohibition from this court from proceeding further in said case, and from pronouncing judgment and sentence against this petitioner, he will suffer irreparable injury thereby, that petitioner is wholly without means and will be unable by reason of his poverty of securing and paying for a transcript and case-made for appeal to this court from said judgment, and that petitioner has no other adequate remedy to secure his rights.

In the case of Warner v. Mathews, District Judge, 11 Okl. Cr. 122, 143 Pac. 516, the precise question here presented was considered and determined. It was therein held:

"The Penal Code provides (Rev. Laws 1910, § 2092): 'If there be in any other chapter of the laws of this state a provision making any specific act criminal and providing the punishment therefor, and there be in this Penal Code any provision or section making the same act a criminal offense, or prescribing the punishment therefor, that offense and the punishment thereof shall be governed by the special provisions made in relation thereto, and not by the provisions of this Penal Code.' *Held* that, in a prosecution against a district court clerk for failing and refusing to pay fees charged and collected as clerk's costs into the county treasury, the specific provision of the fees and salaries act (section 3213, Revised Laws 1910) must govern as against provisions of the Penal Code. *Held*, further, that when the alleged amount of fees embezzled is $20 or less, the information charges only a misdemeanor of which the county court has exclusive jurisdiction."

It is our opinion that, under the provisions of the Penal Code quoted in the opinion in the case of Warner v. Mathews, District Judge, the offense charged in the information in this case is a misdemeanor. It follows that the district court of Jackson county is without jurisdiction to render judgment on the verdict rendered in said cause.

It is therefore ordered that the writ issue prohibiting the respondent as prayed for in the petition.

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(16 Okl. Cr. 675)

FLEETWOOD et al. v. STATE.
(No. A-3219.)

(Criminal Court of Appeals of Oklahoma. May 31, 1919.)

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(Syllabus by Editorial Staff.)

CRIMINAL LAW ⟸1069(6) — APPEAL — TIME FOR TAKING APPEAL—STATUTE.

Rev. Laws 1910, § 5991, providing that an appeal must be taken within 60 days from judgment, unless the time is extended by the trial court or the judge thereof, is mandatory, and, where there was no extension, an appeal filed one day late would be dismissed.

Appeal from County Court, Sequoyah County; W. B. Wall, Judge.

Red Cloud Fleetwood and Grethel Priest were convicted of a violation of the prohibitory liquor law, and they appeal. Appeal dismissed, and cause remanded with directions.

McCombs & McCombs, of Sallisaw, for plaintiffs in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiffs in error, Red Cloud Fleetwood and Grethel Priest, were jointly tried and convicted on an information charging that they did unlawfully convey and transport six gallons of intoxicating liquor from a point named to another point in the town of Sallisaw, and were each sentenced to be confined in the county jail for 30 days and to pay a fine of $50. The judgment was rendered on the 10th day of October, 1917. An appeal was attempted to be taken by filing in this court on December 10, 1917, a petition in error with case-made.

The Attorney General has filed a motion to dismiss the appeal, which is as follows:

"The judgment in this case was rendered October 10, 1917. The appeal was filed in this court on the 10th day of December, 1917, which was 61 days after judgment was rendered. Section 5991, Revised Laws, provides that an appeal must be taken within 60 days from judgment, unless the time is extended by the trial court or judge thereof. There was no extension in this case. Therefore the appeal was filed one day late.

"The above statute is mandatory, and has received construction by this court in a dozen cases. Among them is State v. Gunter, 13 Okl. Cr. 83 [162 Pac. 231], in which the court said: 'Procedure Criminal, § 5991, Rev. Laws 1910, provides that: "In misdemeanor cases the appeal must be taken within sixty days after the judgment is rendered: Provided, however, that the trial court or judge may, for good cause shown, extend the time in which such appeal may be taken not exceeding sixty days." Held, that when an appeal in a misdemeanor case is not taken within the 60 days prescribed by the statute the record or case-made must affirmatively show that the trial court or judge thereof for good cause shown extended the time; otherwise, this court is without jurisdiction to review the judgment, and such appeal will be dismissed.' "

An examination of the record discloses that the motion to dismiss is well founded and should be sustained. For the reasons stated therein, the appeal is dismissed, and the cause remanded to the trial court, with direction to cause its judgment and sentence to be carried into execution.

(16 Okl. Cr. 677)

SHOBE v. STATE. (No. A-3119.)

(Criminal Court of Appeals of Oklahoma. May 31, 1919.)

(Syllabus by Editorial Staff.)

CRIMINAL LAW ⟸1069(1)—TIME FOR FILING APPEAL—MISDEMEANOR.

The Criminal Court of Appeals has no jurisdiction to entertain an appeal from a judgment of conviction for a misdemeanor filed therein later than the 120th day after the rendition of the judgment, and an appeal filed after that time will be dismissed.

Appeal from County Court, Major County; Harry Randall, Judge.

M. L. Shobe was convicted of the crime of malicious trespass upon an inclosed field, and sentenced to pay a fine of $5 and costs of the action, and he appeals. Appeal dismissed.

John V. Roberts, of Fairview, and Chas. L. Moore, of Oklahoma City, for plaintiff in error.

S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. This is a pretended appeal from the county court of Major county, wherein the defendant was convicted of the crime of malicious trespass upon an inclosed field after having been expressly forbidden to enter said field, and his punishment fixed at a fine of $5 and the costs of the action.

The judgment of conviction was rendered on the 13th day of March, 1917. The petition in error and case-made were not filed in this court until the 17th day of August, 1917, more than 120 days after the rendition of judgment in the lower court. This being a conviction for a misdemeanor, the longest period of time allowed by the statute for perfecting an appeal from the judgment is 120 days.

This court has no jurisdiction to entertain an appeal from a judgment of conviction for a misdemeanor filed in this court on a day

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later than the 120th day after the rendition of judgment. Therefore the appeal is dismissed in accordance with the opinion of this court in numerous decisions, among which are the following: Eaton v. State, 7 Okl. Cr. 48, 121 Pac. 1089; Welch v. State, 9 Okl. Cr. 33, 130 Pac. 514; Jones v. State, 4 Okl. Cr. 660, 112 Pac. 760; Bates v. State, 5 Okl. Cr. 249, 114 Pac. 271; High v. State, 9 Okl. Cr. 183, 131 Pac. 189.

(16 Okl. Cr. 679)

Ex parte CARDWELL. (No. A-2423.)

(Criminal Court of Appeals of Oklahoma. June 3, 1919.)

(Syllabus by Editorial Staff.)

HABEAS CORPUS ⊂⇒53—PETITION—DEMURRER.

A petition for habeas corpus, alleging an illegal imprisonment under a commitment by district judge upon a verdict of guilty to await further action of court, and that demurrer to information had been sustained, and that county attorney, though given leave, did not file amended information so that district court was without jurisdiction to try petitioner, did not entitle him to the writ.

Petition by W. C. Cardwell for writ of habeas corpus. Demurrer to petition sustained, writ denied, and cause dismissed.

R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. On behalf of W. C. Cardwell, a duly verified petition for writ of habeas corpus was filed in this court on March 20, 1915, alleging that petitioner was illegally restrained of his liberty and unlawfully imprisoned in the county jail of Choctaw county, by Lee Loftin, sheriff of said county; that the cause of said restraint is that he was committed to the county jail by the district judge upon a verdict of the jury returned in cause No. 667, State of Oklahoma v. W. C. Cardwell, wherein the jury returned a verdict of guilty against him in said cause, to await the further action of the court.

It is alleged that said restraint is illegal and unauthorized because a demurrer to the information was sustained and the county attorney was thereupon granted leave to file an amended information, but the court did not order that a new information be filed in said cause, and that the county attorney thereupon amended said information by interlineation; that said information charged this defendant with the crime of burglary, and as amended was never refiled, and for this reason the defendant moved the court to dismiss said cause and abate the same, which motion was by the court overruled, and for this reason said district court was without jurisdiction to try this defendant. The petition was received by mail.

On November 5, 1915, the Attorney General filed a demurrer thereto on the ground that upon the facts stated the petitioner is not entitled to have a writ of habeas corpus issue.

The demurrer was sustained, and it was ordered that the writ be denied and the cause dismissed.

(16 Okl. Cr. 147)

WARD v. STATE. (No. A-3121.)

(Criminal Court of Appeals of Oklahoma. May 31, 1919.)

(Syllabus by the Court.)

CRIMINAL LAW ⊂⇒1182—PREJUDICIAL ERROR—AFFIRMANCE—RULE OF COURT.

When no counsel appears, and no briefs are filed, the court will examine the pleadings, the instructions of the court, and the exceptions taken thereto, and the judgment and sentence, and, if no prejudicial error appears, will affirm the judgment.

Appeal from District Court, Washington County; R. B. Boone, Judge.

Elwood Ward was convicted of the crime of manslaughter, and he appeals. Judgment affirmed.

Charlton & Farrell, of Bartlesville, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

MATSON, J. This is an appeal from the district court of Washington county, wherein the defendant, Elwood Ward, was convicted of the crime of manslaughter in the first degree, and sentenced to serve a term of 25 years' imprisonment in the state penitentiary for the killing of one Grover Buoy in the city of Bartlesville on the 27th day of August, 1916.

At the time of the killing, the defendant was a police officer in the city of Bartlesville, and the deceased was a farmer boy about 21 years of age, who had lived in that community all his life. The killing occurred in a restaurant known as Jimmie's Cafe in the city of Bartlesville about 2 o'clock in the morning of Sunday, the 27th day of August, 1916.

The evidence on the part of the state makes out a case of murder, and while the defendant attempted to justify this killing on the ground of self-defense, the evidence of the defendant would only tend to reduce the degree of the offense to manslaughter in the first degree.

This cause has been pending in this court since the 24th day of August, 1917. No

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brief has been filed in behalf of the defendant, nor was any appearance made at the time the cause was submitted in November, 1918. At that time the Attorney General moved the court to affirm the judgment for failure to prosecute the appeal. No response has been made to such motion, and it is apparent that the appeal has been abandoned.

Rule 9 (165 Pac. x) of this court provides:

"When no counsel appears, and no briefs are filed, the court will examine the pleadings, the instructions of the court, and the exceptions taken thereto, and the judgment and sentence, and, if no prejudicial error appears, will affirm the judgment."

The court has examined the pleadings, instructions, judgment, and sentence, and has in addition thereto read a large part of the evidence. We find no prejudicial error, and, in accordance with Rule 9, supra, the judgment of conviction is affirmed.

DOYLE, P. J., and ARMSTRONG, J., concur.

(54 Utah, 386)

ARRASCADA et al. v. SILVER KING COALITION MINES CO. et al.
(No. 3300.)

(Supreme Court of Utah. April 21, 1919.)

1. MASTER AND SERVANT ⟸185(27) — INJURIES TO SERVANT—NEGLIGENCE.

Where a mining company's employé directed to do a particular thing which might be more dangerous than what he was doing, in that he might encounter danger from above where two other employés were working, inquired of them if it was safe, receiving an affirmative answer, and not until then proceeded upward toward them, and was struck by a falling rock, the company was liable if its other employés inquired of were negligent.

2. MASTER AND SERVANT ⟸287(4)—INJURIES TO SERVANT — NEGLIGENCE — QUESTION FOR JURY.

In action against mining company and employés for death of another employé struck by rock falling from above where defendant employés were working, whether company was or was not negligent in assuring deceased employé, through other employés, that it was safe above, *held* for the jury.

3. MASTER AND SERVANT ⟸287(6)—FELLOW SERVANTS—QUESTIONS FOR JURY.

Whether miners working above a bulkhead were or were not fellow servants of a timberer working in a chute below the bulkhead *held* for the jury under the evidence.[1]

4. MASTER AND SERVANT ⟸276(2)—DEATH OF SERVANT — CAUSE — SUFFICIENCY OF EVIDENCE.

In action against mining company for death of timberer struck by a falling rock, evidence *held* to justify finding that a rock struck deceased, and that it came from the top of a raise or the roof of the raise.[2]

5. TRIAL ⟸260(1)—INSTRUCTIONS—COVERED REQUESTS.

The refusal of proper requested instructions was not prejudicial error, where those given were full and clear and covered every issue and every phase of the case.

Appeal from District Court, Salt Lake County; P. C. Evans, Judge.

Action by Vicenti Arrascada and others, by Joel Nibley, their guardian ad litem, and Carmen Arrascada, against the Silver King Coalition Mines Company and others. From judgment against the named defendant, it appeals. Affirmed.

Dickson, Ellis & Lucas and Marioneaux & Beck, all of Salt Lake City, for appellant.

Van Cott, Riter & Farnsworth and E. O. Leatherwood, all of Salt Lake City, and W. A. Stone, of Caldwell, Idaho, for respondents.

WEBER, J. The minor children of Vicenti Arrascada, by their guardian ad litem, and Carmen Arrascada, his widow, commenced this action against the Silver King Coalition Mines Company and Evelyn Allen and Howard Breen employés of the mining company for damages sustained through the death of the husband and father as a result of the defendants' alleged negligence. Judgment was obtained in the district court of Salt Lake county against the defendant Silver King Coalition Mines Company. The cause of action against Allen and Breen was dismissed during the progress of the trial. The defendant corporation appeals.

The following is a brief recital of the material facts which the testimony introduced by plaintiffs tended to prove: The defendant owned and operated the Alliance mine at Park City, Utah. On July 14 and 15, 1916, it was engaged in the construction of a three-compartment chute extending from the 900-foot level of the mine upwards to the 700-foot level. The chute was constructed of lumber and timber. The middle compartment was a manway, and the others were for the purpose of carrying ore. On July 14th the chute had been constructed to the height of about 100 feet above the 900-foot level. The top of the chute was about 8 feet below the top of the raise in which the chute was being constructed. The deceased was employed by the defendant on July 14, 1916. Until he was injured the next day he

[1] Dryburg v. Mercur Gold M. & M. Co., 18 Utah, 410, 55 Pac. 367; Miller v. Utah Con. M. Co., 178 Pac. 771; Urich v. Apex Min. Co., 169 Pac. 263; Vota v. Ohio Copper Co., 42 Utah, 129, 129 Pac. 349; Shields v. Silver King M. Co., 166 Pac. 988; Shepherd v. Railroad Co., 41 Utah, 469, 126 Pac. 692.

[2] Johnson v. Silver King Con. M. Co., 179 Pac. 61.

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assisted in the construction of the chute. As the result of an accident occurring July 15, 1916, caused by the alleged negligence of the defendant, Arrascada died on May 17, 1917. In a deposition taken before his death, and read in evidence at the trial, Arrascada testified to the effect that the miners or machine men were drilling in the ground above him and above the three-compartment chute on July 15, 1916, the day of the accident; that he had nothing whatever to do with their work; that he never was present when they did their work; that he did not see them drilling, but heard them working; that he never drilled into nor examined in any way the ground at or around the raise; that just before the accident he was in the top set of the chute, which was lagged over, and went to get on top of the lagging; that he had that day been ordered by the shift boss to get on top of this lagging and nail it down before the machine men blasted their holes; that the machine men told him they were going to blast and to come up; that he called up to them and asked if everything was all right, and was told by one of them that it was; that there was a space of some 16 inches between the foot wall and the chute through which he started to climb, and thus get on top of the lagging and comply with the orders received by him; that, as he was trying to go up so as to get on top of the three-compartment chute, he was hit on the head by a rock; that he knew it was a rock because there was nothing above him but rocks; that there was no timbering in the raise above the chute; that when he was hit by the rock he fell backwards into the chute; that he did not know what happened to him after the rock hit him; that when he regained consciousness he was inside the chute, at the bottom of it. The distance between the lagging or the covering over the three-compartment chute and the top of the raise was about 8 feet, and it was in the same position with respect to the top of the raise on July 15th, a short time after the accident. There were three ways to get on top of the bulkhead, but it was safest to go up on the foot wall side. Day and night shifts were working in the raise. Dalmer Wiley and Elmer Wood were working on the night shift as miners and machine men, their shift beginning at about 7:30 p. m., and ending at 4 a. m. On the shift next preceding that during which the accident occurred Wiley and Wood drilled six or eight holes in the top of the raise, some of which had been completely finished on that shift. These holes were at the top and on each side of the raise. Returning to work on the evening of the day during which the accident occurred Wiley found eighteen holes, ten of which had been drilled by the day shift. Wiley found loose rock near the holes which had been drilled by the day shift, and he picked down some large and some small pieces of rock in the vicinity of the holes on and toward the foot wall side. The ground through which the raise was then being driven was limestone that did not slack or swell. If properly sounded and picked down, it was not dangerous ground. The work of drilling in the top of the raise had the effect of jarring and loosening the ground at and in the vicinity of the holes drilled. Wiley said it was his practice to make frequent soundings and to make examinations of the holes and at points distant from the holes, covering all ground from which rock might fall; that the drilling into the ground through which the raise extended, and particularly the work of drilling near the vicinity of the top of the raise as the same was extended on July 15, 1916, had the effect of jarring the rock loose; that, if a raise is being put up in limestone, it will always be safe from falling rock if it has been picked down in the usual way and with the usual care after blasting; that there is always more or less danger when drilling; that the danger is less if precaution is taken; that soundings must be taken from time to time as conditions require; that in this case the usual practice was to make frequent soundings, and if the ground had been sounded and picked down, it would not have caved from the top or side of the raise.

The questions raised by appellant are whether its motion for nonsuit and prayer for a directed verdict should have been granted, whether the court erred in denying its motion for a new trial, and whether there was error in refusing to give instructions requested by defendants.

It is first urged by appellant's counsel that no primary duty on the part of defendant, as master, to furnish the deceased a safe place to work, is pleaded in the complaint, and that there was no evidence of any breach of such duty. It is alleged in the complaint that it was the duty of the defendant company to exercise ordinary care to furnish a reasonably safe place of work for the deceased and to remove all rock and material in the vicinity of the top of the raise and above the chute which was loose or likely to fall and injure the deceased while obeying the orders of the foreman, and with copious verbiage the complaint goes into all the details as to the alleged breach of duty and the claimed negligence of the mining company, and there was some substantial evidence produced by plaintiffs to sustain the allegations of the complaint.

[1, 2] It is insisted by appellant that the safe place to work rule has no application to this case. Assuming, though not deciding, appellant's position to be correct, that assumption would not absolve defendant from liability. The testimony produced by plaintiffs tended to prove that deceased was directed to do a particular thing which might be more dangerous than what he was doing,

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and by doing it he might encounter danger from above where Breen and Allen had been or were at work. The deceased did not rush into danger; he took the precaution of inquiring from Breen and Allen, who were above him, whether it was safe for him to proceed upward, and they, or one of them, assured him that everything was all right and that he could proceed in safety. It appears from his testimony that it was in reliance upon that assurance that he proceeded to go to the top of the chute, and that while in the act of doing so was struck by a falling rock. Under the circumstances it was the duty of Breen and Allen to inform the deceased of any apparent danger and not to induce him to believe that everything was safe. It was their duty to exercise ordinary care to prevent injury to the deceased, and, if they failed in the discharge of that duty, the jury might well find them guilty of negligence, and, as they represented the defendant, their knowledge was the defendant's knowledge, and their negligence was the defendant's negligence. Under all the circumstances it was, therefore, a question of fact for the jury to determine whether the defendant was or was not negligent with respect to the matters just detailed and whether such negligence was the proximate cause of the accident and consequent injury to the deceased.

[3] In an elaborate argument it is contended that, even if Breen and Allen were negligent, the defendant is not liable, because they were fellow servants of the deceased. According to the evidence of plaintiffs, the deceased was not a fellow servant of Breen and Allen, or either of them. The working place of the deceased was in the chute below the bulkhead. The working place of Breen and Allen was in the raise above the bulkhead. The deceased was doing timbering or carpenter work. Breen and Allen were doing the work of miners. In Dryburg v. Mercur Gold M. & M. Co., 18 Utah, 410, 55 Pac. 367, it is said:

"Two servants of a common master may be at work within five feet of each other, or a less distance, and still not be fellow servants. A wall may be between them, and the one may have no opportunity of knowing how the other performs his work."

The bulkhead or the lagging on the top of the chute may well be considered as a wall separating the place of work of the deceased and that of Breen and Allen. Whether doubt was left by the Dryburg Case, and other early cases, as suggested by appellant, the fellow-servant question is well settled in this state by the more recent cases of Miller v. Utah Con. M. Co., 178 Pac. 771; Urich v. Apex Min. Co., 169 Pac. 263; Vota v. Ohio Copper Co., 42 Utah, 129, 129 Pac. 349; Shields v. Silver King M. Co., 166 Pac. 988; Shepherd v. Railroad Co., 41 Utah, 469, 126 Pac. 692. Many cases based upon the common-law rule of fellow service and one federal case interpreting the Utah statute have been cited by defendant, but those cases have never been accepted as authority on the law of fellow service in this jurisdiction. In harmony with the trend of judicial thought, this court has interpreted our fellow service statute liberally in favor of the injured. It has refused to emasculate the statute, and has construed its provisions in accordance with the manifest legislative intent to mollify the barbaric rigor of the common-law rule of fellow service.

The testimony produced by plaintiffs on the question of fellow service was contradicted by defendant. Whether deceased was a fellow servant of Breen and Allen was not shown by proof so clear and conclusive that it could be decided by the court as a matter of law. Therefore that issue was for the jury to decide.

[4] Defendant maintains that there is no evidence that a rock fell from the top of the raise and struck the deceased. In our opinion there was evidence from which it might be legitimately inferred that a rock struck deceased and that it came from the top of the raise. One of defendant's witnesses testified that the platform or bulkhead was clear of rock and other material, and he also said that, if any rock fell, there was no place for it to fall from except from the back of the raise or roof of the raise. There was testimony tending to prove that ten holes had been drilled by the day shift, and that Allen and Breen left loose rock and material in the roof of the raise. Taking all the testimony into consideration, there was evidence of facts from which the jury might reasonably infer that deceased was struck by a falling rock, and that it came from the roof of the raise. "It is well settled that evidence of negligence need not be direct and positive. Circumstantial evidence is sufficient." Johnson v. Silver King Con. M. Co., 179 Pac. 61. Where "the question of negligence may be said to be doubtful, * * * it has become elementary in this jurisdiction, as well as in many others, that the question is for the jury." Id. And so with all the other issues of fact in this case. As to each the testimony produced by plaintiffs and that of defendant is irreconcilable. Had the jury given credence to the testimony introduced by defendant, they could not have consistently found a verdict for the plaintiffs. Had the testimony of defendant's witnesses been credited by the jury, the irresistible conclusion must have been that Arrascada either fell down the chute accidentally without any fault of defendant or that he deliberately attempted to commit suicide. Obviously the jury believed the witnesses for the plaintiffs and rejected the testimony of defendant's witnesses. It is the province of the jury to decide and settle all controverted issues of

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fact. If the argument made by appellant's counsel were addressed to us as triers of fact, it would be persuasive and might be convincing, but we cannot supersede the functions of the jury without disregarding and repudiating repeated decisions of this court.

[5] Several instructions requested by defendant were not given by the court. The requests were properly refused. They were not correct statements of the law applicable to this case. If we were to concede that they were proper, the refusal to instruct as requested would still not be prejudicial error, because the instructions given were full and clear and covered every issue and every phase of the case. We find no error in the record.

The judgment is affirmed at appellant's costs.

CORFMAN, C. J., and FRICK, GIDEON, and THURMAN, JJ., concur.

(54 Utah, 379)

RICHMOND IRR. CO. et al. v. SHAW et al.
(No. 3187.)

(Supreme Court of Utah. April 21, 1919.)

1. APPEAL AND ERROR ⟸1011(1)—REVIEW—FINDINGS ON CONFLICTING TESTIMONY.

The Supreme Court is not justified in interfering with findings made upon conflicting testimony, unless clearly against the weight of the evidence.[1]

2. WATERS AND WATER COURSES ⟸142—APPROPRIATION—RIGHT ACQUIRED.

An irrigation company and a city had no right to interfere with the use of water by a property owner, and no right without the owner's consent to divert waters from a spring appropriated by the owner's predecessor, even though they had supplied the owner with other water from this spring or from some other source.

3. WATERS AND WATER COURSES ⟸152(13)—WATER LITIGATION—COSTS.

Where a landowner had a right to a certain amount of waters of a spring in litigation and was not wrong in his objections to the actions of plaintiffs in the suit into which he was brought by other parties, all the costs of plaintiffs should not be taxed against him, though the decree is partly adverse to him.

Appeal from District Court, Cache County; J. D. Call, Judge.

Suit by the Richmond Irrigation Company and Richmond City against Mathew H. Shaw and Christian Steffensen. From decree for plaintiffs, said Steffensen appeals. Judgment affirmed.

K. K. Steffensen and Stewart, Stewart & Alexander, all of Salt Lake City, for appellant.

Nebecker, Thatcher & Bowen and A. A. Law, all of Logan, for plaintiffs respondents.

Walter & Harris, of Logan, for respondent Shaw.

WEBER, J. The ownership of what is hereinafter called the North spring, Spring No. 3, or the Lars Johnson spring, is the only question involved on the appeal of the defendant Christian Steffensen from a decree in favor of plaintiffs.

In 1860 a small community of people settled on the present site of Richmond, Cache county, and erected a fort in which they lived. The settlers engaged in farming, and at once commenced building ditches to supply themselves with water for culinary, stock-watering, and irrigation purposes. They first diverted the waters of Birch creek, a tributary of Cherry creek which flows down Cherry creek canyon westward into Cache valley. In this same canyon, towards its southerly side, is what is referred to in the record as "spring area," sometimes as Birch creek springs, and sometimes as Lars Johnson springs. Birch creek springs constitute the headwaters of Birch creek, which flows from this source down into the valley until it empties into Cherry creek. The spring area constitutes a swampy parcel of ground estimated at six or seven rods across each way, and from that water issues in a flowing stream in three well-defined places referred to as Big spring, or Spring No. 1, Middle spring, or Spring No. 2, North spring, or Spring No. 3, the latter spring being also referred to in the record as the Lars Johnson spring. In addition there is some seepage from this whole area which finds its way into Birch creek channel.

More than 10,000 acres of land have been reclaimed and cultivated by the founders of Richmond city, this land being owned in severalty.

Among others the district court found the following facts: That at the time of the settlement, the founders of Richmond, the predecessors in interest of the plaintiffs, diverted all the waters of Birch creek and applied the same to the irrigation of their lands, and other purposes; that thereafter they diverted all the waters of Cherry creek and its tributaries, and applied said waters to beneficial uses, and have continued to so apply said waters; that the diversion, and applications of water were made and conducted as a community enterprise by voluntary association, and the distributions of water to the various appropriators have been made

[1] Plant v. Ritter, 47 Utah, 506, 155 Pac. 426; Woolf v. Gray, 48 Utah, 239, 158 Pac. 783; Folsom v. Fernstrom, 43 Utah, 432, 134 Pac. 1021; Mayer v. Flynn, 46 Utah, 598, 150 Pac. 962.

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continuously from the time of the diversion by a recognized official called a water master who distributed the waters during the irrigation seasons to those entitled thereto; that thereafter the appropriators effected a de facto organization known as the Richmond irrigation district, which assumed and exercised further control over the diverting works and issued certificates to the diverters, designating the shares of water right owned by each, and this organization continued to distribute all the waters of Cherry creek and its tributaries, except such as were distributed and controlled by Richmond city, for a period of more than 20 years and until 1909, when the organization was dissolved, and all the holders of the so-called shares of the organization, who were the owners of right to the beneficial use of the waters that had been diverted, conveyed all their right to the diverting works and distribution system and to the uses of said waters to plaintiff Richmond Irrigation Company, a corporation, which issued to the owners and users of the water certificates of stock, one share for each share held by such persons in the Richmond irrigation district; that said corporation and Richmond city have continuously diverted all the waters of Birch creek and of the Birch creek springs, and distributed the same to the stockholders of the Richmond Irrigation Company and to the inhabitants of Richmond city for irrigation, domestic, culinary, stock-watering, and municipal purposes.

The court further found that Birch creek issues from the spring area, commonly called Birch creek springs or the Lars Johnson springs, and this spring area is fed and supplied by an underground current, which has its source eastward about a mile in Cherry creek and flows in a well-defined underground channel from its source to said spring area, from which the waters issue in a running stream in three well-defined places referred to in the findings as Springs Nos. 1, 2, and 3; that Spring No. 3 lies in and issues from the bed of the natural channel through which the waters issuing from Spring No. 1 flowed continuously until the diversions and alterations by plaintiffs and their grantors and predecessors in interest; that in 1873 the predecessors in interest of plaintiffs diverted all the waters of Cherry creek, and commingled same with the waters issuing from said spring area, and thence forward until 1883 conducted all of said waters so diverted from Cherry creek, together with all of the waters issuing from said spring and spring area, through the natural channel of Birch creek, and applied them to the same uses to which they theretofore, had devoted them; that in 1883 they constructed what was known as the "Upper Ditch" and from such time until the present plaintiffs have diverted and used all of said waters, including the water from Spring No. 3.

The court also found that defendants and their predecessors in interest never used any of the waters of Lars Johnson springs except as the same constituted a part of the waters of Cherry creek, or otherwise than in their turns as prorated to them by the water masters under the authority of the voluntary association which preceded the Richmond Irrigation District and under the authority of said Richmond Irrigation District during the period of its existence, and that they never used any of said waters since the dissolution of the Richmond Irrigation District save as stockholders of the Richmond Irrigation Company, except that the defendants and their predecessors in interest have used, by taking from the stream supplied by Cherry creek and its tributaries where the same flowed past the dwelling houses of defendants, sufficient of the waters thereof for their domestic and culinary needs, and have used water so flowing for watering their stock, but that there is no evidence from which the court can find the amount or quantity of water so used by the defendants and their predecessors in interest; that in 1916 the defendant Steffensen wrongfully diverted the waters of said springs, and prevented them from flowing into the diverting works of plaintiffs; that in the month of December, 1916, Richmond city diverted the waters of Spring No. 3 into its water pipes, which were interfered with by Christian Steffensen, who prevented plaintiff city from taking the waters from said spring into its pipe line and diverting the same, and thus deprived Richmond city of part of the water to which it was entitled; that the use of all of the waters of said Lars Johnson springs is necessary for the proper tilling of the lands of the stockholders of the plaintiff irrigation company, and for the supplying of the needs of the stockholders, and also of the inhabitants of Richmond city, for domestic, stock-watering, culinary, and municipal purposes during the whole of each year.

In our opinion the findings of fact made by the court are supported by substantial evidence though there are many sharp conflicts in the testimony. The plaintiff produced the water masters who had distributed water from 1888 until 1916, with the possible exception of 1 or 2 years. All of them testified that the defendants' grantors had never used any water from the Lars Johnson spring, or Spring No 3, or any of the Birch creek springs, except as shareowners of the voluntary organization and thereafter as stockholders of the Richmond Irrigation Company. Lars Johnson, who acquired a squatter's right in 1888, and who lived on the land on which these springs are situated until 1906, when he sold the land, to which he had secured a patent in 1901, testified

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that he never used any of the water from the Birch creek springs, or from either of them, nor from Spring No. 3, except as he was given permission by the water master. It also appears from his testimony, as well as from that of all other witnesses, that there was a ditch from Spring No. 3, or Lars Johnson spring, that passed near Johnson's house, and that this water was used by Johnson all the time for domestic, culinary, and stock-watering purposes. Johnson sold to William R. Tripp in 1906. Tripp, who occupied the land until 1913, when he sold to the defendant Shaw, claims to have used all the water from Lars Johnson spring without interruption and without asking permission of the water masters during all the time of his ownership. Mathew H. Shaw, the successor in interest to Tripp, also claims to have used all of the water in question until he sold to defendant Steffensen in 1916.

[1] The evidence is conflicting as to the use of the water of the Lars Johnson springs by plaintiffs from 1907 until 1915, but, as the trial court was in a much better position to determine from the testimony the ultimate facts than we are, we are not justified in interfering with findings made upon conflicting testimony, unless they are clearly against the weight of evidence. Plant v. Ritter, 47 Utah, 506, 155 Pac. 426; Woolf v. Gray, 48 Utah, 239, 158 Pac. 788; Folsom v. Fernstrom, 43 Utah, 432, 134 Pac. 1021; Mayer v. Flynn, 46 Utah, 598, 150 Pac. 962.

[2] It is undisputed that from the time that Lars Johnson occupied the Steffensen land in 1888 until plaintiffs attempted to interfere with it there was a stream from the Lars Johnson spring, or Spring No. 3, that had been used by Johnson and his successors in interest for domestic, culinary, and stock-watering purposes. The district court found that the defendant Christian Steffensen is entitled to have sufficient of the waters of Cherry creek and its tributaries flowing in the natural channel thereof past his dwelling house to supply his needs for domestic and culinary uses and for the watering of his stock. The decree is in accordance with the conclusions of law on this subject. In our opinion the conclusion of law should have been that Steffensen should have sufficient of the waters of the Lars Johnson spring, and not generally of Cherry creek and its tributaries, for his use for the purposes mentioned, and such right should have been awarded him by the decree. Steffensen is entitled to the use of the water from that particular spring, and to the use of sufficient water for all of his domestic and culinary purposes and for watering stock, and is entitled to have the waters of that spring conducted to his dwelling and to other points at which he had used the water. Plaintiffs had no right to interfere with that use, and had no right, without Steffensen's consent, to divert the waters from Spring No. 3, even though they had supplied Steffensen with other water from a different spring or from some other source. The conclusions of law and the decree should be modified so as to provide that Steffensen have the use of water from the Lars Johnson spring, or Spring No. 3, sufficient for his domestic, culinary, and stock-watering purposes, and that plaintiffs shall be entitled to the use of the waters of the Lars Johnson spring subject to the rights of Steffensen as hereinbefore stated. As there was no evidence before the court from which the amount of water used by Steffensen for those purposes could be determined, the decree is necessarily indefinite and uncertain. In order that this litigation be ended and the rights of the parties be determined as far as the Lars Johnson spring, or Spring No. 3, is concerned, the district court is hereby directed to reopen the case for the purpose of permitting said Steffensen, if he so desires, to introduce testimony showing the amount of water heretofore used by him and his predecessors in interest from said Lars Johnson spring, or Spring No. 3, for the purposes before stated.

Appellant complains that in the decree the Steffensen property, and upon which these springs are situated, is misdescribed. That is merely a clerical error, and the court is hereby directed to make the correction in the decree in accordance with the facts.

[3] The taxation of all costs against Steffensen is one of the assignments of error. As Steffensen concededly has the right to the use of a certain amount of the waters from the Lars Johnson spring, and as he was not wrong in his objections to the actions of the plaintiff Richmond city in laying the pipe line, and as he was brought into court by the other parties, we are wholly unable to perceive why, in justice and equity, all the costs of plaintiffs should be taxed against him. The district court is therefore ordered to further modify the decree herein by eliminating the costs taxed against the defendant Steffensen, and it is hereby ordered that respondents pay one-half and appellant one-half of the costs on appeal, and each pay his own costs in the district court.

Save as herein modified, the judgment is affirmed.

CORFMAN, C. J., and FRICK, GIDEON, and THURMAN, JJ., concur.

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(54 Utah, 420)

LUNDY v. CAPPUCCIO (BALL et al., Interveners). (No. 3325.)

(Supreme Court of Utah. April 30, 1919.)

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1. ATTORNEY AND CLIENT ⟸184—COMPENSATION — LIEN ON JUDGMENT — PRIORITY OVER GARNISHMENT.

Under Comp. Laws Utah 1917, § 346, relating to attorney's compensation and liens, attorneys who recovered judgment for their client have a lien upon it and the proceeds for their compensation, and may enforce it against the defendant, unless estopped, notwithstanding he paid the amount of the judgment in garnishment proceedings against the client, the judgment creditor.

2. ATTORNEY AND CLIENT ⟸184—LIEN OF ATTORNEY—ASSERTION.

The lien of attorneys for compensation on recovery of a judgment follows the proceeds of the judgment into the hands of garnishment creditors of their client, to whom the judgment debtor paid the amount of the judgment.

3. ATTORNEY AND CLIENT ⟸192(2)—LIEN OF ATTORNEY—ASSERTION.

Attorneys who, under Comp. Laws Utah 1917, § 346, had a lien on a judgment recovered for their client, may, the judgment debtor having paid the amount thereof to garnishing creditors of their client, enforce their lien by an independent action, and are not restricted to intervention in the original action.

4. ATTORNEY AND CLIENT ⟸192(2)—LIEN OF ATTORNEY—ASSERTION—PARTIES.

Where attorneys, who recovered judgment for their client, had no agreement as to compensation, and, though informed of the garnishment of the proceeds of the judgment by other creditors of the client, took no steps to protect their rights, *held*, though payment of the amount of the judgment to the garnishing creditors did not satisfy the same, and destroy the lien of such attorneys given by Comp. Laws Utah 1917, § 346, yet such attorneys, as they could follow the proceeds into the hands of garnishing creditors, will not be allowed to enforce their lien solely against the judgment debtor, and should be compelled to bring in all of the parties, either in an independent proceeding or by intervention in the original proceeding.

Appeal from District Court, Salt Lake County; P. C. Evans, Judge.

Action by G. E. Lundy against Guy Cappuccio, in which there was a judgment for plaintiff. Thereafter James H. Ball and another, interveners and as attorneys for plaintiff, caused execution to be issued upon the judgment, and a levy was made on property belonging to defendant. Defendant filed an affidavit and motion, which the court treated as an order to show cause why the judgment should not be satisfied, and from an order or judgment, setting aside the former order restraining sale of the property levied upon, defendant appeals. Reversed and remanded, with directions.

J. M. Bowman, of Salt Lake City, for appellant.

Ball, Musser & Beck, of Salt Lake City, for respondents.

GIDEON, J. From the findings of the lower court the following facts appear:

On or about December 21, 1916, judgment was entered in the district court of Salt Lake county in an action against the defendant Cappuccio and others in favor of the plaintiff, Lundy, for $300 principal, $20.60 costs, and $25 attorney's fee. In that action James H. Ball and W. E. Rydalch, designated in the proceedings in this court as interveners, were attorneys for Lundy. It further appears that about August 4, 1916, a judgment was rendered in the justice court of Salt Lake City precinct against Lundy, who was defendant in that action, in favor of the plaintiff, Augustus Zetreauts, for something in excess of $160; that a writ of garnishment was issued from that court and served upon defendant Cappuccio, and that such proceedings were had that an order of the justice was made directing Cappuccio to pay that judgment, which was done on June 4, 1917, amounting to $168.25; also that in another action pending in said justice court judgment was entered in favor of the Otis Elevator Company, the plaintiff therein, against the plaintiff herein, Lundy, on August 27, 1914, for an amount of approximately $170; that a writ of garnishment was issued in that case and served upon Cappuccio, and that such proceedings were had that an order was made by the justice directing Cappuccio to pay into that court the amount of the judgment in favor of the elevator company, being $179.72; that in consequence of that order Cappuccio paid said amount on February 20, 1917; that the total of the payments made by reason of the said writs of garnishment and the orders of the justice court was $347.99. It likewise appears that prior to the date of paying these said amounts, and after the service of the writs of garnishment, Cappuccio, with his counsel, called upon the attorneys for Lundy, being the same attorneys designated as interveners herein, and attempted to adjust the question of fees or compensation to be paid to said attorneys, and also advised said attorneys of the fact that the writs of garnishment had been served upon him, and that he was in duty bound to answer such writs.

At that meeting counsel for Lundy, interveners herein, advised Cappuccio that they claimed a lien upon the amount of the judgment, and that they would hold Cappuccio or the proceeds of the judgment for payment of their fee. Apparently there was some con-

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troversy as to the amount of compensation, the interveners insisting that they were entitled to not less than $250 for the services, but agreeing, if paid on that date, to accept $150. For some reason not explained in the record, Cappuccio seemed to regard that amount as excessive, and nothing further was done by either party. Thereafter the interveners, as attorneys for Lundy, caused execution to be issued upon the judgment, and a levy was made by the sheriff on certain property belonging to Cappuccio, and the same was noticed for sale on February 18, 1918. Thereupon, and before the day of sale, Cappuccio, by his counsel, served written notice upon the interveners as attorneys for Lundy, supported by affidavit, that he would move the court for an order directing Lundy to satisfy the judgment on the records of said court, upon the ground and for the reason that he had paid the full amount of said judgment to the creditors of Lundy in the garnishment proceedings before mentioned. At the hearing on that motion the interveners, as attorneys, appeared apparently for Lundy in opposition to the motion, and, while there were no pleadings or answer to the affidavit and motion filed by Cappuccio, the court treated the matter as an order to show cause why the judgment should not be satisfied, and all parties proceeded to a hearing with that apparent understanding.

The objections on the part of plaintiff's counsel to the granting of the motion are best stated in the language of one of the counsel at that hearing as follows:

"The contract between Mr. Lundy and his attorneys was—the understanding was—that Lundy had nothing, and that the attorneys must look to the amount recovered in that action for their fees, and with that understanding the attorneys proceeded and did all the work that was done in that action. We will also show that the defendant Cappuccio had full knowledge of the claim made by the attorneys of their lien on the judgment."

The court made findings of fact and conclusions of law, entered an order or judgment denying the motion of the defendant to have the judgment satisfied, fixed the amount of fees due counsel for Lundy at $150, and decreed that they had a lien upon the judgment entered in the original proceeding against the defendant for that sum, with interest. The court also set aside its former order restraining the sheriff from selling the property levied upon under the execution, and further directed that upon the payment by defendant Cappuccio of $150, with interest and costs, the judgment be satisfied. From that order or judgment, the defendant, Cappuccio, appeals to this court.

Numerous assignments of error are made —among others, that the court had no power or right to make findings of fact or conclusions, as there were no issues presented upon which such findings could be made; that the court erred in permitting interveners, Ball and Rydalch, to make a claim of lien, upon the ground that they had failed to file any complaint in intervention setting forth the facts on which relief was sought; that the court erred in finding that the interveners were entitled to recover the sum of $150, or any other sum, for the reasons that (a) the parties interested in and affected by that finding had not presented any such issue by any pleadings, and the court was without authority to make such finding, and (b) that the finding is not supported by the evidence.

[1] The interveners claim the right to a lien under the provisions of Comp. Laws Utah 1917, § 346, which reads as follows:

"The compensation of an attorney and counselor for his services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision, or judgment in his client's favor and the proceeds thereof in whatsoever hands they may come, and cannot be affected by any settlement between the parties before or after judgment."

It may be conceded that under the provisions of that section the interveners, as attorneys for Lundy, had a lien upon the judgment in question and the proceeds thereof for the amount of their compensation, unless they are estopped to assert it. It may be conceded, also, that the payments of the judgments against Lundy in the justice court by the defendant, Cappuccio, would work a satisfaction of the judgment obtained in the district court to the amount of such payment, and, as between Lundy and Cappuccio, the judgment is satisfied, and the motion should have been granted unless the interveners, by reason of the lien for attorney's fee, had a right to object to such cancellation. Appellant contends, as we understand his position, that the payment of the judgments in the justice court was not a voluntary payment on his part, but that such payment was compulsory, made upon an order of court having jurisdiction over the defendant, Cappuccio, and the garnishment proceedings; that the interveners were advised of such proceedings, and it was therefore incumbent upon them, if they intended to rely upon the lien, to assert it and take proceedings at that time to protect their interest, and not compel the defendant, Cappuccio, to incur the necessary expense of defending against the garnishment proceedings and probably having judgment entered against him, with attending costs. On the other hand, it appears to be the contention of the interveners, who are the real parties in interest as respondents here,

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that the lien existed by virtue of the statute, that it was the duty of the defendant to protect that lien, and that, if he proceeded to pay the judgments in the district court, he would do so at his peril. As stated by one of the interveners in his testimony before the court, in reciting what was said at one of the interviews with defendant Cappuccio:

"I told Cappuccio at that time, and Mr. Ball told him, that if he went to paying out money on this matter without bringing us in and looking after our fees, he would do so at his own peril, and we talked in a friendly way and told him our position."

The testimony of both interveners was to the effect that no contract fixing a definite sum was made by them with the plaintiff, Lundy, but that they were to receive whatever compensation they did receive from the proceeds of the judgment. The above quotation from the testimony of the witness intervener reflects accurately, it seems, the position, and their conduct toward the defendant, Cappuccio, when advised that the garnishment proceedings had been instituted against him.

[2-4] Under the provisions of the section quoted, the lien of an attorney for compensation for his services attaches from the commencement of an action upon the judgment in his client's favor and upon the proceeds thereof, in whatsoever hands they may come. That lien can only be lost, either by waiver or such acts on the part of the attorney as would constitute an estoppel. It cannot be defeated by a subsequent attachment or garnishment. T. Harlan & Co. v. Bennett et al., 127 Ky. 572, 106 S. W. 287, 128 Am. St. Rep. 360. The facts appearing in this record would not authorize a holding that the interveners had lost their right to claim a lien, but clearly they were at fault in not taking some action to enforce or assert such lien at the time they were advised of the garnishment proceedings against the debtor. We are not unmindful, and ought not to be, that the defendant is a layman, and did not fully understand the rights of the interveners as lien claiments, nor, possibly, his duty as a judgment debtor; neither should we overlook the fact that the interveners are lawyers of experience and ability, and understand their legal rights, and the methods necessary to enforce them. It is clear that, as the amount of the compensation had not been agreed upon between the interveners and their client, Lundy, the court was without authority or power to fix that amount, unless, at least, the plaintiff, Lundy, had some notice of the proceeding at which such judgment or order would be made. The court, at the hearing, fixed the amount due the interveners as $150. There was nothing before the court, however, indicating that the services rendered were of less value than $250 unless it be the statement on their part, made to Cappuccio, that if payment was made at the time of the interview between those parties they would accept $150.

At the hearing on the motion, nominally at least, the interveners were representing the plaintiff, Lundy; but as we have seen, Lundy was not the real party in interest. The interveners could not represent the plaintiff, Lundy, in any proceedings attempting to fix the amount of their compensation, as, of necessity, in the absence of an agreement, any proceedings to determine such amount their interests would be opposed to that of their client. There is nothing in the record to indicate that both of the judgment creditors in the proceedings in the justice court are not within the jurisdiction of the district court. If within the jurisdiction of the district court, such parties can, by an order, be brought into this proceeding and the rights of all parties determined. The lien in favor of the interveners follows the proceeds of the judgment into the hands of those garnishment creditors. Carl Fischer-Hansen v. Brooklyn Heights Rd. Co., 173 N. Y. 492, 66 N. E. 395; Bailey v. Murphy, 136 N. Y. 50, 32 N. E. 627; Poole v. Belcha, 131 N. Y. 200, 30 N. E. 53. Under the provisions of our Code the district court has authority to order such parties into proceedings of this nature as are interested in the subject-matter of the litigation or are necessary for a proper determination of the rights involved. The interveners, however, are not limited to proceedings in this action, but may, if they so elect, proceed to enforce their claim of lien by an independent action. Carl Fischer-Hansen v. Brooklyn Heights Rd. Co., supra. As indicated, the interveners were not diligent in an effort to enforce their lien, and to now compel the defendant, Cappuccio, to pay the amount of such lien, without an effort first being made to collect such amount from the parties actually receiving the proceeds of the judgment, would be a hardship which a court ought not to enforce. As indicated, however, the defendant is not entirely blameless for not taking some action to protect his interest, when advised that the lien would be insisted upon by the interveners.

In view of the entire record, and after a careful consideration of the rights and interests of the parties, we have, with some doubt as to what order ought to be made in this case, concluded to reverse the order of the district court and remand the cause, with directions to permit the interveners to proceed in such manner as they may elect, either, in this proceeding or in an independent action, and bring all the parties interested before the court for a determination of their respective rights, to enforce the lien of interveners to the amount of the compensation found due them against the proceeds of the

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judgment in the hands of garnishment creditors in the justice court, and, if unable to collect from such judgment creditors, to enforce the same against defendant, Cappuccio. Such is the order. Each party will pay his own costs on appeal.

CORFMAN, C. J., and WEBER and THURMAN, JJ., concur.

FRICK, J., concurs in the result.

(54 Utah, 309)

ANDERSON v. ANDERSON. (No. 3305.)

(Supreme Court of Utah, April 7, 1919. On Application for Rehearing, May 27, 1919.)

1. HUSBAND AND WIFE ⟸297 — SEPARATE MAINTENANCE.

In an action by a wife for separate maintenance, evidence *held* to sustain a finding that plaintiff lived separate and apart from the defendant without her fault.

2. HUSBAND AND WIFE ⟸283(1)—SEPARATE MAINTENANCE—GROUNDS FOR.

If the conduct of a husband toward his wife is such as to legally entitle her to live separate and apart from him, she is entitled to separate maintenance, regardless of whether or not the husband deserted her, or whether he refused to maintain her.[1]

3. HUSBAND AND WIFE ⟸293—SEPARATE MAINTENANCE—ALIMONY—RESTRAINT UPON ALIENATION OF PROPERTY.

In suits by wife for separate maintenance, where alimony is allowable, in order to insure its payment, equity will enjoin the husband from alienating or incumbering his property without leave of court, under Comp. Laws 1917, §§ 3000, 3011–3013.

4. HUSBAND AND WIFE ⟸295—SEPARATE MAINTENANCE—ATTORNEY'S FEES.

In an action by a wife for separate maintenance, trial court was empowered, either independently, or by Comp. Laws 1917, §§ 2998, 3010, 3011, either before or at the conclusion of the trial, to allow her attorney's fees.

5. HUSBAND AND WIFE ⟸295—SEPARATE MAINTENANCE—ATTORNEY'S FEES—REASONABLENESS—JUDICIAL KNOWLEDGE.

In an action for separate maintenance, the trial court had the right to consult its own experience and knowledge, without taking testimony as to what was a reasonable attorney's fee in the particular case.

On Application for Rehearing.

6. HUSBAND AND WIFE ⟸300 — SEPARATE MAINTENANCE — RESTRAINING DEFENDANT FROM DISPOSING OF PROPERTY.

A judgment for plaintiff, in an action by a wife for separate maintenance, will not be modified on appeal, although it unnecessarily restrains defendant from disposing of any part of his property; it being assumed that the trial court, which retains jurisdiction of the case, will, upon due application and a proper showing, qualify its decree at any time in such manner as the circumstances of the parties and conditions may in justice require.

Appeal from District Court, Salt Lake County; Wm. H. Bramel, Judge.

Suit by Bertha G. Anderson against Robert G. Anderson. Decree for plaintiff, and defendant appeals. Affirmed.

Soren X. Christensen and Chris Mathison, both of Salt Lake City, for appellant.

F. B. Scott, of Salt Lake City, for respondent

CORFMAN, C. J. Plaintiff brought suit against the defendant, her husband, for separate maintenance. The grounds alleged were cruelty. The defendant denied cruelty. The trial court found the issues for the plaintiff, and by its decree awarded her separate maintenance, attorney's fees and costs. The court ordered that the defendant be restrained from disposing of or incumbering his property without leave of court. It was also decreed that the alimony awarded the plaintiff should be a lien and charge upon the defendant's property until the further order of the court. Defendant appeals.

The defendant complains that the trial court erred and assigns as grounds for reversal the following: (1) That the evidence is insufficient to sustain the finding of the court that the plaintiff, without her fault, lives separate and apart from the defendant; (2) that the court erred in failing to make findings on the issues whether the defendant had without cause deserted the plaintiff, and whether defendant, having the ability, had neglected to provide for and suitably maintain the plaintiff; (3) that the court erred in ordering that the defendant be restrained from disposing of or incumbering his property without leave of court; (4) that the court erred in adjudging the alimony decreed to be a lien on defendant's property until the further order of the court.

[1] (A) The first and principal contention made by defendant has necessitated our reviewing the testimony. After so doing we would not feel justified in holding that the decision of the trial court is not supported by a fair preponderance of the testimony. It is apparent, however, that in some measure, at least, the plaintiff was not entirely without fault. The testimony shows that oftentimes the differences between the parties were over matters trivial in nature, and in the disputes that followed they were equally to blame. However, on several occasions, the defendant, without sufficient cause or excuse, commanded the plaintiff to leave the house, to "get out and go—get out of my

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] Willardson v. Willardson, 172 Pac. 719.

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house; I don't want you sticking around here; rustle your own living." Again, the plaintiff testified, referring to the defendant's attitude toward her in the home: "He told me time and again to get out and go; that he was through with me." The plaintiff further testified that on these and other occasions referred to in the testimony the defendant's attitude towards her was such that she became so nervous and sick as to require medical aid and treatment. There is also testimony in the record tending to show that the plaintiff on these occasions endeavored to effect a reconciliation with the defendant, without avail. Indeed, during the progress of the trial, after the defendant expressed a willingness to live with the plaintiff, the court afforded the parties an opportunity to adjust their differences, when, instead of trying to effect a reconciliation, the defendant indulged himself in making accusations against the plaintiff of improprieties and misconduct with another man. As we view the testimony, the attitude of the defendant towards the plaintiff was such as to compel her to live separate and apart from him without fault on her part. It is wholly unnecessary to refer to and discuss the testimony in detail. Suffice it to say there is ample proof pointed out to sustain the trial court's findings and decision that the plaintiff lives separate and apart from the defendant without her fault.

(B) It follows from what has already been said that there is no merit in the defendant's contention that the trial court erred in failing to expressly find that the defendant had without good and sufficient cause deserted the plaintiff, and whether the defendant, having sufficient ability, had neglected or refused to provide and suitably maintain the plaintiff.

[2] It is fundamental that, if the conduct of the defendant towards the plaintiff was such as to legally entitle her to live separate and apart from the defendant, she would be entitled to separate maintenance, regardless of whether or not the defendant deserted the plaintiff, or whether he had refused to maintain her. Plaintiff's action was predicated on cruelty, not on the ground of desertion or failure to provide. Willardson v. Willardson, 172 Pac. 719; Smith v. Smith, 154 Mass. 262, 28 N. E. 263.

[3] (C) As to the third and fourth contentions made by defendant we think the rule is firmly established that in suits of this nature, where alimony is allowable, in order to insure its payment, equity will enjoin the husband from alienating or from incumbering his property without leave of court. 2 Bishop, M., D. & S. §§ 1106, 1107. Moreover, Comp. Laws Utah 1917, §§ 3011, 3012, 3013, and 3000 expressly so provide.

[4, 5] (D) There is absolutely no merit in the contention made that the plaintiff is not entitled to the attorney fee allowed her by the trial court. We think the trial court was empowered to make the order concerning attorney's fees under Comp. Laws 1917, §§ 2998, 3010, and 3011, either before or at the conclusion of the trial. Independent of statute, under the rules of the common law, the plaintiff was entitled to employ counsel and render the defendant liable to pay for the services rendered by him in her suit. 2 Bishop, M., D. & S. § 992. So, too, had the trial court the right to consult his own experience and knowledge, without taking testimony, as to what was reasonable in the particular case. Peyre v. Peyre, 79 Cal. 336, 21 Pac. 838.

The plaintiff, on the appeal to this court, made and filed certain cross-assignments of error. After reviewing the record, we can arrive at no other conclusion than that the judgment and decree rendered in plaintiff's favor was right and should be affirmed. We therefore need not enter upon a discussion of plaintiff's cross-assignments.

It is ordered that the judgment and decree of the district court be affirmed; costs to respondent.

FRICK, WEBER, GIDEON, and THURMAN, JJ., concur.

On Application for Rehearing.

CORFMAN, C. J. Counsel for defendant has filed a petition for rehearing. The matters complained of in the petition were all given due consideration in our former opinion, and we still think we were right in the conclusions arrived at.

Defendant seriously complains of the order of the district court enjoining him from incumbering, selling or otherwise disposing of any of his property and in making the award for the separate maintenance of the plaintiff a lien thereon.

[6] It seems hardly necessary to thus incumber and enjoin the sale and disposal of all of the defendant's property in order to secure the prompt payment of the award for separate maintenance of the plaintiff. However, the district court will, as is usual, retain jurisdiction of the case, and we have no doubt that upon due application and a proper showing made that court will be disposed to qualify its decree at any time and in such manner as the circumstances of the parties and conditions may in justice require.

We therefore decline to order a modification of the decree of the district court as rendered, and order that the defendant's petition for a rehearing be denied.

FRICK, WEBER, GIDEON, and THURMAN, JJ., concur.

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(30 Ariz. 351)

MOSHER v. CITY OF PHŒNIX et al. (No. 1640.)

(Supreme Court of Arizona. May 21, 1919.)

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1. MUNICIPAL CORPORATIONS ⟸63(1) — PRESCRIBING FIRE LIMITS AND CHARACTER OF BUILDINGS—REVIEW.

The city of Phœnix, under Civ. Code 1913, par. 1897, subsec. 17, having the power to prescribe fire limits and to regulate the kind of materials to be used and the character of buildings to be erected, the right of the city to exercise such power may not be questioned.

2. MUNICIPAL CORPORATIONS ⟸63(1)—PRESCRIBING FIRE LIMITS—INQUIRY INTO MOTIVES.

Courts, on complaint of a property owner, will not inquire into the motives or purposes of a city commission in prescribing fire limits and stipulating as to the character of buildings to be erected therein.

Appeal from Superior Court, Maricopa County; Frank H. Lyman, Judge.

Action by Hattie L. Mosher against the City of Phœnix, and Hubert J. Mann. From an order sustaining a demurrer to the complaint, and a judgment dismissing the complaint, and awarding costs to defendants, plaintiff appeals. Affirmed.

J. B. Woodward, of Phœnix, for appellant.

R. E. Sloan, City Atty., of Phœnix, for appellees.

ROSS, J. From an order sustaining a general demurrer to appellant's complaint, and a judgment dismissing her complaint and awarding costs to appellees, this appeal is prosecuted.

The complaint sets forth in substance that appellant is the owner of real estate in Phœnix with a frontage of 352 feet on Central avenue, extending back 300 feet between Taylor and Polk streets; that the property is on the fringe of the business section of Phœnix, too near the same and the taxes thereon too heavy to justify the use of said property as residence property, and at the same time is too far removed from the business to warrant a placing of permanent improvements thereon in the form of substantial business structures or blocks of business buildings; that appellant planned erecting thereon a colony or group of buildings at a "rental price * * * within the command of all deserving mechanics"; that in May, June, and August, 1917, the city granted her permits to build 13 buildings thereon under Ordinance 42; that she proceeded to, and did, construct some of the buildings under permits; that by petty devices, appellee Mann, city inspector, obstructed her building operations and caused her serious loss, and with the aid of the city commission, has prevented her from improving her property and debarred her in the lawful use of same, thereby destroying and rendering her property rights therein valueless, and is threatening to tear down one or more of her buildings, and has caused her arrest on the false assumption that she had transgressed the laws of the city in the erection of buildings under permits; that she has been arrested "five times for the alleged cause of building without a permit, and interior finish work on the same," and has driven her workmen from the premises and refused permission to continue work upon said buildings, and has revoked five of the permits theretofore granted.

The allegation of conformity with the ordinances of the city in the construction of buildings is as follows:

"That each building in process of completion, and to be completed, is or will be built with cement floors, cement walks leading to or around each building, and solid cement between each building, the roof and side coverings to be used being incombustible material, and all work conforming to the requirements of said Ordinance [42], not one of which is a menace by reason of its construction, or a fire risk, to the neighboring property."

The complaint sets forth Ordinance 42; also Ordinances 197, 198, and 199, passed September 10 and 11, 1917, as emergency measures.

By Ordinance 42, the construction of frame and wooden structures within the fire limits as established is prohibited, except "(B) one-story sheds confined to the rear half of the property, not abutting on a street, and not nearer than 20 feet to any other structure." It further provides for the height, size, and material to be used in structures.

Ordinance 197 establishes a special fire limits district, including in its boundaries appellant's property and a great many other blocks of the city; the appellant's property theretofore being in the general fire limits.

Ordinance 198 defines the powers and duties of the city inspector of buildings, and vests in him large discretionary powers relating to the mode and manner of construction and material used in the erection, alteration, and repair of any building or structure, and

Ordinance 199 amends subdivision B of Ordinance 42, quoted above, by providing, among other things, that "sheds must have no interior finish, such as wainscoting, ceiling, and the like."

Appellant asserts in her complaint that these ordinances and their enforcement by the city authorities deprive her of her property without due process of law, in violation of section 4, article 2, Arizona Constitution and the Fourteenth Amendment to the federal Constitution, and prays that the appellees be

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restrained from interfering with her in any manner.

The particular defect or insufficiency of the complaint, for which the demurrer was sustained, is not disclosed by anything in the record nor by the briefs; but it is apparent that the allegations thereof, wherein appellant undertakes to inform the court that she has complied in the erection of her structures with Ordinance 42, omits stating that said structures were on "the rear half of the property," or that they were "not abutting on a street," or were "not nearer than 20 feet to any other frame structure," and omits to state that the prohibition contained in Ordinance 199 that "sheds must have no interior finish, such as wainscoting, ceiling, and the like," has not been violated.

If the city possessed the power to pass these ordinances, a property owner building on his property must observe them, and he cannot complain because the city authorities interfere to stop their violation. The general law of this state (paragraph 1897, subsec. 17, Civil Code 1913) empowers cities to establish fire limits and—

"To prescribe the thickness, strength and manner of constructing stone, brick and other buildings, and construction of fire escapes therein. It shall also be competent for the common council to fix and designate fire limits within which no buildings having outside wooden walls shall be constructed or repaired so as to increase their value beyond a percentage to be fixed in the ordinance; and the common council may, by ordinance, prescribe special fire limits, within the general fire limits, within which special fire limits they may require such building material to be used and such additional precautions to be observed in the construction of new buildings, and the repairing and maintenance of said buildings, as they may from time to time designate, and for the prevention of fires and the spread and communication thereof; and to provide any proper remedy for the enforcement of such ordinance as may be passed in relation to fire limits or any particular provision thereof, and to that end they may provide for the appointment of a building inspector, designate his authority, fix his term of office and provide his compensation."

Among the powers vested in the city commission of the city of Phœnix, is—

"To prescribe fire limits and determine the character and height of buildings that may be erected therein and the nature of materials to be used in the construction, alteration or repair of such buildings, or in the repair or alteration of existing buildings within such fire limits." Subsection 9, § 2, c. 4, Charter of City of Phœnix.

[1] The Legislature having expressly granted the power to cities to prescribe fire limits and to regulate the kind of materials to be used and the character of buildings to be erected, the right of the cities to exercise that power may not be questioned. City of Olympia v. Mann, 1 Wash. 389, 25 Pac. 337, 12 L. R. A. 150; Hubbard v. Medford, 20 Or. 315, 25 Pac. 640; Village of Ashley v. Ashley Lumber Co. (N. D.) 169 N. W. 87; 28 Cyc. 736, 741; 19 R. C. L. 830, § 135.

[2] It is the contention of appellant that the last three ordinances were enacted by the city commission for the sole purpose of annoying and harassing her, and to prevent and obstruct her free and lawful use of her property. The law seems to be well settled that the courts will not inquire into the motives or purposes of those whose duty it is to enact laws or ordinances. Hadacheck v. Alexander, 169 Cal. 616, 147 Pac. 259, 28 Cyc. 375.

It is also contended that these ordinances were passed as emergency measures, when, as a matter of fact no emergency existed, and that, therefore, they are not valid ordinances. It is not necessary that we decide this question, for, if they be left entirely out of consideration, still appellant has failed to present a case satisfying us that she has complied in making her improvements, or that she proposes to comply, with the terms of Ordinance 42, against which no such objection is lodged.

From what we have said, it will appear that appellant's statement of her grievances is insufficient to invoke the equity powers of the court.

The judgment is therefore affirmed.

CUNNINGHAM, C. J., and BAKER, J., concur.

(20 Ariz. 355)

YOUNG v. CAMPBELL et al. (No. 1559.)

(Supreme Court of Arizona. May 21, 1919.)

1. NEGLIGENCE ⟸116—PLEA OF CONTRIBUTORY NEGLIGENCE—GENERAL DENIAL.

A general denial and plea of contributory negligence do not constitute inconsistent defenses, and may be pleaded together, and negligence on the part of the defendant is not admitted on plea of contributory negligence followed by a general denial.

2. APPEAL AND ERROR ⟸781(6)—SETTLEMENT RENDERING QUESTIONS MOOT—DISMISSAL.

Where, after rehearing has been ordered, the parties reach a settlement rendering the questions at issue, raised on the motion for rehearing, moot questions that will receive no further notice, the appeal will be dismissed.

On motion for rehearing. Appeal dismissed.

For former opinion, see 20 Ariz.——, 177 Pac. 19.

CUNNINGHAM, C. J. The appellees moved for a rehearing, alleging that the opinion

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filed in the case sets forth a doctrine in procedure that is more than novel, but is in its nature without support of the law.

The rehearing was granted on the grounds that the language used by the court in its opinion is open to be understood in the sense that the appellees criticize it. The principal criticism is that the opinion holds that a plea of contributory negligence is an admission of record that the pleader has been guilty of negligence as a fact, notwithstanding he has interposed a general denial putting in issue his negligence.

[1] Such is not the rule intended to be applied by this court in this case. The general rule, as stated in 29 Cyc. 582, is applicable, in most cases, to our system. The rule is there stated in the following language:

"A general denial and plea of contributory negligence do not constitute inconsistent defenses, and may be pleaded together, and negligence on the part of the defendant is not admitted by a plea of contributory negligence following a general denial."

We do not wish to be understood as announcing the rule as appellees contend we have announced it. We expressly withdraw all language used in the opinion which has the effect of supporting such rule. The judgment having been vacated by the order granting a rehearing, the reasons for the judgment are withdrawn.

[2] Since the court ordered a rehearing in this case the parties have reached a settlement, of which we are informed. As a consequence, the questions at issue, raised on the motion for a rehearing, have become moot questions, and will not receive further notice.

The cause having been settled, upon motion of appellant, acquiesced in by the appellees, the appeal is dismissed.

ROSS and BAKER, JJ., concur.

(20 Ariz. 357)

SAWYER v. HUNING. (No. 1676.)

(Supreme Court of Arizona. May 21, 1919.)

1. JUDGES ⟸30—ABSENCE OF JUDGE FROM COUNTY—VALIDITY OF TELEGRAPHIC ORDERS.

A trial judge who is absent from his county seat and in another county cannot make a valid order to continue a case and transmit it by telegraph to the clerk of the court for entry on the minutes; the judge's presence in the county being absolutely necessary to the validity of all judicial acts unless excepted by statute.

2. STIPULATIONS ⟸7—SUFFICIENCY—ASSENT TO CONTINUANCE OF HEARING.

Assent by attorneys to minute entries continuing a hearing at the judge's request because of his illness was a sufficient stipulation to enable judge to retain jurisdiction to grant a new trial, notwithstanding Civ. Code 1913, par. 591, deeming a motion for new trial denied after 20 days from judgment.

3. CORPORATIONS ⟸121(7)—SALE OF STOCK—ACTION ON CONTRACT—VERDICT—AMOUNT.

In an action on a note given for corporate stock sold under an agreement for the cancellation of the note and return of the money upon the buyer's demand if dissatisfied, the buyer could not, on the seller's refusal to return the money paid, recover the amount paid after having received as a stockholder part of the price thereof on account of liquidation of the stock, since to do so would give the purchaser an amount in excess of that paid for the stock.

Appeal from Superior Court, Navajo County; Sidney Sapp, Judge.

Action by Henry Huning against E. A. Sawyer. From an order granting a new trial after a judgment for defendant on his cross-complaint, defendant appeals. Affirmed.

Thorwald Larson, of Holbrook, for appellant.

C. H. Jordan and J. E. Crosby, both of Holbrook, for appellee.

CUNNINGHAM, C. J. The appellee, as plaintiff, commenced this action against the appellant on notes made by the defendant to plaintiff. The defendant set forth his defense, praying a cancellation of the notes and other affirmative relief. On a trial before the court with a jury, the jury rendered a general verdict in favor of the defendant. On the 17th day of December, 1917, the court rendered a judgment in favor of the defendant in accordance with the general verdict, granting him the relief prayed for in his cross-complaint.

The plaintiff filed his motion for a new trial in due time, on December 26, 1917. Referring to the minute entries in the supplemental abstract of the record, filed by the appellee, we find on January 2, 1918, the following:

"January 2, 1918. The following telegram is entered upon the minutes of the court by the clerk at this time: 'Phœnix, Ariz., 4:23 p. m. 1—2/18. Lloyd C. Henning, Clerk of the Superior Court, Holbrook, Arizona. The court for good and sufficient reasons orders all motions, pleadings and cause for trial to be continued from this the second day of January, '18 until Monday 14 of January, 1918, this order you spread on your minutes as of 10 a. m. today. Sidney Sapp, Judge.'"

The following minute orders appear:

"Jan. 14, 1918. The court directed the clerk to enter upon the minutes of the court the continuance of the hearing of motion for new trial in this action until January 16, 1918, on account of illness of the judge, which said con-

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tinuance is satisfactory to all parties in this action."

"January 16, 1918. In the above-entitled cause the hearing on the plaintiff's motion for a new trial is continued from this date to January 23, 1918, by agreement of counsel."

"January 16, 1918. The Hon. Sidney Sapp, Judge of this court, in open court, directed the clerk to enter in his minutes that, because of the illness of the said judge, he was not able to be present in court, January 2, 1918, the date on which motion for new trial herein was to be heard, and that all interested parties were notified, as well as the clerk of the court, that the hearing would take place January 14, 1918, to which neither side have made and do not make any objections. On this 16th day of January, 1918, the court, at the request of the defendant, now continues the hearing on motion for new trial herein until January 23, 1918."

The hearing of the motion for a new trial was postponed from January 23, 1918, from time to time until April 8, 1918, when the parties argued the motion, and upon such submission the court announced that a decision would be rendered May 6, 1918.

On May 6, 1918, the court rendered its decision on the motion, granting the plaintiff a new trial. From which order the defendant appeals, and assigns as error the said order granting a new trial.

The appellant contends that the appellee's motion for a new trial was denied by operation of law 20 days after the 17th day of December, 1917, the date of rendition of the judgment, to wit, on the 7th day of January, 1918, for the reason that the motion was not continued by any valid order of the court nor by a stipulation of the parties as prescribed by paragraph 591, C. C. A. 1913.

We held, in Chenoweth v. Prewett, 17 Ariz. 402, 153 Pac. 420 that—

"Unless the court retains jurisdiction by proper orders of continuance or by stipulation of the parties, it is without power to hear and determine the motion after the 20 days' lapse of time from the rendition of judgment."

See, also, Bigler v. Welker, 16 Ariz. 44, 141 Pac. 124.

[1] We are referred to no law permitting a trial judge who is absent from his county seat, and at the time in another county, to make a valid order and transmit such order by telegraph to the clerk of the court for entry upon the minutes of the distant court. The judge's presence in the county where the causes are pending is absolutely necessary to the validity of all judicial acts, except such acts as the statutes provide may be performed outside of a county and transmitted to the county by the means prescribed. The judge could not delegate to the clerk the authority to make the order of continuance, nor could the judge make the order while in Phœnix and send it by telegraph to Holbrook for the clerk there to enter, in the absence of the judge. The entry, on its face, discloses no authority for the existence of the order. The order relied upon by the appellee is void, as an order of the court, and served no duty of such an order of continuance of the motion for a new trial.

The minutes of the court entered by the judge on the 16th day of January recite that all interested parties were notified of the judge's inability to hear the motion on January 2, and that it would be heard on January 14, 1918, to which they agreed by a silent acquiescence. At the time the order was made in the minutes, January 16, 1918, the defendant moved for a postponement of the hearing until January 23, 1918, and his motion was granted.

[2] We think these several entries in the minutes show the existence of a stipulation of the parties continuing the hearing from January 2, 1918, to January 14, 1918, at the request of the judge because of his illness. Hence the court retained jurisdiction to pass upon the motion by orders of the court and by stipulation of the parties. The record presents a case different from Chenoweth v. Prewitt and from Bigler v. Welker. Before the statute (paragraph 591, supra) "deems" the motion denied at the expiration of 20 days after rendition of judgment, there must be absent from the case, as a fact, all valid court orders continuing the hearing on the motion, and no stipulation of counsel. The statute does not require a stipulation of counsel to be more solemnly entered into than is necessary to bind the parties. An agreement reached in open court and recited in the minutes is binding on the parties, and neither party will be heard to assume a position contrary to such agreement in the further progress of the case. It would shock the conscience for a party to agree in open court to a postponement of the hearing and thereafter to ask for and be granted further continuances of the motion for a new trial and raise no objection to the court passing on the motion until the court rules against his contention, and then, for the first time, on appeal, contend that the court lost jurisdiction because the motion was not continued by order of the court or by stipulation of parties. The minutes of the trial court in this case do not bear out the appellant's contention that the court lost jurisdiction to pass on the motion for a new trial.

The appellant complains of the order granting a new trial, upon the ground that no sufficient tender of corporate stock had been made by appellant to appellee.

The ninth paragraph of the motion for a new trial is, in part, that—

"The court erred in not changing and modifying said instruction so as to explain fully to the jury the nature of a tender and failure of defendant to make one in this action."

The abstract of the record shows the order of May 6, 1918, as follows:

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"In the above-entitled cause the court at this time grants the motion for the plaintiff for a new trial, and orders that a new trial be had."

In a separate paper, signed and filed by the judge on July 29, 1918, as a "transcript of the notes covering remarks and order of the court, delivered orally in open court, Monday, May 6, 1918," we find the following:

"I do not know that it is necessary to go into detail regarding this motion for a new trial, as counsel for both plaintiff and defendant are not here, and this being the time fixed for hearing this matter, it is ordered by the court that the motion be granted, and that a new trial be ordered.

"I think the main proposition is the question of tender, and I doubt if tender was ever made, or, if made, was ever kept good. As far as the matter of estoppel, set up in the case, I don't take that very seriously."

The court instructed the jury with regard to the matter of tender, as follows:

"If the jury believe from the evidence that after the giving of the note in question, and the defendant learned all the alleged facts regarding the transaction, and after discovering such facts, and after payment was demanded of said note, he failed to tender or return the stock, * * * and that he accepted payments made by the liquidating agent of said bank on such stock, he is now liable on the note, and you should return a verdict for the plaintiff.

"You are instructed that if you find from the evidence that the plaintiff * * * represented to E. A. Sawyer, the defendant, at or before the time of the purchase of the shares of stock mentioned in answer of the defendant that he would return to the defendant, Sawyer, the purchase money paid for said stock and take back said stock at any time demanded by the defendant, upon his return or offer to return the said stock; and if you find from the evidence that the defendant did demand the return of the purchase money paid for said stock, and did tender or return the said stock to the plaintiff, Huning, and that the plaintiff, Huning, refused to return said purchase money and refused to receive back said stock, then you should find the issues in this case for the defendant."

These are the only instructions in the record having reference to the matter of tender of stock by Sawyer to Huning, and the instructions contained in the last two paragraphs quoted above are those complained of in the motion for a new trial.

The matter referred to as the question of estoppel is, briefly stated, as follows: Sawyer bought 50 shares of bank stock from Huning at the agreed price of $125 per share, paying $5,000 cash and the note sued on for the balance, $1,250. The agreement was that, if Sawyer became dissatisfied with his purchase, Huning would cancel the note and return the money upon Sawyer's demand and upon his return of the stock. The evidence is without serious conflict that Sawyer demanded the cancellation of the note and a return of his money. Huning refused to do either—cancel the note or return the money. The evidence is conclusive that while Sawyer has been the holder of the 50 shares of stock, the bank went into the hands of a liquidating agent, and that agent paid to Sawyer, on account of the liquidation of stock held by Sawyer, $55 per share. Evidence of Sawyer's acceptance of the amount paid in distribution to the stockholders was offered by the plaintiff as evidence estopping Sawyer from denying his absolute, unconditional ownership of the stock so being partially liquidated.

The judgment is one canceling the note and granting Sawyer a judgment against Huning for $5,000 with interest. What reasons the trial judge may have entertained as sufficient to require him to grant the plaintiff a new trial, certainly it would shock the conscience to permit a judgment to stand which gives no effect to evidence, clear, uncontradicted, and admitted as true by the party receiving the benefits, that such party had received already $2,750 of the $5,000 sought to be recovered, and which the judgment does not recognize.

[3] The right of Sawyer to have his note canceled and to receive from Huning $45 per share of stock would be established upon evidence satisfying the court and jury that Sawyer and Huning agreed to the terms of the contract set forth; that Sawyer demanded the return of the note and tendered the stock. The matter of the inability of Sawyer to return the 50 shares of stock is not raised in the case. Huning says, in effect, that he is not legally called upon to recognize Sawyer's demand for the rescinding of the former contract until Sawyer physically presents the full 50 shares of stock as a tender at the time of making the demand; otherwise the former contract remains unimpaired. In other words, the plaintiff contends for the enforcement of the general rule of tender to the facts in this case. So many exceptions to the general rule have been recognized and enforced by the courts that it has become a difficult matter at times to determine whether the facts of a given case are within the general rule or within some exception. It is clear, however, in this case, conceding that Sawyer properly notified Huning of a determination to rescind the stock agreement, that Sawyer was not entitled to recover from Huning a greater sum of money than he paid for the stock, and, to permit the judgment to stand, Sawyer is recovering $2,750 and interest from the date of the contract, in excess of the amount he paid Huning. The judgment is decidedly excessive, at least; and, the court having exercised a discretion to grant a new trial as the proper remedy to correct the judgment, that determination should not be disturbed by this court.

The appellee has assigned cross-errors

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based upon the judgment. The view we have taken obviates a consideration of such errors, even if they are properly assigned.

The order granting a new trial is affirmed.

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ROSS and BAKER, JJ., concur.

(20 Ariz. 363)

QUEN GUEY v. STATE. (No. 466.)

(Supreme Court of Arizona. May 21, 1919.)

1. INDICTMENT AND INFORMATION ⟸41(6)—PRELIMINARY EXAMINATION—NECESSITY.

Under Const. art. 2, § 30, before a prosecution by information for a felony can be legally had, it must be preceded by preliminary examination, or accused must waive such examination.

2. INDICTMENT AND INFORMATION ⟸47—AVERMENT AS TO PRELIMINARY EXAMINATION.

An information for felony need not aver that a preliminary examination of defendant has been held or been waived by defendant, as required by Const. art. 2, § 30.

3. INDICTMENT AND INFORMATION ⟸41(6)—PRELIMINARY EXAMINATION — PRESUMPTIONS.

If defendant, charged by information with felony, does not avail himself of Pen. Code 1913, § 972, when he is arraigned, by moving to have the information set aside because there was no preliminary examination, the law will presume that a preliminary examination has been duly had or waived.

4. CRIMINAL LAW ⟸369(13)—AGGRAVATED BATTERY—EVIDENCE OF PRIOR OFFENSE.

In a prosecution for aggravated battery by choking and striking a female, evidence that defendant, about two years before, had assaulted the complaining witness and her sister with a pistol was inadmissible, neither motive, common scheme, identity of person, mistake, or accident being involved in the case.

Appeal from Superior Court, Yavapai County; John J. Sweeney, Judge.

Quen Guey was convicted of battery on a female and he appeals. Reversed and new trial ordered.

The county attorney filed an information against the defendant, Quen Guey, in the superior court of Yavapai county, wherein it is charged that the said defendant "did * * * willfully, unlawfully, and feloniously commit a battery upon the person of one Minnie Schemer, by choking and striking the said Minnie Schemer, the said Quen Guey then and there being an adult male person, and the said Minnie Schemer being then and there a female person." The trial resulted in a verdict of guilty, and in due time the defendant filed a motion for new trial, which was overruled, and judgment was pronounced against him. He seeks to review such judgment by this appeal.

Robert E. Morrison, of Prescott, for appellant.

Wiley E. Jones, Atty. Gen., and F. L. Haworth, Co. Atty., of Prescott, for the State.

BAKER, J. (after stating the facts as above). The defendant interposed a demurrer to the information on the ground that such information failed to allege that a preliminary examination in the case had been held or that the defendant had waived such examination. The court overruled the demurrer, and this ruling of the court is assigned as error.

[1, 2] The Constitution of the state provides:

"No person shall be prosecuted criminally in any court of record for felony or misdemeanor, otherwise than by information or indictment; no person shall be prosecuted for felony by information without having had a preliminary examination before a magistrate or having waived such preliminary examination." Section 30, art. 2 (Declaration of Rights), Constitution of Arizona.

Counsel for the defendant has argued, at great length and with much force and ability, that under the constitutional provision quoted the trial court acquires no jurisdiction of a felony charge prosecuted by information, unless the accused has had a preliminary examination, or has waived such examination, and that the information must allege one or the other. We very willingly concede that counsel is correct to the extent that, before a prosecution by information for a felony can be legally had in this state, it must be preceded by a preliminary examination, or the accused must have waived such examination. It is the fact that there was a preliminary examination or waiver thereof, and a judicial determination thereon by the examining magistrate that a felony has been committed, and that there is probable cause to believe that the accused is guilty thereof, that confers jurisdiction on the superior court, and authorizes the county attorney to file an information in said court charging the crime committed according to the facts in evidence on such examination, or for the offense in the preliminary information when such examination has been waived by the accused. It seems to have been the intention of the framers of the Constitution, in prescribing the necessity of a preliminary examination or its waiver, before filing an information, to afford a shield to the citizen against the unwarranted zeal of prosecuting officers, and lessen the danger of the institution of criminal proceedings against a citizen through mere personal spite or malevolence. But why should it be necessary to aver in the information that such prelimi-

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nary examination in the case had been held or had been waived by the accused? The constitutional provision does not in terms require, nor does it intimate, that the information should contain any such averment. The examination required by the provision is certainly no part of the offense charged nor is it descriptive thereof. Such an averment cannot be said to be necessary for the information of the court as to its jurisdiction over the case, and, so far as it is a shield to the accused, he may avail himself of it by a proper plea in abatement or motion to quash the information.

[3] The Penal Code (section 972) provides:

"The indictment or information must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases. * * * If it be an information: (1) That before the filing thereof the defendant has not been legally committed by a magistrate, except in cases where such commitment is not required by law."

The accused is required to avail himself of this procedure at the time he is arraigned, and, if no such step is taken upon his part, the law will presume that a preliminary examination has been duly held or waived. Williams v. State, 6 Okl. Cr. 373, 118 Pac. 1006; Canard v. State, 2 Okl. Cr. 505, 103 Pac. 738, 881, 139 Am. St. Rep. 949.

The question has been before this court once before, in the case of Mo Yaen v. State, 18 Ariz. 491, 163 Pac. 135, L. R. A. 1917D, 1014, in which case the court said:

"If this is such a case as the law requires a preliminary examination to be had before a magistrate prior to the filing of an information, the failure to make such examination is not a ground for demurrer, but is a ground for a motion to quash the proceedings and abate the action. If the examination was or was not a necessary step in the proceedings, certainly such step need not be alleged on the face of the information."

The Constitution of Oklahoma, § 17 (Bill of Rights), prescribes:

"No person shall be prosecuted for a felony by information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination."

The Supreme Court of that state has considered this provision of the Constitution in several cases, and has uniformly held that it is not necessary to allege in the information whether the accused has had a preliminary examination or has waived such examination. Canard v. State, supra; Williams v. State, supra; Wood v. State, 3 Okl. Cr. 553, 107 Pac. 937; Caples v. State, 3 Okl. Cr. 72, 104 Pac. 493, 26 L. R. A. (N. S.) 1033.

The Constitution of the state of Delaware (article 5, § 8) provides:

"Prosecutions by informations shall only be had after examination and commitment and holding to bail by the judge or justice of the peace."

The Supreme Court of that state, in considering this provision of the Constitution, in the case of State v. Moore, 2 Pennewill (Del.) 299, 46 Atl. 669, said:

"It is not necessary, in order to give the court jurisdiction, to aver in the information an examination and commitment or holding to bail of the defendant. It is a matter of defense, and defendant may avail himself of the failure to proceed by examination and commitment or holding to bail, by plea in abatement."

To use a threadbare expression, the case is on "all fours" with the case at bar.

The Constitution of Idaho (article 1, § 8) provides:

"No person shall be held to answer for any felony or criminal offense of any grade, unless upon presentment or indictment of a grand jury or on information of a public prosecutor, after commitment by a magistrate."

The statute of the state (Rev. Codes, § 7662) provides:

"No information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor, as provided by law, before a justice of the peace, or other examining magistrate or officer, unless such person shall waive his right to such examination."

The Supreme Court of that state, in the case of State v. Farris, 5 Idaho, 666, 51 Pac. 772, said:

"There is nothing in either the Constitution or the statutes which, directly or by implication, requires that the fact of there having been a preliminary examination should be set forth in the information."

The court seemed, however, to believe it to be the better practice that the information should aver the fact that there had been such examination, or that the defendant had waived the same.

In several of the states, the requirement that a preliminary examination shall be held, or that it must be waived, before the filing of an information against the accused, is found in the statutes, and the courts of these states, in considering such statutory provisions, have uniformly held that it is not necessary to allege in the information the fact that such examination had been held, or that it had been waived by the accused. State v. Anderson, 5 Wash. 350, 31 Pac. 969; Washburn v. People, 10 Mich. 372; People v. John Shubrick, 57 Cal. 565; State v. Barnett, 3 Kan. 250, 87 Am. Dec. 471.

[4] The next assignment of error is based upon the ruling of the court allowing the prosecution to prove that the defendant upon another occasion, about two years prior to the time at which it is alleged that the crime (aggravated battery) in the information was committed, assaulted the complain-

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ing witness and her sister with a deadly weapon, to wit, a pistol. The defendant objected to the introduction of this testimony. It was error to admit the evidence.

In Gilett on Incidental and Collateral Crimes, p. 79, the author says:

"Collateral crimes may be shown where they tend to show malice, guilty knowledge, intent, motive, or the like, if such element enters into the offense."

The general rule is that one criminal case cannot be made out by proving another of like character, and the case in hand is not within any of the exceptions to the general rule. Neither motive, common scheme, identity of person, mistake, or accident is involved in the case. There is no evidence of any character showing any connection between the two assaults or any relationship between them. The evidence concerning the prior assault sheds no light upon the transaction charged in the information, and it was calculated to excite the prejudices of the jury. It was a different transaction, and in no way connected with the one for which the accused was being tried. That a person has committed one crime has no direct tendency to show he has committed another similar crime, which had no connection with the first, and a person charged with one offense cannot be expected to some to court prepared to meet the charge of another. If the doing of one wrongful act shall be deemed evidence to prove the doing of another of a similar character, which has no connection with the first, issues would be multiplied indefinitely, without previous notice to the defendant, and greatly to the distraction of the jury.

"The general rule is that when a man is put upon trial for one offense, he is to be convicted, if at all, by evidence which shows that he is guilty of that offense alone, and that, under ordinary circumstances, proof of his guilt of one or a score of other offenses in his lifetime is wholly excluded." People v. Sharpe, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851.

There is no doubt in my mind of the prejudicial effect of the testimony touching the prior assault. I am not prepared to say that the evidence does not support the verdict, yet, after an examination of the record, I am satisfied the case is not one where it may fairly be said that the jury would have returned a verdict of guilty, in the absence of such improper testimony, and I do not think that section 22, art. 6, of the state Constitution, warrants an affirmance of the judgment:

"No cause shall be reversed for technical error in pleading or proceedings when upon the whole case it shall appear that substantial justice has been done."

Counsel for the defendant has assigned other errors, based upon the failure of the court to instruct the jury to the effect that before considering the evidence of the prior assault, they must be convinced beyond a reasonable doubt that the defendant was guilty of the offense charged in the information, and also upon the misconduct of the county attorney in his argument to the jury, referring to facts which had not been offered or received in evidence, but, since the same matters are not likely to arise upon a second trial, I do not find it necessary to discuss them.

For the error of admitting evidence of the prior assault the case is reversed and a new trial ordered.

CUNNINGHAM, C. J., and ROSS, J., concurs.

(20 Ariz. 370)

PEABODY CONSOL. COPPER CO. v. MAIER et al. (No. 1646.)

(Supreme Court of Arizona. May 21, 1919.)

1. CORPORATIONS ⟸543 — VOID TRANSFER — IMPUTATION OF NOTICE.

Where the principal stock and bond holder sued for money advanced and salary, and by judicial sale acquired all assets of company in excess of property sufficient to satisfy mortgage securing bonds, and thereafter promoted another company, to which he transferred first company's property, such transferee, having taken with notice through its promoter that his acquisition of the property in the first place from the first company was in fraud of the first company's creditors, held the property in trust for such creditors.

2. APPEAL AND ERROR ⟸1032(1)—REVERSAL FOR PREJUDICIAL ERROR.

The Supreme Court will not disturb a judgment unless it is made to appear clearly from the record that harmful error has been committed.

Appeal from Superior Court, Pima County; Samuel L. Pattee, Judge.

Action by Leopold Maier and Bernhard Maier, a corporation doing business under the firm name and style of Maier Bros., against the Bonanza Belt Copper Company and the Peabody Consolidated Copper Company. From decree for plaintiffs, defendant Peabody Consolidated Copper Company appeals. Affirmed.

This action was commenced in the superior court of Cochise county, and thereafter transferred for trial to Pima county. The appellees commenced the action against the Bonanza Belt Copper Company, a corporation, to recover an account for goods and merchandise furnished the said Bonanza Belt Copper Company, and against the Peabody Consolidated Copper Company as the present owner of the assets of the Bonanza

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Belt Copper Company and as a successor to the corporate franchise rights and liabilities of the said Bonanza Belt Copper Company.

The plaintiffs recovered judgment against the Bonanza Belt Copper Company for their account as it stood on the 6th day of April, 1914, and were granted a decree against the mines in the hands of the Peabody Consolidated Copper Company ordering the same sold to satisfy plaintiff's judgment against the Bonanza Belt Copper Company. From the decree ordering the sale of said mines, the Peabody Company appeals.

John B. Wright, of Tucson, for appellant.
Francis M. Hartman, of Tucson, for appellees.

CUNNINGHAM, C. J. The relief demanded by this action was a personal judgment against the Peabody Company as the corporate successor to the Bonanza Belt Copper Company, and also a decree against the mines, the title to which was the assets of the Bonanza Belt Copper Company at the time the plaintiffs' debt was created, and which said mines the appellant acquired by means of transactions which were performed for the purpose and with the intent to hinder, delay, and defraud creditors of the Bonanza Company, and especially these plaintiffs. The trial court rendered a personal judgment against the Bonanza Belt Copper Company in favor of the plaintiffs for their claim up to April 6, 1914, and denied recovery for all items of account after that date, on the theory that the plaintiffs were notified on that day by the general manager of the Bonanza Belt Copper Company to close the credit account, and that plaintiffs are bound by that notice. The court further decreed that the mines described, the record title of which is in the appellant, Peabody Consolidated Copper Company, be sold to satisfy plaintiffs' said judgment.

[1] The appellant seriously contends that, as the appellant is guilty of no fraud in fact, it cannot be held liable to pay the debts of the Bonanza Belt Copper Company; and in support of such contention it seriously and persistently urges upon our attention the case of Luedecke v. Des Moines Cabinet Co., 140 Iowa, 223, 118 N. W. 456, and particularly and especially requests that we examine the notes to 32 L. R. A. (N. S.) 616, where this Luedecke Case is annotated. The language of the case that is pressed upon our attention is as follows:

"In order to render the purchasing company personally liable for the debts of the selling corporation, it must appear that: (a) There be an agreement to assume such debt; (b) the circumstances surrounding the transaction must warrant a finding that there was a consolidation of the two corporations; or (c) that the purchasing corporation was a mere continuation of the selling corporation; or (d) that the transaction was fraudulent in fact"—citing cases.

The court concludes by saying:

"None of these things appear in this case, and in our opinion the court was in error in rendering a personal judgment against the purchasing corporation."

These cases have no application to the judgment in this record. The judgment is not a personal judgment against the Peabody Company. The personal judgment is against the Bonanza Belt Copper Company, and pursues in the hands of the Peabody Company the real estate which belonged to the Bonanza Company at the time plaintiffs' debt arose. It is well settled that—

"Equity regards the property of a corporation as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue it into whosoever possession it may be transferred, unless it has passed into the hands of a bona fide purchaser; and the rule is well settled that stockholders are not entitled to any share of the capital stock, nor to any dividend of the profits, until all of the debts of the corporation are paid." C., R. I. & P. R. R. Co. v. Howard, 74 U. S. (7 Wall.) 392, 409, 19 L. Ed. 117, 120.

See, also, C., M. & St. P. R. R. Co. v. Third Nat. Bank, 134 U. S. 276, 10 Sup. Ct. 550, 33 L. Ed. 900, 904; Northern Pac. Ry. Co. v. Boyd, 177 Fed. 804, 819, 101 C. C. A. 18.

The trial court expressly relied upon a line of cases correlated with the Boyd Case. Our inquiry, therefore, is confined to a state of the facts which authorize the creditor to pursue property of his corporate debtor into the hands of a purchaser with notice of the creditor's rights.

The parties concede that plaintiffs were bona fide creditors of the Bonanza Company prior to and at the time the appellant corporation acquired its rights to the mines, the property in question. The circumstances surrounding the several transactions resulting in the record title to these mines coming to a pause in the Peabody Company are sustained by undisputed evidence or admissions.

The Peabody Company's immediate grantor was L. C. Dessar, who, by deed of August 5, 1915, conveyed to the Peabody Company said mines. Dessar organized and caused the Peabody Company to be incorporated on July 10, 1915, with an authorized capital stock of 300,000 shares of the par value of $5 a share. All of said capital stock was issued and delivered to L. C. Dessar in consideration of said deed and of the bonds secured by a trust deed. Dessar acquired the rights he conveyed by said deed of August 5, 1915, in the following manner: On July 23, 1914, L. C. Dessar was the principal stockholder, the controlling director, and general manager of the Bonanza Belt Copper Company, and claimed an indebtedness due

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him for money advanced in the sum exceeding $9,000, and a salary as general manager at $500 per month overdue for two years up to July 9, 1914, in the sum of $7,500, and filed suit against the said debtor, demanding judgment for both claims. In due time he recovered judgment in the sum of $18,013.84. Thereafter an execution was issued and levied upon said mines, the mines were noticed for sale and sold to the judgment creditor, L. C. Dessar, for his bid of $500. In due time, July 22, 1915, L. C. Dessar received a sheriff's deed conveying all of the debtor's rights in the mines to such purchaser. The purchaser, who was the principal stockholder, the retiring general manager, and thereupon became the apparent owner of all of the assets of the Bonanza Company, granted to said Bonanza Company a lease of the mines until he sold the mines to the Peabody Company on August 5, 1915, so that the Bonanza Company could continue to operate the mines in its own name for a short time. No one will seriously contend, in the light of these facts, that Dessar was ignorant of the claims of these plaintiffs. The transaction was consummated by the assistance of the courts, of which the plaintiffs are not charged with having any actual knowledge. Dessar's action was one in the nature of an action by a trustee to recover of the beneficiary a personal claim for money advanced to and personal services rendered as agent for the beneficiary, and a satisfaction of said claims in part by converting the entire trust estate into his personal ownership, for the small sum of $500, a sum not greater than the reasonable court costs of the proceeding which resulted in the transfer. By means of said court proceeding, L. C. Dessar acquired all of the assets of the Bonanza Belt Copper Company in excess of the property sufficient to satisfy a mortgage lien held by the Empire Trust Company, as trustee for the bondholders, and L. C. Dessar was the sole bondholder. L. C. Dessar thereby became possessed of all the right, title, interest, and claim of the judgment debtor, the Bonanza Belt Copper Company (paragraph 1373, R. S. A. 1913), in and to the said mines as of the date of the levy of the execution which resulted in the sale. As an unsecured creditor of the Bonanza Company, Dessar, by such judgment and sale of the Bonanza Company's equity in the mines, caused the Bonanza Company to deliver all of its assets to him. He thereby became a preferred creditor of the Bonanza Company. Dessar was the principal stockholder, general manager, and principal creditor, controlling and directing all of the affairs of the Bonanza Belt Copper Company. He was the person most vitally interested in its affairs, and was in the position to be the best informed of its creditors of all its affairs. He is therefore charged with full knowledge of the creditors of the Bonanza Belt Copper Company and of the amount of their debts owing by said Bonanza Company. Dessar had actual notice, as general manager of the said Bonanza Company, of the plaintiffs' debt. With full knowledge of these affairs, Dessar proceeded, by said court action, to reduce all of the Bonanza Company's assets to his use, to the exclusion of the rights of the other creditors, including these plaintiffs. These assets consisted of the Bonanza Belt Copper Company's equity of redemption in the mines in excess of value sufficient to satisfy the bonded indebtedness represented by the bonds with interest issued under the authority of the trust deed mentioned herein. Such equity was great or small in proportion to the value of the mines over and above the amount of the bonded debt secured by said lien. The value of such equity was uncertain so long as said lien remained unsatisfied, and such condition existed on the 23d day of July, 1915, when Dessar received his sheriff's deed.

The question therefore becomes vital whether the Peabody Consolidated Copper Company became a bona fide purchaser of said equity in excess of the lien of the trust deed without notice of plaintiffs' claim against such equity as a creditor of the Bonanza Company? Of course, L. C. Dessar, while he possessed such property, could not be heard to say that he had no notice of the existence of plaintiffs' debts. Dessar is chargeable with full notice of plaintiffs' rights, and the facts show that Dessar caused himself, as a creditor, to be preferred to other creditors to the loss of the other creditors. Is the Peabody Company also, chargeable with notice of plaintiffs' rights and the wrongs committed by L. C. Dessar against plaintiffs? If the Peabody Company is chargeable with notice of the means used in the circumstances by which Dessar acquired the said mines to the harm of the plaintiffs, then the transfers, first from the Bonanza Company to Dessar, and, second, from Dessar to the Peabody Company, are void as to these creditor plaintiffs.

At the time the Peabody Company acquired the said mines, Dessar was its promoter, its financial agent, its sole stockholder and controlling director—in fact, its guiding spirit. Is it possible that the Peabody Company could have acquired all of the rights of the Bonanza Belt Copper Company in the equity in the mines through the principal creditor, the general manager, and controlling stockholder of both corporations without at the same time acquiring knowledge of the means used by the mutual agent and stockholder to accomplish the conveyance and transfer and in the passage through him leave behind the other creditors? The answer of the lower court is, "No;" that Dessar's knowledge affecting the title conveyed to the corporation he so represented must be imputed to the corporation he so organized—to the Pea-

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body Consolidated Copper Company. This view of the matter of imputed notice is supported by 1 Thomp. Corporations, § 116, cases cited notes pages 250 and 251, and by natural justice and sound logic.

Consequently the Peabody Company is chargeable with notice to the effect that the Bonanza Company preferred its principal stockholder and general manager as a creditor to its other unsecured creditors, and by means of a judgment permitted him to convert to his own use all of the assets, to the loss of its general creditors. The matter of value of the equity so converted by Dessar is not a question in this case. The intention and purpose with which the conversion was accomplished is a question in the pleadings. The complaint charges (paragraph XIII) the Peabody Company with having acquired title to the mines from Dessar in the manner and by the means above referred to "for the purpose and with the intent to hinder, delay, and defraud the creditors of the said Bonanza Belt Copper Company, and especially for the purpose and with the intent of hindering, delaying, and defrauding the plaintiffs in the collection of their said debt. * * *" The plaintiffs further allege in the same paragraph of their complaint that the action of Dessar in causing the properties to be sold under said two judgments "resulted in stripping the said Bonanza Belt Copper Company of all of its property, leaving it without any assets whatever subject to execution." The Peabody Company answered paragraph XIII of the complaint in paragraph V of its answer, wherein it says that it "denies that any of the acts or transfers or things alleged in said paragraph XIII of the complaint were for the purpose and with the intent to hinder, delay, and defraud the creditors of the said Bonanza Belt Copper Company, and especially for the purpose and with the intent of hindering and delaying and defrauding the plaintiffs or any other person or corporation in the collection of any debt." The appellant thereby asserts the necessity of the existence of an actual fraudulent purpose and specific intent to defraud in order to avoid a conveyance having the effect of depriving other creditors of means of satisfying their debts; that there must appear to exist a personal intent, a consciously fraudulent and dishonest motive, before the conveyance becames void as to creditors. But such is not the meaning ordinarily given to such results of conveyances. See Gibson v. Love, 4 Fla. 217; California Cons. Mining Co. v. Manley, 10 Idaho, 786, 81 Pac. 50; Nelson v. Leiter, 190 Ill. 414, 60 N. E. 851, 83 Am. St. Rep. 142.

The plaintiffs, as unsecured creditors of the Bonanza Belt Copper Company, had an equitable right to subject the said Bonanza Company's equity in the mines to a satisfaction of their debts in common with Dessar and other creditors. Of course, the rights of creditors are subordinate to the mortgage lien, as the equity depends upon that lien. The fact that Dessar converted all of the said equity to his use and benefit while standing in a confidential relation to the debtor and thereby being charged with a duty to cause said debtor to deal justly and honestly with all of its unsecured creditors makes him and the debtor whom he represents equally cognizant of the wrong resulting to other creditors less favorably situated, and without any personal, dishonest motive. The results amount to hindering, delaying, and depriving the plaintiffs of a valuable right by acts purposely and intentionally done, hence, in law, defrauding the plaintiffs purposely and intentionally. The law imputes the fraud from the acts, conveyances, and transfers when they result in a wrong to another, in violation of a duty owing. The grantee receives and holds the title acquired in each circumstances in trust, subject to the claims of the persons wronged, provided the grantee is chargeable with notice of such wrong as a fact.

[2] The lower court necessarily found, as a fact, that the Peabody Consolidated Copper Company did have notice of these plaintiffs' claims against the said equitable title, and for that reason it was not a bona fide purchaser for value, but held the property subject to plaintiffs' rights. This court will not disturb a judgment unless it is made to appear clearly from the record that harmful error has been committed. Upon this record and the whole case, justice seems to have been done the appellant. The judgment seems to have been particularly just and favorable to the appellant.

There being no reversible error on the record, the judgment is affirmed.

ROSS and BAKER, JJ., concur.

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(20 Ariz. 377)

CAMPBELL et al. v. CALDWELL.
(No. 1623.)

(Supreme Court of Arizona. May 21, 1919.)

1. PUBLIC LANDS ⟸55—ARIZONA LANDS—INSTITUTIONAL GRAZING LAND LEASE.

Under Public Land Code, §§ 2, 3, 8, 9, 30–32, the negotiations for the leasing of institutional grazing land is to be carried on by the State Land Commissioner, but his acts and conduct in that regard are subject to the control and direction of the State Land Department, to whom all disputes, grievances, and other matters pertaining to administration of state lands are to be referred.

2. PUBLIC LANDS ⟸55—ARIZONA LAND—INSTITUTIONAL GRAZING LAND LEASE.

Applicant for institutional grazing land lease cannot maintain action to compel execution of lease upon Land Commissioner's refusal to make lease applied for, where before bringing action he did not present, or offer to present, his grievance to State Land Department, the power to make leases being with the department and not the commissioner, and applicant for lease having opportunity to present case to department upon commissioner's refusal to execute lease, under Public Land Code, §§ 2, 3.

3. PUBLIC LANDS ⟸55—ARIZONA LAND—INSTITUTIONAL GRAZING LAND LEASE — DISCRETION OF COMMISSIONER.

Under Public Land Code, §§ 2, 3, 8, 9, 30–32, and 37, enacted pursuant to Const. art. 10, §§ 1, 3, and 10, State Land Department or Land Commissioner may, in their discretion, refuse to execute institutional grazing land lease though applicant is the first and only person to apply therefor and has made application in the prescribed form and manner.

4. MANDAMUS ⟸148—EXECUTION OF PUBLIC LAND LEASE—"PARTY BENEFICIARY INTERESTED."

Applicant for institutional grazing land lease is not a party beneficially interested within Civ. Code 1913, par. 1554, providing for application for a writ of mandamus by a party beneficially interested, since the mere filing of written application for lease of land did not confer upon him any interest in the land other than that of the general public.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Beneficially Interested.]

5. PUBLIC LANDS ⟸55—ARIZONA LAND—APPLICANT FOR LEASE—INTEREST IN LAND.

The mere filing of a written application for lease of public lands does not confer upon applicant any interest in the land other than that of general public.

6. COURTS ⟸95(2)—DECISIONS—CONSTRUCTION OF STATUTES.

In construing statutes to determine power of Land Department and the status of applicant for lease of public lands, decisions by other states having laws very similar are very persuasive.

Appeal from Superior Court, Maricopa County; F. H. Lyman, Judge.

Mandamus by T. M. Caldwell against Thomas E. Campbell and others, composing the State Land Department of Arizona, and others. Peremptory writ issued, and defendants appeal. Reversed and remanded, with directions.

Wiley E. Jones, Atty. Gen., and Geo. W. Harben and L. B. Whitney, Asst. Attys. Gen., for appellants.

Armstrong & Lewis and O. E. Schupp, all of Phœnix, for appellee.

ROSS, J. This is an action brought by appellee, Caldwell, against appellants, Campbell et al., constituting the State Land Department of Arizona, and W. A. Moeuer, State Land Commissioner, praying that a writ of mandate issue to them commanding them:

"(1) To approve the application of the plaintiff herein for a lease of the lands hereinbefore described; (2) to fix the amount of rental per annum therefor; (3) to notify plaintiff of the amount of annual rental so fixed; (4) upon receipt of said annual rental from plaintiff, to execute a lease to him for said lands for grazing purposes for a term of five years."

The facts set forth in the complaint as a basis for said prayer, and claimed by appellee to make it the duty of the court to require appellants to do the things prayed for, are, so far as material, that the state is now, and was at all times herein, the owner of the herein described institutional lands, to wit: Section 22, township 21 south, range 11 east, G. and S. R. B. and M., in Cochise county, the same being a part of a federal grant to the state under the Enabling Act approved June 20, 1910; that said lands had theretofore been classified and designated as suitable for grazing purposes only, and subject and open to lease for that purpose; that on the 11th day of September, 1916, appellee, who is in all ways qualified and eligible to lease lands, duly made his application upon a blank form furnished by the State Land Commissioner, and paid one dollar, the filing fee required, for a lease of same for a term of five years; that, although no other application for said land had been made, the Land Commissioner, whose duty it was to approve appellee's application, refused to fix the annual rental, and refused to execute a lease thereof to appellee, without any cause or reason therefor; that said refusal was arbitrary and unreasonable, and not within the power, authority, or duty of the commissioner.

An alternative writ of mandamus was issued to appellants commanding them to execute the lease as prayed for or show cause on a day fixed.

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Appellants interposed defenses by way of motion to quash, plea in abatement, demurrers, general and special, denials, and alleged affirmatively that on January 12, 1917, and before the institution of this suit, the lands were leased by them to one W. A. McBride.

At the trial the facts as alleged in the complaint were stipulated or admitted to be true, except the allegations that "it was the duty of the commissioner to approve plaintiff's application to fix the amount of annual rental, to notify plaintiff of the amount of annual rental so fixed, and to execute a lease to plaintiff upon receipt of said annual rental"; and the court, upon such stipulations and the pleadings, entered judgment for appellee, and peremptorily ordered them to do the things prayed for in the complaint, from which judgment this appeal is prosecuted.

The assignments all go to the sufficiency of the complaint and the admitted facts to state a cause of action. It is the contention of appellants that, even though it be conceded that an applicant is the first and only applicant to lease institutional grazing lands theretofore designated to be open to lease, and that he is qualified and has made application upon the form and in the manner prescribed by the State Land Department or State Land Commissioner, and in accordance with the law, still the State Land Department or Land Commissioner may, in their discretion, refuse to accept his application and refuse him the lease. The contention of appellee is, the existence of these facts being conceded, that a plain legal duty devolves upon appellants to grant the lease. In other words, they have no discretion in the matter. It is this question we are to decide.

The Constitution, § 1, art. 10, makes the state a trustee of the lands granted to it by the federal government for the several purposes for which such lands are granted. Section 9 of this article authorizes the trustee to sell and lease said lands "in the manner, and on the conditions, and with the limitations, prescribed by the said Enabling Act and this Constitution, and as may be further prescribed by law"; and section 10 makes it the duty of the Legislature to "provide by proper laws for * * * the lease of such lands for terms not longer than five years. * * *" It is provided in section 3 of said article 10 that leases for a term of five years or less may be made without publicly advertising the same. In an effort to comply with these mandates, the Legislature, at its second special session 1915, enacted chapter 5, entitled "An act to provide a code for the systematic administration, care and protection of the state lands and vesting the necessary powers thereof in a department, to be known as the State Land Department, and creating the office of Commissioner of State Lands to carry out the provisions hereof. * * *"

The personnel of the Land Department and their duties and powers are set forth as follows:

"Sec. 2. *Creation of Department—Commissioner.* There is hereby created a department of state, which shall be known as the State Land Department. Said department shall consist of the Governor, the Secretary of State, the Attorney General, the State Treasurer and the State Auditor, who shall serve without extra compensation. The Governor shall be ex officio chairman of the department. Said department shall appoint a State Land Commissioner, who is hereby clothed with the powers of Surveyor General, and shall hold office until his successor shall have been appointed and qualified. Subject to the control and direction of the State Land Department, the commissioner shall have charge of and administer the state lands and shall exercise the powers and perform the duties hereinafter set forth.

"Sec. 3. *Duties and Powers of Department.* The department is hereby authorized to sell and lease all lands owned or held in trust by the state, under such provisions as are hereinafter provided, and under such other rules and regulations, not in conflict with the provisions of this act, as the department may direct; to hold semimonthly meetings, at which time all disputes, grievances and other matters pertaining to the administration of state lands may be heard by said department; and to perform all of the duties heretofore imposed by law upon the State Land Commission."

The powers of the commissioner are defined by sections 8 and 9, as follows:

"The commissioner, under the direction of the department, shall have charge and control of all lands owned by the state of Arizona, except such as are under the specific use and control of state institutions, with full power to administer the same, and shall have charge and control of the timber, stone, gravel and other products thereof or thereon, subject to the provisions of law. * * *

"The commissioner shall have power to summon witnesses to appear and give testimony, and to compel said witnesses to produce records, books, papers and documents relative to any subject or matter which the commissioner shall have the authority to investigate or determine; to cause the depositions of witnesses residing within or without the state, or absent therefrom, to be taken upon notice to the interested parties, if any, in like manner as depositions of witnesses are taken in civil actions pending in the superior court, in any matter which the commissioner shall have the authority to investigate or determine. * * *"

The sections of chapter 5, known as the Public Land Code, bearing upon the leasing of the state lands are as follows:

"Sec. 30. *Application for Lease.* All state lands not otherwise administered shall be subject to lease as in this act provided, but no state lands shall be leased for a longer term than 5 years, and not more than 160 acres of agricultural lands nor more than 640 acres of grazing

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lands shall be leased to any one person, association or corporation. All applications for lease shall be made on blank forms, to be prepared and furnished by the commissioner, and shall be signed and sworn to by the applicant and filed with the commissioner.

"Sec. 31. *Two or More Applicants.* In case two or more applicants apply to lease the same land, the commissioner shall approve the application of the one who, after investigation or hearing by the commissioner shall appear to have the best right to such lease, but if it should appear that none of the applicants has any rights or equities superior to those of another, the commissioner may, at a stated time, and after due notice to all such applicants, receive sealed bids submitted in accordance with such rules and regulations as the commissioner may adopt, and shall approve the application of the bidder, who, in all respects, is eligible to hold a lease upon the land, and will pay the highest annual rental therefor; provided, that the commissioner shall have the right to reject all the bids submitted.

"Sec. 32. *Minimum Rental.* No lease shall be executed for a consideration less than $10.00 per year, except that when a lease is made for a tract of land of five acres or less, then in that event for not less than $2.50 per year, nor for an annual rental of less than three cents per acre on grazing lands and not less than two and one-half per cent. of the commissioner's estimate of the value of agricultural lands; said rental shall be paid in advance, annually or for such other period not exceeding two years as the commissioner may fix."

[1] While, under these provisions, it is manifest that the immediate negotiations for the leasing of lands were intended to be carried on by the commissioner, it seems quite clear that his acts and conduct in that regard are "subject to the control and direction of the State Land Department," composed of the Governor and other state officers named, and, while his acts might be efficacious where no "disputes, grievances, or other matters pertaining to" a given contract of lease arise, when such do intervene it appears action by the department as such is contemplated. By section 3, supra, it is made the duty of the department to lease all lands owned or held in trust by the state, and "to hold semimonthly meetings, at which time all disputes, grievances, and other matters pertaining to the administration of state lands may be heard by said department."

[2] The appellee's complaint fails to show that his grievance or dispute was ever presented to the department for action, or that the department as such ever refused to give him a lease. We think, aside from any other question, before an applicant for a lease may maintain this kind of action, he should be required to present, or offer to present, his grievance to the department for action. Until that is done, he cannot, nor can the court, know what the action of the department might be. Had he adopted the remedy of appealing to the department, he might have satisfied the members thereof that he was entitled to a contract of lease. We think, at all events, that it was the intention of the Legislature to give to an aggrieved applicant to purchase or lease lands an opportunity to appear before, and submit his case to, the department as such; and it would also seem, as a corollary to that, that he must do so before he can invoke the aid of the court to compel the department to act. The power to make leases lies with the department and not the commissioner (sections 2 and 3). This duty or power is again stated in section 38, wherein it is provided that "the department is hereby authorized to execute leases and contracts for the lease of lands containing" precious and valuable minerals and valuable natural deposits. The appellee, in making the department and the members thereof defendants in his action, concedes as much, and exposes the weakness of his position in failing to invoke their power to review his grievance against or dispute with the commissioner before asking the court to compel action.

But, granting the whole power of negotiating and making leases is vested in the commissioner under sections 30, 31, and 32, and that a disappointed applicant may treat his refusal to grant a lease as final, and as relieving him from appealing to the department for redress, what is his status before the law?

[3] It is provided that, when the land is wanted or applied for by two or more, bids shall be taken and the land awarded to the one in all respects eligible who will pay the highest annual rental; but the highest eligible bidder is not entitled as a matter of right to the lease of the land, for, even in such circumstances, "the commissioner shall have the right to reject all bids submitted." As between the bidders, if the land is to be leased to any one of them, it shall be to the one making the highest offer, if qualified. The commissioner may reject the highest bidder, and in doing so all other bids are disapproved, for, if he approves of any, it must be the highest. Now, if he may reject the highest bid—if that power without restriction or limitation except as indicated is vested in him—we would hardly presume the Legislature intended to say he could not exercise the same power upon a formal application or proposal to rent as in this case. There is no legislative expression making it his mandatory duty to accept the applicant's offer to lease in the absence of competition. It will be conceded that one who has occupied the lands of the state as lessee ordinarily would have a better right and a more equitable claim for a renewal of his lease than an original applicant for a piece of land would have to a lease thereof. Yet the Legislature in section 37 of the Land

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Code states "that if the commissioner does not deem the continued leasing of said land to be for the best interest of the state, said lease shall not be renewed." We are forced to the conclusion that the law does not specially enjoin upon the State Land Commissioner by virtue of his office the duty of accepting an applicant's proposal to lease institutional or state lands under the state of facts here, but, on the contrary, we think it was intended that he should be permitted to exercise his discretion in the matter, and either refuse or accept the proposal, as in his judgment would best subserve the interests of the state; and to that end the commissioner was given the power in section 9, supra, "to investigate and determine" what should be done, not only on applications to lease, but any other "subject or matter" brought before him.

[4] The application for a writ of mandamus under the statute, paragraph 1554, Civil Code 1913, must be made by "the party beneficially interested." The question is, Is appellee such a party? It is but natural, as well as compatible with a fair sense of justice, to assume that the Land Department will recognize, so far as reasonable and practicable, that "the first in time shall be first in right" in awarding leases of the state or institutional lands, but there is nothing in the law requiring it. If two or more persons apply for a piece of land, it is not the first in time that is entitled to it, but the one who will pay the highest rental value for it. If there is but one proposal to rent, the rental value must be fixed by the land department or commissioner, and cannot be less than three cents per acre, with no limit upon the maximum that may be fixed. Section 32, supra. There could be no mutual obligation as long as the rental value was left unsettled. If the Land Department or commissioner becomes bound upon an application being filed, then the applicant is also bound to pay the rental value fixed, whatever it may be. That is not the law. Neither the state nor the applicant in such circumstances is bound. If, after the rental value is fixed, the applicant is dissatisfied, he may refuse to accept the lease notwithstanding his application. He acquires no interest in the land susceptible of enforcement until there is a mutual obligation.

[5] "The mere filing of a written application for a lease of public lands does not confer upon the applicant any interest in the land other than that of the general public." State v. Ross, 39 Wash. 399, 81 Pac. 865; Whiteman v. Severance, 46 Minn. 495, 49 N. W. 255; State ex rel. Marsh v. State Board Land Commissioners, 7 Wyo. 478, 53 Pac. 292.

[6] The appellee contends that the decisions in these cases are not in point for the reason the statute laws in these states are very different from ours. That may be true in some respects, but, as to the discretionary powers of the land departments and the status of an applicant to lease lands, the laws are very similar to ours, and for that reason we consider these decisions in point and very persuasive.

Appellee cites a number of cases of lieu land selections, homestead and pre-emption applications, and the like, wherein the courts have held, under the peculiar statutes granting rights thereunder, "the first in time is the first in right"; but, as we have seen, our Legislature did not adopt that rule in providing for the lease of our state lands, and it follows that those decisions are no authority of control in construing our land code.

It follows that the trial court committed error in directing a peremptory writ of mandamus to issue against the appellants, and the judgment is therefore reversed and cause remanded, with directions that appellee's complaint be dismissed.

CUNNINGHAM, C. J., and BAKER, J., concur.

(20 Ariz. 412)

BOYCE, State Auditor, v. HUNT.
(No. 1721.)

(Supreme Court of Arizona. June 4, 1919.)

STATES ⇐63 — GOVERNOR'S SALARY — INCREASE DURING TERM—"UNTIL OTHERWISE PROVIDED BY LAW."

Const. art. 5, § 13, naming Governor's salary "until otherwise provided by law," does not entitle the Governor, notwithstanding article 4, § 17, prohibiting change in public officers' compensation during his term, to increase given him pending his term by Laws 1917, c. 61, the salary having been "otherwise provided by law" by Laws 1913, c. 44 (Civ. Code 1913, par. 3222), though same amount was named, the quoted words having reference to a new law on the subject, and not a change in amount of salary.

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

Mandamus by George W. P. Hunt against Jesse L. Boyce, State Auditor of Arizona. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

Wiley E. Jones, Atty. Gen., and W. E. Ryan, of Phœnix, for appellant.

L. B. Whitney and G. P. Bullard, both of Phœnix, for appellee.

ROSS, J. Appellee, as plaintiff, seeks by this suit to mandamus appellant as state auditor to settle and allow his claim for bal-

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ance of salary as Governor of the state from March 14, 1917, to January 5, 1919. Appellant demurred to the complaint on the ground that it failed to state facts sufficient to constitute a cause of action. This demurrer was overruled, and judgment ordered for appellee. The auditor has appealed from the judgment.

Chapter 44, Laws of 1913, third special session of the First Legislature (paragraph 3222, Civil Code), fixed the salary of the Governor of the state at $4,000 per annum. That was the salary attached to the office when appellee was elected and inducted into office. In 1917, March 14th, and after appellee's term of office began, there was passed and approved, with the emergency clause, chapter 61, known as the Salary Act, in which the salary of the Governor was fixed at $6,500 per annum, an increase of $2,500 over the salary fixed by chapter 44, Laws of 1913, supra. It is the increase, to wit, $4,529.51, that appellee seeks to recover.

It is the contention of appellant that the appellee is not entitled to the increase because of the prohibition in section 17, article 4, of the Constitution. That section plainly, clearly, and distinctly takes from the Legislature the power to increase or diminish "the compensation of any public officer * * * during his term of office."

In a recent case (Greenlee County v. Laine, 20 Ariz. ——, 180 Pac. 151) we held that this provision of the Constitution is all-inclusive, covering every public officer of the state, and making it impossible for the Legislature to either increase or diminish the compensation of a public officer during his term. In the Laine Case we were asked to ingraft upon section 17, article 4, an exception in favor of judges of the superior courts because section 24 of article 6 prohibits the reduction of a judge's salary, but says nothing as to the power or right to increase his salary. In view of the two provisions of the Constitution as to the salary of judges, the contention was plausible, if not tenable. There is no foundation for such contention in behalf of appellee.

However, it is contended by appellee that section 17, article 4, because of other expressions in that instrument, not considered in the Laine Case, has no application to his claim for increase of salary. He premises his contention upon section 13, article 5, of the Constitution reading as follows:

"Until otherwise provided by law the salaries of the state officers shall be as follows: Governor $4,000.00 per annum. * * *"

The first Governor of the state was paid this constitutional salary until May 14, 1913, on which date chapter 44, supra (paragraph 3222, Civil Code) went into effect. By this act it was provided:

"State officers shall receive the following salaries: The Governor $4,000 per annum. * * *"

Since the date of the approval of chapter 44, the Governor of the state had been paid the statutory salary therein provided. The constitutional and statutory salaries are identical in amount, and it is therefore contended that the salary of the Governor was not "otherwise provided by law" until changed in amount by chapter 61, supra, and for that reason appellee should receive the increase provided in the latter act. In other words, he would have us construe the expression "until otherwise provided by law" as referring to and modifying the amount of salary, and not the source of power to otherwise provide salaries. According to his theory, if the act of May 14, 1913, had changed the salary, increasing it from the constitutional sum of $4,000 to $6,500, or had decreased it from the constitutional salary to $2,000 per annum, then it would have been "otherwise provided by law," but, since the First Legislature did not change the amount of salary fixed by the Constitution, his salary is not "otherwise provided by law." We cannot concur in that contention. The act of May 14, 1913, was a law differing in character from the constitutional provision that first fixed the Governor's salary. After its passage and approval it was the only source of authority to which the Governor of the state could look for his compensation. It took the place of the constitutional provision on that subject just as effectually and completely as if it had provided a salary in a different amount to that fixed by the Constitution. By that act the salary of the Governor was "otherwise provided by law," in that it was provided for by "statutory law" and not constitutional law.

Appellee calls our attention to what was decided by the Utah Supreme Court in State on relation of Heber W. Wells v. Tingey, 24 Utah, 225, 67 Pac. 33, as supporting his contention. Granting the Utah constitutional provisions are enough like ours on the question of the power or right to change the compensation of a public officer during his term of office—and we think they are—as to constitute some authority for our guidance in construing our Constitution on that subject, still the Tingey Case arose out of a state of facts so decidedly different from the facts we have here that the conclusions therein but remotely point in the direction of appellee's contention. The facts of the Tingey Case are these: It was a mandamus proceeding brought by Heber W. Wells against Charles S. Tingey, State Auditor, and had for its object the compelling of the auditor to audit and allow a salary claim by Wells as Governor of Utah. At the time that Wells was elected and took office, his salary was fixed

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by the state Constitution in language, the material part of which is:

"The compensation of the officers provided for by this article, until otherwise provided by law, is fixed as follows: Governor, $2,000 per annum. * * *"

Gov. Wells was inducted into office on the first Monday of January, 1901. An act of the Legislature effective May 13, 1901, fixed the Governor's salary at $4,000 per annum, and another act, passed at the same session, made appropriations to pay him the increased salary during the years 1901 and 1902. The Utah court held that Gov. Wells was entitled to the increased salary because the constitutional salary was intended to be paid the officer only until the Legislature in its discretion otherwise provided by law; that is, by "statutory law." It was there said that the word "law" in its broadest sense includes the Constitution, but where it occurs in the expression "until otherwise provided by law" it clearly has reference to "statutory law"; that the general prohibition in the Constitution against the increasing or diminishing of the salary of an officer during his term "applies only to such salaries as the Legislature shall by enactment fix, and that the salaries fixed in said section [of the Constitution], like many other provisional matters in the Constitution, was intended to continue in force only until otherwise provided by the act of the Legislature."

When the Legislature acted, the legislative or statutory salary was substituted for the constitutional salary. It was then fixed or otherwise provided by law. In the Utah case the salary was "changed." Here it was not changed, although it might have been if the Legislature had seen fit to do so. It could have made it less or greater than the constitutional salary, and, under the Tingey decision, it could not "thereafter again be changed so as to affect the salary of any officer during the term for which he was elected." We think the controlling or dominant reason for the holding in the Tingey Case that the salary provided by the act of May 13, 1901, was a legal salary was not because of a change of salary in amount, but because it was fixed by legislative enactment, as it was intended it should be. Any expression of the Utah court, apparently placing emphasis upon the "change" of salary, was called forth not because the court intended that as the basis of its decision, but because it was one of the facts of the case. The Tingey Case does not involve the power of the Legislature to change the statutory salary or the salary fixed by the Legislature. It was limited to the power of that body to change the provisional salary fixed by the Constitution.

We conclude that our act of May 14, 1913 (paragraph 3222, Civil Code), otherwise than in the Constitution, provided the salary for the Governor of Arizona, and that thereafter the Legislature was powerless to change it so as to affect his compensation during his term of office. Chapter 61 of the Laws of 1917 was a legislative effort to increase the statutory salary fixed by chapter 44 from $4,000 to $6,500, and is a direct violation of the prohibition contained in section 17, article 4, of the Constitution.

The judgment is reversed, and the cause remanded, with directions that the demurrer to the complaint be sustained, and that judgment be entered dismissing the complaint.

CUNNINGHAM, C. J., and BAKER, J., concur.

(30 Ariz. 416)

LANEY, Co. Atty., v. STATE ex rel. JONES et al. (No. 1665.)

(Supreme Court of Arizona. June 4, 1919.)

1. STATUTES ⟸122(4)—SUBJECTS AND TITLE—SCHOOL DISTRICTS.

Laws 1917, c. 5, amendatory of Civ. Code 1913, par. 2770, authorizing creation of high school district out of a high school district, does not violate const. art. 4, § 13, subd. 2, in that the title "establishment and maintenance of high schools" does not cover the subject.

2. CONSTITUTIONAL LAW ⟸65—DELEGATION OF POWER—SCHOOL DISTRICTS.

Laws 1917, c. 5, amendatory of Civ. Code 1913, par. 2770, authorizing creation of high school district out of high school district, is not invalid as unlawful delegation of power of dismembering union high school districts to electors of a portion of such districts.

3. CONSTITUTIONAL LAW ⟸205(1) — PRIVILEGES TO VOTERS IN SCHOOL DISTRICTS—CREATION OF NEW DISTRICT.

Laws 1917, c. 5, amendatory of Civ. Code 1913, par. 2770, authorizing creation of high school district out of high school district, is not invalid as an unlawful attempt to confer privileges on a portion of the electors of a union high school district which are not conferred on the remaining electors.

4. CONSTITUTIONAL LAW ⟸42—VALIDITY OF STATUTE—PERSONS ENTITLED TO ASSAIL.

High school district which, after another high school district was created out of it, had statutory assessed valuation of $3,000,000, and remaining territory was contiguous, could not urge that Laws 1917, c. 5, amendatory of Civ. Code 1913, par. 2770, which authorized creation of new district, was by reason of provision for assessed valuation and contiguous territory of old district invalid because it will not operate uniformly on all communities similarly situated.

Appeal from Superior Court of Maricopa County; F. H. Lyman, Judge.

Mandamus by the State, on relation of D. P. Jones and others, against L. M. Laney,

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County Attorney. From a judgment awarding peremptory writ after order overruling demurrer to petition and sustaining demurrer to defendant's answer, defendant appeals. Reversed and remanded, with directions to sustain demurrer and dismiss petition.

L. M. Laney and Thomas P. Walton, both of Phœnix, for appellant.

J. L. Gust and T. J. Prescott, both of Phœnix, for appellees.

ROSS, J. Appellees concede the correctness of appellant's statement of the facts of the case, and we therefore adopt it:

"This is a mandamus proceeding brought in the superior court of Maricopa county by the appellees for the purpose of compelling the appellant, the county attorney of said Maricopa county, to bring a quo warranto action against W. M. Scott, F. D. Rowell, and G. W. Lines, to oust them from further exercising the powers, franchises, and privileges of a board of education for the Gilbert single district high school. The appellees are the members of the board of education of the Mesa Union High School.

"Gilbert school district is officially known as school district No. 41 of Maricopa county, and Mesa school district is officially known as school district No. 4 of Maricopa county.

"On October 19, 1907, Mesa union high school district was duly organized and incorporated of and from the territory comprised within school districts numbered 4, 10, 19, 26, 29, 41, and 57, all of Maricopa county.

"On November 2, 1907, the high school of said Mesa union high school district was, pursuant to an election duly had, located in the town of Mesa in said school district No. 4 of said Mesa union high school district, and at the time of instituting this action in the court below the Mesa union high school district, with boundaries as then existing, was maintaining a high school for said district in said town of Mesa.

"On June 19, 1917, said Gilbert school district, being school district No. 41, and theretofore part of Mesa union high school district, did hold an election for the purpose of establishing and maintaining a high school in said Gilbert school district, and did, in all respects, comply with the provisions of chapter 5 of the Session Laws of 1917 of Arizona, entitled: 'An act to amend paragraph 2770, chapter 13, title 11, Revised Statutes of Arizona, 1913, Civil Code, providing for the establishment and maintenance of high schools.' It is conceded by both sides that if said act, being chapter 5, Laws of 1917, is in all respects valid and constitutional, then Gilbert High School, by virtue of its said election of June 19, 1917, and the further proceedings pursuant thereto, became, and at the time of instituting this suit in the lower court was, a validly organized and subsisting high school district. If said act of 1917, pursuant to which Gilbert high school district was organized is a valid law, then the county attorney of Maricopa county, the appellant herein, should not be compelled by mandamus to seek by quo warranto proceedings to oust the trustees or board of education of said Gilbert high school district from office. If said chapter 5, Laws of 1917, is unconstitutional and void, then said Gilbert high school district is not a valid high school district, the board of education thereof are unlawfully exercising their functions as such officers, and the county attorney should, and is ready and willing to, bring a quo warranto action to prevent the members of said board of education of Gilbert high school district from further acting as such officers.

"The case was decided in the court below solely upon the pleadings, which, in the chronological order of their being filed, are as follows, to wit: Petition for writ of mandamus; order that alternative writ issue; alternative writ of mandamus; return and answer to writ and petition (including demurrer for insufficiency of facts); demurrer to return and answer to writ and petition.

"The court below made an order overruling the defendant's demurrer to the plaintiff's petition, and sustained the plaintiff's demurrer to the defendant's answer. Thereupon the defendant, having elected to stand upon his demurrer and answer, the court made an order for judgment in favor of the plaintiffs, pursuant to which the written judgment and order that peremptory writ of mandamus issue was filed on April 19, 1918."

The appellant's assignments challenge the correctness of the ruling of the court on the demurrers, and, of course, the correctness of the judgment that was entered.

The only question considered by the lower court, and the only question raised on appeal, is the constitutionality of chapter 5, Laws of 1917.

Further quoting appellant, which quotation appellees concede is correct, the constitutional validity of chapter 5 was assailed by appellees upon the three following grounds:

"(1) That the title of the act is violative of section 13 of subdivision 2 of article 4 of the Constitution of Arizona, which is as follows: 'Sec. 13. Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title."

"(2) That said act constitutes an unlawful attempt on the part of the Legislature to delegate the power of dismembering union high school districts to electors of a portion of such districts.

"(3) That said act is an unlawful attempt to confer privileges upon a portion of the electors of a union high school district which are not conferred upon the remaining electors of the union high school district."

Chapter 5 is an amendatory statute of paragraph 2770, Civil Code, reading, before the amendment, as follows:

"2770. Any school district having an average daily attendance of two hundred or more pupils may, by a majority vote of the qualified school electors thereof, establish and maintain a high school, or two or more adjoining school districts having a joint average daily attendance of two hundred or more pupils may unite and form a

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union high school district for the purpose of establishing and maintaining a high school therein at the expense of such district or union high school district."

The change in this paragraph by the amendment, which is the bone of contention, is the following added proviso:

"Provided, that no such high school district shall be formed of territory already embodied in any high school district, unless the remaining territory of the original district shall be contiguous and shall have an assessed valuation of three million ($3,000,000) dollars or more; provided further, that when a new district shall be formed under the terms of this act from territory already included in a union high school district, such territory shall no longer be included in such original high school district."

[1] It is claimed that the subject of the organization of new high school districts out of territory included in and constituting a part of an already existing union high school district is not expressed in the title of chapter 5, and is not germane to nor connected with the title of said chapter. The effect of the amendment was to extend the privilege of establishing high schools to certain communities or districts from which the privilege had been withheld, or perhaps more correctly, to which it had not been granted by the law before its amendment. It is contended that the context of the amendment was not foreshadowed by this subject as expressed in the title. It is not said what the title, "The Establishment and Maintenance of High Schools," would authorize by way of legislation, but it is strenuously contended that it is not broad enough to permit legislation granting the privilege of forming a high school out of territory included in an established high school district.

An analysis of the contention of appellees, when laid bare, is that the title should have gone further and indicated or announced that the purpose of the act was to provide for the organization of high schools out of territory already included in established high school districts. That, in failing thus to index the subject to be treated in the context, the act was misleading and misinforming. Clearly, the title contained "but one subject"—High Schools, Their Establishment and Maintenance—and quite as clearly the Legislature did not depart from the subject.

In State Board of Control v. Buckstegge, 18 Ariz. 277, 158 Pac. 837, we considered the clause of the Constitution limiting every act of legislation to one subject and matters properly connected therewith, and requiring the subject to be expressed in the title, and laid down this general rule:

"This provision of the Constitution does not require that the title of an act should minutely and in great detail describe the legislation proposed; it is not necessary that the title be a synopsis or a complete index to the legislation. The title of the act, however, should be sufficiently full and comprehensive as to indicate, in a general way at least, what is to follow in the way of legislation. It should not be so meager as to mislead or tend to avert inquiry into the contents thereof."

The object of chapter 5 was to provide for the organization of high schools, their maintenance being already cared for by chapter 13, title 11, Civil Code. The legislation providing for the establishment or organization of high school districts out of any territory, whether included within existing high school districts or not, falls literally within the terms of the subject expressed in the title. Without discussing them, we cite a few cases wherein the organization of political divisions involving the same question we have was considered, and in all of them appellees' contention is rejected. State v. Lewelling, 51 Kan. 562, 33 Pac. 425; State v. Hordey, 41 Kan. 630, 21 Pac. 601; Allison v. Hatton, 46 Or. 370, 80 Pac. 101; State v. City of New Whatcom, 3 Wash. 7, 27 Pac. 1020.

[2] The original act provides the manner of organizing high schools by prescribing the requisite qualifications of the organizers, as to number of pupils, etc., and sets forth the steps to be taken by the organizers. The amendment makes no change in these respects that can affect the question we now approach. Appellees contend that the provision in this regard unlawfully delegates the power to dismember a union high school district, to electors of a portion of such district. This we think involves the power of the Legislature. We know of no constitutional requirement, and none has been called to our attention, making it necessary that all of the electors of an organized high school district should give their consent before it is divided, or before some portion thereof is detached and organized into a separate high school district. On the contrary, the rule seems to be, as stated in 35 Cyc. 833, 834:

"The power to organize, establish, or lay off new school districts, or to divide, change the boundaries, or otherwise alter existing districts is vested primarily in the Legislature, which may act without the assent of the inhabitants of the affected territory. And indeed this power on the part of the Legislature has been very frequently exercised in many instances.

"The power to establish new school districts or to alter existing ones may be delegated by the Legislature to subordinate agencies or officers; and in most jurisdictions this has been done. When the power to exercise the authority is made to depend upon the performance of certain conditions, such as the signing of a petition by a certain number of voters, or the like, the agent or officer cannot act until such conditions have been complied with, and cannot refuse to act when they have been."

In the late case of Worthington School District v. Eureka School District, 173 Cal. 154, 159 Pac. 437, the court said:

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"The power of the Legislature over school districts is plenary. Pass School District v. Hollywood City School District, 156 Cal. 416, 105 Pac. 122, 26 L. R. A. (N. S.) 485, 20 Ann. Cas. 87; Reclamation District v. Birks, 159 Cal. 233-238, 113 Pac. 170. It may divide, change, or abolish such districts at pleasure, and may delegate to boards of supervisors powers of annexation under certain conditions. Kramm v. Bogue, 127 Cal. 122-125, 69 Pac. 394."

[3] The third point argued by appellees is disposed of by the law cited to the second point. The statute, in leaving the question as to whether a portion of a high school district shall be detached and formed into a separate district to a vote of only those electors residing in the detached portion, does not confer any special privilege upon such electors. The privilege is open alike to all communities of the state possessing the qualifications prescribed by the statute. A case very much in point is Wheeler v. Herbert, 152 Cal. 224, 92 Pac. 353, wherein the legislative act in question provided that a certain designated portion of Fresno county, if 60 per cent. of the electors residing therein at an election should so decide, should be detached from Fresno county and attached to Kings county. One of the contentions in that case was that the act granted special privileges to the voters residing in the portion of Fresno county proposed to be cut off, in that they only were permitted to vote on the question, and that therefore it violated that section of the state Constitution prohibiting the granting of privileges not common to all citizens. Appellees are making the same contention. In passing on the question, the California court said:

"Such right or privilege is not of the class of privileges referred to in that section. Ex parte Gerino, 143 Cal. 415, 77 Pac. 166, 66 L. R. A. 249. But if it were conceded that such privilege does fall within the scope of the section, the law does not violate its provisions. It forbids the grant of a privilege to any citizen or class of citizens, unless it is granted, upon the same terms, to all citizens. A law applying uniformly to all citizens of a particular class does not violate this section, if the class is one founded upon some natural, intrinsic, or constitutional distinction differentiating its members from the general body from which the class is selected. Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604; Bruch v. Colombet, 104 Cal. 351, 38 Pac. 45; Krause v. Durbrow, 127 Cal. 684, 60 Pac. 438. The citizens of the territory to be transferred are directly affected by the act, and, therefore, have a greater interest in the matter than other citizens of the same county. * * * That it is competent for the Legislature to pass a law which shall be executed only in the event that a majority of a certain class of persons shall declare in favor of it is a principle too well settled to require discussion. People v. McFadden, 81 Cal. 489, 22 Pac. 851, 15 Am. St. Rep. 66; Blanding v. Burr, 13 Cal. 357; Hobart v. Board, 17 Cal. 31; People v. Nally, 49 Cal. 481; Robinson v. Bidwell, 22 Cal. 379."

[4] It is also contended that paragraph 2770, as amended, will not operate uniformly upon all communities similarly situated because the right of organizing a high school district out of territory already included in a high school district is conditioned upon the latter being left with an assessed valuation of $3,000,000 after the withdrawal, and can then only withdraw providing the territory of the old district remains contiguous. In the present case, the Mesa Union High School, after the withdrawal of the Gilbert district, remains intact so far as territory is concerned, with an assessed valuation far in excess of $3,000,000. That the law might in its application, in instances, bear unequally or not operate uniformly, is of no concern to appellees, as its terms work no hardship on appellees.

In Gherna v. State, 16 Ariz. 344, 146 Pac. 494, Ann. Cas. 1916D, 94, this court said:

"We believe it to be the unquestioned rule that a person cannot raise a constitutional objection to a part of a statute which is not applicable to his own particular case. The authorities are overwhelming to this effect. We cite but a few. * * * Courts will not entertain an objection to the constitutionality of a statute, unless the objection is made by one whose rights have been in some way injuriously affected. Unless a person's rights are directly involved, such questions must necessarily be postponed, until they are met with upon the highway of adjudication, unless the unconstitutional feature, if it exists, is of such a character as to render the entire act void."

We conclude that chapter 5 as amended is not vulnerable to the objections presented by the appellees, and it necessarily follows that the judgment of the lower court must be reversed, and the cause remanded, with directions that appellant's demurrer be sustained, and the complaint dismissed.

CUNNINGHAM, C. J., and BAKER, J., concur.

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(20 Ariz. 425)

SPRINGFIELD FIRE & MARINE INS. CO. OF SPRINGFIELD, MASS., v. GOODGAME et al. (No. 1685.)

(Supreme Court of Arizona. June 4, 1919.)

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1. INSURANCE ⟸602 — FIRE INSURANCE — PENALTY FOR NONPAYMENT—AMOUNT OF RECOVERY.

Rev. St. 1913, par. 3441, making fire insurance company, upon failure to pay loss within specified time upon demand therefor, liable for 15 per cent. penalty and attorney's fees, does not require insured to recover the exact sum demanded and sued for to entitle him to penalty and attorney's fees; recovery of ascertained loss being sufficient.

2. INSURANCE ⟸561—FIRE INSURANCE—NOTICE OF LOSS—PROOF OF LOSS—WAIVER.

Where insurer, shortly after fire, sent special adjuster to investigate every detail of fire, who fully examined insured, reducing answers to writing and requiring insured to sign name under oath thereto, insured's failure to give written notice of loss, and furnish proofs of loss as required by policy, was not fatal, where he made repeated demands upon insurer for payment of loss, though the writing signed stated that insurer did not waive compliance with policy.

3. NEW TRIAL ⟸105—NEWLY DISCOVERED EVIDENCE.

In action on fire policy, denial of new trial on ground of alleged newly discovered evidence of insured's statement as to quantity of goods destroyed was not abuse of discretion, where such evidence would merely contradict other statements made by insured at other times and places as to amount of goods destroyed.

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

Action by S. J. Goodgame and another against the Springfield Fire & Marine Insurance Company of Springfield, Mass. From judgment for plaintiffs, and from an order refusing a new trial, defendant appeals. Affirmed.

G. P. Bullard, of Phœnix (W. W. Hindman, of Los Angeles, Cal., on the briefs), for appellant.

Richard E. Sloan, G. Scott, and C. R. Holton, all of Phœnix, for appellees.

CUNNINGHAM, C. J. On the 17th day of December, 1917, the appellant issued its insurance policy to S. J. Goodgame, one of the appellees, by which the appellant insured against loss by fire 17,612 pounds of seed cotton belonging to said Goodgame for a period of 48 days, in the sum of $4,403. The premium, amounting to the sum of $75.97, was duly paid. The other appellee, Mrs. Anna Blackburn, is made a party because of her interest as mortgagee of the said cotton to secure the payment of a note in the sum of $3,250, of which note and mortgage the appellant is charged with notice.

On December 20, 1917, the said cotton so insured was totally destroyed by fire, through no fault of the insured. The insurer appellant denied the amount and the value of the cotton destroyed, and denied that proof of loss had been made as required by the policy. The insured and mortgagee, the appellees, commenced this action on their policy, alleging the loss, proof of loss, demand for payment, and neglect and refusal of payment.

The trial resulted in a verdict for the plaintiffs for the sum of $3,350. The court gave judgment on the verdict for said sum, and in addition, on the authority of a stipulation, gave judgment for 15 per cent. penalty, and a further sum of $400 as attorney's fees. From an order refusing a new trial, and from the judgment, the defendant appeals.

The appellant complains of the penalty and of the attorney's fees granted the plaintiffs, for the reason, it alleges, that such items can be recovered only when the plaintiffs, after demand therefor, recover in an action the full amount of the claim sued for, and that plaintiffs recovered here only $3,300, $260.46 less than the amount sued for; that the court erred in refusing to instruct the jury to return a verdict for the defendant, for the reason that no proof of loss or demand, as required by said policy, was made by the insured; that an instruction given was erroneous for certain stated reasons; and that the court erred in refusing a new trial for all of the reasons given, and for the further reason that the showing made of evidence newly discovered entitled defendant to a new trial.

[1] The matters of the amount of the attorney's fees and the amount of damages were disposed of by stipulation of the parties, and withheld from the jury's consideration. We are concerned here only with the question of authority to recover attorney's fees and damages at all, notwithstanding paragraph 3441, R. S. A. 1913, granting such right. Said paragraph is as follows:

"In all cases where a loss occurs and the fire insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, 15 per cent. damages on the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of such loss."

Thus the statute gives the insured the right to recover the 15 per cent. and attorney's fees wherever a loss has occurred and the company has failed to pay the loss within the time specified in the policy, after de-

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mand made therefor, and, if the necessity arises for the insured to prosecute the collection of such loss, then a reasonable attorney's fee may be recovered. The appellant, in its two assignments, contends that the insured cannot recover the penalty or the attorney's fees, unless the plaintiff insured first demands a specific sum, sues to recover the exact sum demanded, and at the trial recovers the exact amount demanded and sued for. The statute (paragraph 3441) will not bear such interpretation. A slight mistake would become disastrous to the insured, if such strictness were made necessary. The ascertained loss under the policy is all the statute requires to give the insured a right to recover the penalty after demand and failure of the insurer to pay the loss within the time is reserved for payment in the policy.

The appellant cites cases which seem to support the position taken by it. Pacific Mutual Life Insurance Co. v. Carter, 92 Ark. 378, 123 S. W. 385, 124 S. W. 764, is relied upon particularly, and quoted from extensively. It seems that the court disallowed a recovery for the penalty and for the attorney's fees, both of which are given by statute worded similarly to ours. This resulted because the plaintiff demanded an excessive amount. Said the court:

"The penalty and attorney's fee is for the benefit of the one who is only seeking to recover, after demand, what is due under the terms of his contract, and who is compelled to resort to the courts to obtain it."

I see no cause to criticize such statement, but that was said in a case where the plaintiff's demand was for payment in excess of his right to demand, and evidently the insurer refused payment of the excess demanded. We have had occasion heretofore, in Germania Fire Ins. Co. v. Bally, 19 Ariz. 580, 173 Pac. 1052, 1 L. R. A. 488, to consider paragraph 3441, supra, and will not further discuss the questions there determined. Appellant's two said assignments are overruled, as without merit.

The third assignment of error attacks the order refusing to instruct the jury to return a verdict for the defendant. The appellant contends that this instruction should have been given as requested, for the reason that the plaintiff wholly failed to prove by competent evidence that notice of loss was given, or that demand for payment of the loss was made as required by the policy.

The policy in suit requires the insured, if fire occurs, to give immediate notice in writing of any loss thereby, and within 60 days after the fire, unless such time is extended in writing by the company, a signed and sworn statement detailing facts and opinions of the insured with reference to the fire and to the loss thereby. The sum for which the company is liable, the loss sustained under the policy, "shall be payable sixty days after due notice * * * and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy," and that "no suit or action on this policy for the recovery of any claim shall be sustainable in any court * * * until after full compliance by the insured with all the foregoing requirements."

Immediate notice of the fire and notice of loss of insured property must be given the company, and proof of loss must be furnished within 60 days after the fire, and the company must pay the loss 60 days after notice and satisfactory proof of the loss have been received by the company. These are mutual duties the parties to the contract owe to each other.

The appellant contends that the insured did not comply with the terms of the policy, first, by giving written notice of the loss; nor, second, by furnishing proofs of loss within the time specified in the policy. The fire occurred early on the morning of December 21, 1917, and on the 28th day of December, 1917, after considerable telephoning and telegraphing, the insurance company had their special adjuster, a Mr. Farrar, on the ground investigating every detail of the fire, because the company looked upon the fire as suspicious. The insured was summoned before this special agent, and he was requested to, and he did, answer questions propounded to him, and his answers were reduced to writing and subscribed under his oath. Before this cross-examination commenced, however, the company required the insured to sign a paper by which the insured agreed that, if he gave the company any valuable information which ought to be given in another manner and by other means, the company should not be held to have been informed until the means were employed which are referred to in the policy. The intent of this agreement is "to save and preserve all the rights and defenses of all parties, and to permit an investigation of the claim and the determination of the amount of the loss or damage, in order that the party of the first part [the insured] may not be unneccessarily delayed in his business, and that the amount of his claim may be ascertained and determined without regard to the liability of the party of the second part, and without prejudice to any rights or defenses which said party of the second part may have."

If this agreement means anything, it means to throw the insured off his guard by persuading him to return to his business without delay and leave the matter of adjusting this loss to the special agent. On January 14, 1918, the insured addressed a letter to the special agent, expressing disappointment from not hearing of the result

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of the adjustment of the cotton loss, and requested that such matter be attended to at once. The intention of the letter is to demand payment of the loss, and the company had full information of the claim, the demand, and the repeated efforts made by the insured to collect his money in payment of the loss.

[2] Is it possible that an insured, after loss by fire, must furnish to the company the identical information it has already obtained through its special investigation of the fire and of the loss? Is it possible that by a new agreement, without consideration, the company is to be treated as not having received the very information necessary to charge it with liability, and require the insured to furnish that information in writing, when the company has already been furnished the information in writing, but furnished through its own agent, and not wholly by the insured? Is it possible that the policy is unenforceable because a formal demand for payment of the loss was not made, and the fact is the local agency and all special agents were begged and importuned for payment, and even the Corporation Commission requested payment for the insured? Neither the company nor any agent representing the company in the vicinity of the loss has advanced any valid excuse for refusing payment of the actual loss under the policy. From the evidence, Mr. Farrar believed the amount of the loss was much less than 17,612 pounds of seed cotton, and that was the purpose of his investigation. No intimation was ever made that the company refused payment of the loss because no formal notice or proof of loss was furnished the company, or because a written demand for payment was not served on the company within the time provided in the policy.

True, after the time expired, the company ceased to "investigate," and then for the first time discovered that its liability on the policy was no longer in existence, but expired pending an investigation of its liability. It may be good business to avoid paying the loss on an insurance policy by means of keeping the insured busy about other matters until by lapse of time he loses his rights altogether, but, before a court of justice should favor such practice, it should be made to appear clearly that the insured furnished no information tending to show an intention to claim any loss, nor expected payment of a loss under a valid policy. The refusal of the court to instruct the jury to return a verdict for defendant was proper.

From what is said above, appellant's fourth assignment of error is without merit, in that the statement made under oath at the request of the adjuster is sufficient proof of loss, although irregular in form, as the court instructed. The instruction given does not submit a question of law to the jury, as complained of.

The last assignment is that the court erred in refusing a new trial "for the reasons given in support of the preceding assignments of error, and for the reason that said motion presented newly discovered evidence pertinent to the issue of the fact." The appellant contends that the affidavits in support of the grounds of newly discovered evidence urged for a new trial show that appellant discovered evidence "from which it appears that appellee Goodgame, on or about January 1, 1918, had stated that the amount of seed cotton destroyed by the fire was about 1½ bales."

[3] All through the trial the question of the amount of the loss was uppermost. The appellant offered testimony and the appellees offered testimony on that matter. If the said appellee did make the statement claimed, and admitted having made the statement, this would not relieve the company from paying the actual loss. The evidence in question contradicts evidence given on the trial, but it is not substantive evidence tending to establish a fact, but tends only to contradict other statements made by the same witness, at other times and places, concerning the fact in controversy. The trial court, in refusing a new trial, is not guilty of such abuse of discretion as would justify this court in reviewing his action.

Finding no reversible error in the record, the judgment must be affirmed.

ROSS and BAKER, JJ., concur.

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(67 Colo. 398)

FLOWER et al. v. CASEY. (No. 9132.)

(Supreme Court of Colorado. April 7, 1919. Rehearing Denied June 11, 1919.)

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1. MUNICIPAL CORPORATIONS ⇐162(4)—CIVIL SERVICE—LICENSE INSPECTOR—WRONGFUL DISCHARGE—COMPENSATION.

Plaintiff, chief license inspector of city, who stood highest in the examination and was oldest in point of service and certification, should have been retained at the head of the list of inspectors, though it became necessary to drop a member from the pay roll, and since plaintiff was the first to be dropped, though he agreed to continue in the service at the salary of an inspector, he is entitled to recover for the months he was wrongfully kept out of the service.

2. MUNICIPAL CORPORATIONS ⇐162(4)—CIVIL SERVICE — WRONGFUL DISCHARGE — RECOVERY OF SALARY.

Where, after plaintiff, chief license inspector of city, was wrongfully dropped from pay roll, his salary was transferred to the general fund and kept by the city, contention that plaintiff cannot recover, since his salary was paid to another, is untenable.

3. MANDAMUS ⇐169 — DISMISSAL — ABOLITION OF OFFICE CLAIMED BY PLAINTIFF.

That after plaintiff filed suit in mandamus, asking to be reinstated as an employé in license inspection department of city and his salary paid to him, the city charter was changed and license inspection department abolished, did not require dismissal of action; the proceeding being a proper remedy to compel payment of salary, which was a liquidated claim.

4. MANDAMUS ⇐107 — COMPELLING PAYMENT OF SALARY OF OFFICER.

Mandamus is the proper remedy to require the certification of pay rolls and warrants for salary to which an employé is entitled, and to compel the payment thereof.

Teller and Burke, JJ., dissenting.

En Banc.

Error to District Court, Denver County; George W. Allen, Judge.

Suit in mandamus by Thomas Casey against J. S. Flower and others, constituting the Civil Service Commission of the City and County of Denver, and J. F. Markey, Auditor of the City and County of Denver. Judgment for plaintiff, and defendants bring error. Affirmed.

June 1, 1912, City Auditor Markey appointed Thomas Casey chief license inspector for the city and county of Denver. He had theretofore been employed as a license inspector since 1908. There were in all seven inspectors, including Casey. After his appointment, he and the other six in this department, while they were not obliged to do so, took the city civil service examination May 7, 1914, and he passed with a grade of 91.8 per cent. being the highest, and May 15th was placed on the eligible list. The grades of the seven inspectors taking this examination were as follows: 91.8, 87.6, 87, 86.2, 85, 80.2, and 78.4 per cent. Some time in 1915 two of them were dropped, and in April Wilbur F. Cannon and one Delaney were appointed in their stead, but Delaney failed to pass, and his name was dropped, and the place was not afterward filled, leaving six inspectors. December 14, 1915, Auditor Markey notified Casey in writing that, on account of the adoption of the prohibition amendment, the falling off of the revenue of the city, and the decrease in the amount allowed the auditor's office for 1916, he had abolished the office of chief license inspector from and after December 31, 1915, that his work had been satisfactory, and that it was on account of economy that his name was dropped. December 27, 1915, the auditor notified the city civil service commission that necessity for economy in the auditor's office had caused him to abolish the office of chief license inspector and to drop Casey's name from the pay roll after December 31, 1915. January 4, 1916, the commission notified the auditor that it approved dropping Casey's name from the pay roll.

No other inspector was discharged, let out, or dropped from the pay roll except Casey. The five who remained after Casey was dropped continued on the pay roll, each drawing the salary of $100 per month as inspector from January 1 to May 17, 1916. May 9, 1916, there was a charter election, and May 17th the Speer amendment took effect, doing away altogether with the license inspection department. Casey drew no salary from January 1 to May 17, 1916. There was $5,000 remaining in the city treasury in this department May 17, 1916. The distinction between the chief and the other inspectors was the salary. Casey, as chief, drew $150 per month, and the others $100 each per month. After he was notified by the auditor that his name would be dropped from the pay roll as chief inspector, he asked to remain as inspector, and offered to do an inspector's work at the salary of $100 per month. This was refused, and he was let out or dropped from the pay roll after January 1, 1916.

February 23, 1916, he filed suit in mandamus asking to be reinstated as an employé in the license inspection department, and to require that his name be certified upon the pay roll, and to have issued to him warrants or vouchers for his salary, and that the same be paid. After the amendment to the city charter took effect, May 17, 1916, his petition and the alternative writ were amended, making certain officers under the new charter parties defendant, in addition to the city officers under the old charter when he began

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the suit. Issues were joined, and trial was had to the court November 28, 1916, which ordered that the alternative writ be made peremptory, and commanding the payment of $456.65 to Casey, being the salary of an inspector from January 1 to May 17, 1916, at $100 per month.

Section 204 of the city charter provided:

"All persons, at the time of the adoption of this charter, occupying positions affected by the provisions of this article, shall retain their positions until discharged, under the provisions hereof."

Section 201 provided:

"When the force in any department is reduced, the person last certified to such department for employment shall be the first laid off, and when the force in such department is increased, the persons suspended shall be reinstated in the order of their original certification."

Rule 8 of the civil service commission provided:

"Whenever, for lack of work or lack of funds or other necessary cause, it becomes necessary to reduce the force in any employment within the classified service, the person last certified for employment shall be laid off first."

James A. Marsh and Jacob J. Lieberman, both of Denver, for plaintiffs in error.

Frank McLaughlin and Joshua F. Grozier, both of Denver, for defendant in error.

GARRIGUES, C. J. (after stating the facts as above). [1] 1. Casey stood highest in the examination, was the oldest in point of service and certification, and, when it became necessary to reduce the force, he should have been retained at the head of the list of inspectors, and the one last in time of appointment, service, and certification should have been dropped. From January 1 to May 17, 1916, the five inspectors retained were each paid an inspector's salary. When the position of chief inspector was abolished, Casey asked to be retained as an inspector, and offered to work at an inspector's salary, which was refused, and he was laid off and his name stricken from the pay roll. While, as chief inspector, he drew $150 a month, and the other inspectors only $100 a month, still he was an inspector.

[2] 2. It is argued that the salary which should have been paid Casey as an inspector was paid to another, who in fact performed the services; that is, the five retained inspectors, after Casey was dropped, were all paid an inspector's salary from January 1 to May 17, 1916. Therefore, if Cannon should have been dropped from the pay roll, but was not, and performed the services and drew the salary of an inspector, then Casey's salary was paid to Cannon; or, if Casey should have been at the head of the list, but was dropped, then the one who in fact stood at the head of the list was paid Casey's salary, so, no matter what position in the line Casey should have occupied, as long as he did not in fact fill the position, but was dropped, and it was filled by another, who did the work and drew the salary, it would be against public policy to compel the city to pay it twice, under the doctrine announced in Thompson v. Denver, 61 Colo. 470, 158 Pac. 309, Ann. Cas. 1918B, 915.

This argument, upon its face, seems quite plausible; but it is not logical. Cannon was not paid Casey's salary; he was permitted to remain in his position, and to draw his own salary as an inspector, when he should have been the first one dropped, and his salary turned into the general fund. No inspector drew Casey's salary; they all remained in the position of an inspector, and drew their respective salaries. Casey's salary as chief, after he was dropped, was transferred to the general fund, and kept by the city, and the five other inspectors were permitted to remain and draw their own salaries, not Casey's.

[3] 3. The change in the city charter from a commission to a mayor form of government went into effect May 17, 1916, by which the license inspection department was abolished. Therefore it was impossible after that for the court to reinstate Casey as an inspector, because there was no such position. The case was tried in November, 1916, and it is argued that the action should have been dismissed, because it was impossible at that time for Casey to be reinstated.

[4] Mandamus is the proper remedy to require the certification of pay rolls and warrants for salary to which an employé is entitled, and to compel the payment thereof. City of Denver v. Bottom, 44 Colo. 308, 98 Pac. 13. The parties were properly before the court before the new charter was adopted, and it would have been idle ceremony to dismiss for the purpose of bringing another action for the salary, in which the issues would have been the same, and in which the city could have had no defense other or different from that in the original proceeding. The court having acquired full jurisdiction before the charter was changed, the change would not, under the facts in this case, operate to dismiss the action. The salary was fixed by ordinance; the right to recover was for an exact amount; the claim, therefore, was liquidated; and we think the proceeding a proper remedy in such a case to compel its payment.

Judgment affirmed.

TELLER and BURKE, JJ., dissent.
ALLEN, J., not participating.

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(66 Colo. 312)

BOARD OF COM'RS OF CHAFFEE COUNTY v. WALKER. (No. 9162.)

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(Supreme Court of Colorado. Dec. 2, 1918. Rehearing Denied June 2, 1919.)

1. COUNTIES ⟸205(4)—CLAIM AGAINST—APPEAL.

Appeal from county's action in deferring consideration of claim, perfected within 11 days after board of county commissioners had deferred consideration, where no meeting of board had taken place in the meantime, was premature, the board having reasonable time in which to investigate claim against county.

2. DISTRICT AND PROSECUTING ATTORNEYS ⟸5(1)—COMPENSATION OF DISTRICT ATTORNEY—"INDICTMENT OR INFORMATION."

Mills' Ann. St. 1912, § 2879, giving district attorney $5 fee "for drawing each indictment or information," does not entitle him to such fee for each count contained in information; the words "indictment or information" having reference to the entire instrument, and not to the separate counts.

3. OFFICERS ⟸94 — COMPENSATION — STRICT CONSTRUCTION OF STATUTES.

Statutes relating to fees and compensation of public officers must be strictly construed, and such officers are entitled only to what is clearly given by law.

4. DISTRICT AND PROSECUTING ATTORNEYS ⟸5(1)—COMPENSATION OF DISTRICT ATTORNEY—"TRIAL OR CONVICTION."

Mills' Ann. St. 1912, § 2879, giving district attorney $15 fee for the trial or conviction of each defendant in felony cases, does not entitle him to such fee for every count contained in the information.

5. DISTRICT AND PROSECUTING ATTORNEYS ⟸5(3)—NECESSARY EXPENSES—STENOGRAPHER'S SALARY.

Laws 1907, c. 172, §§ 1 and 2, giving district attorney the right to collect from each county in his district the expenses necessarily incurred in the discharge of his duties, entitled district attorney to reimbursement for expense of employing a stenographer; the services of a stenographer being indispensable to the discharge of his duties.

6. DISTRICT AND PROSECUTING ATTORNEYS ⟸5(3)—EXPENSES—DEPUTIES' FEES.

The county's proportionate charge of maintaining office by district attorney under Laws 1907, c. 172, §§ 1 and 2, providing that a county shall bear a share of district attorney's expenses in proportion to fees earned in such county, should be based upon fees earned by both district attorney and deputy.

Error to District Court, Chaffee County; James L. Cooper, Judge.

Action by Gilbert A. Walker against the Board of County Commissioners of the County of Chaffee, State of Colorado. Judgment for plaintiff, and plaintiff and defendant present error and cross-error. Reversed and remanded, with instructions.

Wallace Schoolfield, of Salida, for plaintiff in error.

Gilbert A. Walker, of Denver, pro se.

Barney Whatley, of Leadville, W. L. Strachan, of Colorado Springs, and R. W. Fleming, of Ft. Collins, amici curiæ.

SCOTT, J. This action is by the district attorney against the board of county commissioners of Chaffee county to recover certain fees and accounts claimed by the plaintiff. The first count set forth a claim for expenses necessarily incurred in maintaining his office as district attorney in the aggregate sum of $862.81. Of this sum it was claimed that the proportionate share of Chaffee county under the statute was $326.14, of which sum the board allowed $78.30, and denied the remainder, for which judgment was demanded.

The complaint for a second cause of action claimed a total sum of $170 for fees in various criminal proceedings. Of this sum the board allowed $90, and disallowed the remainder, for which judgment was prayed.

The third cause of action set forth a claim in the total sum of $405 for fees and expenses in criminal cases, of which sum $120 was allowed, and the remainder denied, and for which judgment is demanded.

The court found that there was nothing due the plaintiff on the first cause of action, that there was due the plaintiff the sum of $5 under the second cause of action, and that there was due the sum of $225 under the third cause of action, and rendered judgment in his favor in the sum of $230.

The plaintiff and defendant present assignments of error and cross-error, based solely upon conclusions of law by the trial court, and there is no disputed question of fact in the case. These conclusions of law are as follows:

"First. That where the county commissioners act upon a claim, and allow only a portion thereof as and for payment in full, such action of the commissioners is a sufficient disallowance to enable the claimant to appeal to the district court.

"Second. That the district attorney is entitled to but one fee for drawing an information, regardless of the number of counts therein or the number of defendants charged thereby.

"Third. That the district attorney is entitled to a trial fee for each defendant for each count under which such defendant is actually tried or convicted.

"Fourth. That the district attorney has no authority to employ a stenographer by the year and at a stated annual salary.

"Fifth. That, in determining what proportion of the expense of maintaining the district attorney's office shall be paid by each county, the basis is the fees earned by the district attor-

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ney's office, regardless of what proportion thereof was earned by the district attorney personally, and what proportion by his deputies.

"Sixth. That the district attorney is entitled to collect his fee for drawing an information, without waiting to see if the same will be quashed."

The dispute here involves only the first, second, fourth, and fifth conclusions.

The court allowed a claim of $5 under the second cause of action for drawing a criminal information, where the board had simply deferred consideration of the claim. This action by the board seems to have been on the 5th day of April, and the notice and bond of the plaintiff in appeal filed on the 16th day of April, 1915; in other words, the appeal was perfected within 11 days after the board deferred consideration of the item; further, that no meeting of the board was held in the meantime. It was held by the Court of Appeals (Board of Com'rs of Hinsdale County v. Crump, 18 Colo. App. 59, 70 Pac. 159) that, where eight meetings of the board had been held after the filing of the claim and before action of the board, the plaintiff had a right to assume that the claim had been disallowed.

[1] We think that the board is entitled to a reasonable time in which to investigate a claim against the county, and that, in view of the facts in this case, where but a few days had elapsed after it was laid over for investigation, and that the board had held no subsequent meeting, the appeal was prematurely taken, and the claim should not have been allowed in this proceeding.

The fees claimed under the second cause of action, and disallowed by the court, were in cases where the plaintiff claimed a fee of $5 for drawing each count in each information. The court held that the district attorney was entitled to a fee of $5 for each information regardless of the number of counts it contained.

The statute (Mills' Ann. St. 1912) provides (section 2879):

"For drawing each indictment or information, five dollars: Provided, no fee shall be allowed for drawing any indictment or information which may be quashed."

[2] We must interpret the words "indictment or information" as intended by the Legislature to be used in their broad general sense and to mean the entire instrument. It was well understood when the statute was enacted that an information might contain several counts, and if the Legislature had intended that the fee was to be allowed for each count in an information, it should have said so. Counsel have argued that these terms must be construed as having been used in a technical sense, in that each count in itself must be held to constitute a criminal charge.

The same section of the statute was explicit when referring to the fee of the district attorney in case of trial and conviction, when it provided for a fee of $15 for conviction in case of each defendant in felony cases.

[3] The rule of construction in such matters is that statutes relating to the fees and compensation of public officers must be strictly construed, and such officers are entitled only to what is clearly given by law. City of Corona v. Merriam, 20 Cal. App. 231, 128 Pac. 769.

It is certainly not clear that the Legislature intended the fee for each count, rather than each information.

Under the third cause of action the court allowed the full amount on the following items:

"To trial district court In Re People v. Hunley, 16 counts at $15.00, felony, $240.00."

There were other similar charges.

In the Hunley Case it appears that Hunley was charged in 16 counts in one information involving but one transaction, and pleaded guilty to the information as a whole.

Section 2879, M. A. S. 1912, provides:

"For the trial or conviction, in any court of competent jurisdiction of each defendant, in cases of felonies, fifteen dollars."

[4] Plainly there was but one trial and one defendant in this case, and therefore, under the language of the statute, the district attorney was entitled to but one fee of $15. The statute cannot be construed to intend a fee for every count the prosecuting officer may choose to set forth in the information. The fee is allowed for each trial and conviction. Here there was but one transaction, one case, one trial, one conviction, and one defendant. The court erred in allowing these several fees in the particular case, and in the other similar items of the bill.

The remaining item to be considered is that of $600 charged as a part of the expense necessarily incurred in maintaining the office of the district attorney, being for the services of a stenographer at the rate of $50 per month for the period of one year. The court declined to allow this sum or any part of it. The question thus raised is whether or not the services of a stenographer may be included as an expense necessarily incurred in maintaining the office of the district attorney under the statute.

Chapter 172, Laws of 1907, provides that the District Attorney in a district of the class here involved, may maintain an office for the transaction of his official business, together with the manner in which such expense shall be paid, as follows:

"Section 1. Except as otherwise specifically provided, the district attorney of each judicial district in the state of Colorado, and each of his assistants and deputies, shall be allowed to

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collect and receive from each of the counties in his district the expenses necessarily incurred in the discharge of his official duties for the benefit of such county.

"Sec. 2. Except as otherwise specifically provided, the district attorney of each judicial district in the state of Colorado shall be entitled to collect and receive at the end of each year, of and from each of the respective counties in his judicial district the necessary expenses of maintaining an office for the transaction of his official business, which expenses shall be borne by the various counties in his judicial district, each in proportion to the fees earned by said district attorney in such county during such year."

In the case of Teller County v. Trowbridge, 42 Colo. 449, 95 Pac. 554, it was held that the district attorney was not entitled to deduct from the fees of his office the amounts, or any part thereof, incurred and expended by him as such district attorney for office rent, clerk hire, stenographer, telephone, postage, letter files, and stationery. But this conclusion was based solely upon the fact that there was no statute of the state which authorized such expense, or that even required the district attorney to maintain an office. The court said:

"There is no statute of this state which either expressly or impliedly requires the district attorney to 'incur on the public account' the expenses of office rent, stenographer, clerk hire, or telephone, or any of the other expenses enumerated above. He is not required to keep an office; other state and county officers are so required, which clearly indicates that it was within the contemplation of the Legislature that, if such expenses were incurred by the district attorney, they should be borne by him."

But at the next session of the Legislature following the decision in that case the Legislature amended the law in that respect by the enactment of chapter 172, Laws of 1907, above quoted, and which requires the district attorney to maintain an office, and to collect and receive at the end of each year, proportionately from the counties of his district, "the necessary expenses of maintaining an office for the transaction of his official business."

It is obvious that this statute was intended to supply that which the court so found to be wanting in the law before such expenses could be charged and collected by district attorneys.

[5] It is common knowledge that in these modern times the services of a stenographer are necessary in the proper transaction of the official business of a district attorney. Indeed, such service may now be regarded as indispensable to the proper and efficient discharge of such official duties. We must therefore hold that the court erred in refusing to allow the reasonable and necessary expense incurred by the district attorney in this respect.

[6] There is a dispute between counsel as to whether the proportionate charge for maintaining an office should be based upon the fees earned by the district attorney acting in person, or whether it should include the fees earned by both himself and his deputy. We think that, while the term "deputy" is not mentioned, it was clearly intended to include fees of the deputy as well. The office so maintained is for the transaction of the official business of the entire district, and in the transaction of that business it is immaterial whether the district attorney performs such services in person or by deputy, in so far as it may apply to the question of the maintenance of that office.

The judgment is reversed, and the cause remanded, with instruction to enter judgment in accordance with the views herein expressed.

Former opinion modified, and petition for rehearing denied.

GARRIGUES, C. J., and BAILEY, J., concur.

(66 Colo. 319)

In re INTERROGATORIES BY THE GOVERNOR. (No. 9581.)

(Supreme Court of Colorado. June 2, 1919.)

1. STATUTES ⟸248—TIME OF TAKING EFFECT—CONSTITUTIONAL PROVISIONS—EMERGENCY CLAUSE—REPEAL.

Const. art. 5, § 19, providing for emergency clauses in statutes, was not repealed by the initiative and referendum amendment to article 5, § 1.

2. STATUTES ⟸251—TIME OF TAKING EFFECT—EMERGENCY CLAUSE—SAFETY CLAUSE.

All referable acts of the General Assembly which contain the emergency clause (Const. art. 5, § 19), but not the so-called safety clause (article 5, § 1), as amended by adoption of the initiative and referendum, if not referred, take effect 90 days after the adjournment of the session of the General Assembly at which passed, and not before.

3. STATUTES ⟸35½—ENACTMENT—ABSENCE OF SAFETY CLAUSE—REFERENCE.

In the absence of the so-called safety clause (Const. art. 5, § 1, as amended by adoption of initiative and referendum), all acts of the General Assembly, although they carry the emergency clause (article 5, § 19), declaring that they shall take effect from and after their passage, are still subject to referendum.

4. STATUTES ⟸255—TIME OF TAKING EFFECT—ABSENCE OF SAFETY CLAUSE—REFERENCE.

All acts of the General Assembly not referable because the safety clause (Const. art. 5, § 1, as amended by adoption of initiative and

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referendum), is attached, or because they show upon their face that they are excepted from the referendum provision, not carrying the emergency clause (article 5, § 19), go into effect 90 days after their passage and approval by the Governor.

5. STATUTES ⟸251 — EMERGENCY CLAUSE — TIME OF TAKING EFFECT.

All acts having both the emergency (Const. art. 5, § 19) and safety clauses (article 5, § 1, as amended by the adoption of the initiative and referendum) go into effect immediately upon their passage and approval by the Governor.

En Banc.

In the matter of interrogatories by the Governor. Interrogatories answered.

Victor E. Keyes, Atty. Gen., and H. E. Curran, Asst. Atty. Gen., for the Governor.

Charles Hayden, of Walsenburg, and Paul W. Lee, of Ft. Collins, opposed.

BAILEY, J. Certain interrogatories have been propounded to this Court by the Governor, as follows:

1. Does an act of the General Assembly which contains the emergency clause, but does not contain the so-called safety clause, go into effect immediately upon the passage and approval thereof?

2. In the absence of the so-called safety clause, is an act of the General Assembly subject to the referendum, notwithstanding it contains the emergency declaration that the same shall take effect from and after its passage and approval?

3. When does an act of the General Assembly passed with the emergency clause, but without the so-called safety clause, take effect and become operative?

The emergency clause alluded to above is found in section 19, article 5, of the Constitution, as follows:

"No act of the General Assembly shall take effect until ninety days after its passage (except in case of emergency which shall be expressed in the act) unless the General Assembly shall, by a vote of two-thirds of all the members elected to each house otherwise direct."

The so-called safety clause is in section 1, article 5, as amended by the adoption of the Initiative and Referendum, as follows:

"The legislative power of the state shall be vested in the General Assembly consisting of a Senate and House of Representatives, both to be elected by the people, but the people reserve to themselves the power to propose laws and amendments to the Constitution and to enact or reject laws the same at the polls independent of the General Assembly, and also reserve power at their own option to approve or reject at the polls any act, item, section or part of any act of the General Assembly. * * *

"The second power hereby reserved is the Referendum, and it may be ordered, except as to laws necessary for the immediate preservation of the public peace, health or safety, and appropriations for the support and maintenance of the department of state and state institutions, against any act, section or part of any act of the General Assembly, either by a petition signed by five per cent. of the legal voters or by the General Assembly. Referendum petitions shall be addressed to and filed with the Secretary of State not more than ninety days after the final adjournment of the session of the General Assembly that passed the bill on which the referendum is demanded. The filing of a referendum petition against any item, section or part of any act, shall not delay the remainder of the act from becoming operative. The veto power of the Governor shall not extend to the measures initiated by, or referred to the people. All elections on measures referred to the people of the state shall be held at the biennial regular general election, and all such measures shall become the law or a part of the Constitution when approved by a majority of the votes cast thereon and not otherwise, and shall take effect from and after the date of the official declaration of the vote thereon by proclamation of the Governor, but not later than thirty days after the vote has been canvassed. This section shall not be construed to deprive the General Assembly of the right to enact any measure."

Before the emergency clause can be incorporated with an act of the legislature a two-thirds vote of both houses is required, and a separate vote is required to be taken upon the incorporation of the clause.

The questions of law raised by the interrogatories are of first impression with us. In People ex rel. v. Ramer, 61 Colo. 422, 158 Pac. 146, an effort was made to have this court determine the effect of the passage of an act having the emergency clause without the safety clause attached, but since that question did not then appear to be properly before the court in that case it expressly declined to determine it.

The precise questions involved were, however determined in Sears v. Multnomah County, 49 Or. 42, 88 Pac. 522, where the initiative and referendum amendment is, as noted in Van Kleeck v. Ramer, 62 Colo. 4, 156 Pac. 1108, practically identical with our own. There it was sought to establish the rule that an act passed with the emergency clause, but without the safety clause, could not be submitted to the voters under the referendum amendment, upon the theory that the two provisions were in this respect identical in effect. In discussing this question the court said:

"That an act may take effect under a general emergency clause, and yet be subject to the referendum, is clearly contrary to the intent of the amendment, and would produce disastrous results. The clause in the amendment which reads, 'Any measure referred to the people shall take effect and become the law when it is approved by a majority of the votes cast thereon, and not otherwise,' clearly means that a law

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upon which the referendum is invoked cannot take effect prior to its approval by the vote; and consequently no act that is subject to the referendum can be made to go into operation for ninety days after the adjournment of the session or its approval by vote."

In concluding that the emergency clause alone is ineffectual as a safety clause that court said:

"Therefore we conclude that if the act comes within the amendment of section 1 of article IV of the Constitution, and the Legislature desires to have it take effect upon its approval, it must so declare, and set it forth in the preamble or body of the act, and, as the emergency clause contained in this act does not pretend to bring it within the exception of the amendment of section 1 of article IV, it cannot operate to give it immediate effect, and therefore it became effective ninety days from the approval thereof by the Governor, and the demurrer should have been sustained."

So also in State ex rel. Tax Commission v. Moore, 103 Ark. 48, 145 S. W. 199, where the court used the following language:

"Under this initiative and referendum amendment only 'laws necessary for the immediate preservation of the public peace, health or safety,' are exempted from the provisions, and no power is reserved by the people to pass directly upon such laws. All other laws are subject to its operation, and ninety days being given by its terms from the final adjournment of the session of the Legislature which passed them in which to demand or order the referendum thereon, they cannot take effect or go into operation till the expiration thereof, nor thereafter until approved by the people, if the referendum is ordered or invoked."

In South Dakota, where the provisions of its Constitution are very similar to ours, a contrary view to the one applied by the Oregon court was originally expressed. State ex rel. Lavin v. Bacon, 14 S. D. 394, 85 N. W. 605; however that State in a more recent decision modified its views as announced in the Bacon Case, supra, and practically aligned itself with the holdings of the Oregon and Arkansas courts. This latter opinion is reported in State ex rel. Richards v. Whisman, 36 S. D. 260, 154 N. W. 707, L. R. A. 1917B, 1. In effect the court receded from its holdings in State v. Bacon, supra, as is plainly indicated by this extract from the later opinion:

"Sections 1 and 22 of article 3 should be construed and read together as if forming different parts of but one section. State v. Bacon, 14 S. D. 394, 85 N. W. 605. The emergency measures mentioned in section 22 must and can only refer to the same emergency measures mentioned in the referendum clause exception contained in section 1. It therefore follows that the Legislature, by necessary implication, is only authorized to declare emergencies in that class of measures specified in the said exception to the referendum clause. As to all emergency measures and acts within the purview of this exception, the Legislature may declare an emergency to exist, for the purpose and to the end that such enactment may at once go into effect, and such declaration and finding as to the existence of such emergency is final, and not within the power or province of the courts to question. But as to any measure, law, enactment, clearly not within the class of emergency measures specified within said exception, the Legislature has no power or authority to declare an emergency to exist in relation thereto, by any vote, however large the same may be; and the action of the Legislature in embodying emergency clauses in measures clearly not comprehended within the said exception are wholly unwarranted and void, and should be so held by the courts. Not that the act itself would be void, but the emergency clause would be void, * * * with the result that, in the event of a proper referendum petition being filed as required by law, such enactment would not go into effect until approved by a majority vote of the electors of the State."

So it may be safely stated that there is no case to be found at variance with those above cited, except State ex rel. Langer v. Crawford, 36 N. D. 385, 162 N. W. 710, Ann. Cas. 1917E, 955. The conclusion there was by a divided court, three to two, in which every judge filed an opinion expressing his individual views. The prevailing opinions do not appeal to us as correctly interpreting the law, or as either logical or persuasive.

The emergency and so-called safety clauses here involved have separate and distinct functions. They are not interchangeable. After the adoption of the referendum amendments the emergency clause as to all referable laws, as a means of making such acts immediately effective, became inoperative. Nor does the safety clause alone make an act effective at once. It is only when both safety and emergency clauses are incorporated in, or attached to, an act, that it is immediately in force.

The following language of the referendum constitutional amendment: "All elections on measures referred to the people of the State shall be held at the biennial regular election, and all such measures shall become the law or a part of the constitution, when approved by a majority of the voters thereon and not otherwise," is stated in such clear and definite language so plainly expressing the purpose and intent of the act that construction is not possible. It simply states that no act which is subject to the referendum shall take effect until approved by a majority of the votes thereon, and that ends the matter. This provision cannot by any course of logical reasoning be held to mean that such an act can be put into effect through the emergency clause prior to the expiration of the time within which it may be referred. No other conclusion is possible, without doing violence to the meaning of the language which gives expression to the clear purpose

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and object of the people in adopting this amendment.

The conclusion is irresistible that no act, not of the excepted class, can have the force of law, or can become operative until after ninety days from the adjournment of the assembly at which passed, and if referred, then not until approved by a majority of the people by vote at a general election.

[1] It is argued that the emergency clause of the Constitution above recited was not repealed by the initiative and referendum amendment. This requires no argument. It was not so repealed. It is as effective now as it was before the amendment in so far as the legislature has power to finally enact statutes. When the General Assembly had the absolute power to enact all legislation, the emergency provision was applicable to all acts of the body. But when the power to finally enact legislation was withdrawn from the General Assembly except as to certain classes, then manifestly the emergency provision could apply only to acts within the power of the legislature to finally enact. Plainly the legislature cannot act in an emergency where it has no power to act at all. It can only apply the emergency clause of the constitution to an act to which it has the power to give finality.

We therefore reach these conclusions:

[2] 1. That all referable acts of the General Assembly which contain the emergency clause, but not the so-called safety clause, if not referred, take effect ninety days after the adjournment of the session of the General Assembly at which passed, and not before.

[3] 2. In the absence of the so-called safety clause, all acts of the General Assembly, although they carry the emergency clause, declaring that they shall take effect from and after their passage, are still subject to reference.

[4] 3. All acts of General Assembly not referable because the safety clause is attached or because they show upon their face that they are excepted from the referendum provision, not carrying the emergency clause, go into effect ninety days after their passage and approval by the Governor.

[5] 4. All acts having both the emergency and safety clause go into effect immediately upon their passage and approval by the Governor.

(66 Colo. 500)

HUGHES v. LEONARD et al. (No. 9090.)

(Supreme Court of Colorado. May 5, 1919.)

1. HUSBAND AND WIFE ⟸278(1) — SEPARATION AGREEMENT—VALIDITY.

Separation agreement made after parties had separated and when there was no prospect of reconciliation is valid.

2. HUSBAND AND WIFE ⟸278(1) — SEPARATION AGREEMENT—"COERCION."

A separation agreement could not be attacked by the wife on the ground her signature thereto was coerced by her husband's threats to alienate his property in case she refused, since a threat to do what it was his legal right to do cannot be deemed "coercion."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Coercion.]

3. HUSBAND AND WIFE ⟸278(1) — SEPARATION AGREEMENT—RATIFICATION.

Plaintiff wife's action in retaining property under a separation agreement after knowing alleged grounds for rescission *held* to have ratified agreement.

4. EQUITY ⟸88 — LACHES — PLEADING—NECESSITY.

The court, either at trial or upon review, may dismiss action because of laches, although it be not specially pleaded.

5. HUSBAND AND WIFE ⟸279(2) — SEPARATION AGREEMENT—SETTING ASIDE—LACHES.

Plaintiff wife *held* barred by laches from setting aside a separation agreement after her husband's death, where she had accepted benefits of it without protest during his lifetime.

6. HUSBAND AND WIFE ⟸278(1)—SEPARATION AGREEMENT—FRAUD.

Plaintiff wife cannot set aside a separation agreement upon ground that her husband falsely represented his financial standing, where she neither pleads nor proves that such misrepresentations misled her when contract was executed.

En Banc.

Error to District Court, City and County of Denver; John A. Perry, Judge.

Action by Emily Hughes, as widow and sole heir at law of John J. Hughes, deceased, against Thomas W. Leonard and Jane F. Dunn. Judgment for defendants, and plaintiff brings error. Affirmed.

April 29, 1915, John J. Hughes (since deceased) and plaintiff, Emily Hughes, were husband and wife. On that date, said John J. Hughes conveyed lots 29 and 30, in block 111, East Denver subdivision of the Congressional grant of the city of Denver, and lots 15 and 16 in block 122, Stiles' addition to the city of Denver, to the defendant Thomas W. Leonard; the consideration named in the deed being one dollar and other good and valuable considerations.

May 3, 1915, said deed was filed for record, and recorded in Book 2558, p. 323, of the records in the office of the clerk and recorder of the city and county of Denver.

May 4, 1915, said John J. Hughes died, leaving as his sole heir at law his widow, this plaintiff, Emily Hughes.

May 5, 1915, defendant Leonard quitclaimed said property to the defendant Jane F

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Dunn, by deed filed for record May 12, 1915, and recorded in Book 2460, at page 45, of said records; the consideration named in said deed being one dollar.

Plaintiff brings this action to have both deeds set aside on the ground that the warranty deed is a testamentary disposition made by decedent to circumvent the law and in fraud of the rights of the widow; that the quitclaim deed was executed in furtherance of the same plan; and that both deeds were without consideration.

The complaint alleges that at the time of the execution of the warranty deed John J. Hughes was ill and believed himself near death; that he placed this deed in the hands of Leonard with instructions to hold until the issue of said illness should become certain; that, should said illness prove fatal, Leonard was instructed to immediately place the instrument of record and convey the property to Dunn, otherwise to destroy the warranty deed or return it to said John J. Hughes; that when Leonard placed said warranty deed of record he was certain John J. Hughes "was about to die"; that the quitclaim deed from Leonard to Dunn was, in fact, not delivered, but was filed of record by Leonard himself; that Jane F. Dunn is a niece of decedent, and resides in Boston, Mass.; that the warranty deed was received by Leonard with full knowledge of the fraudulent purpose of decedent.

The quitclaim deed contains the following recital:

"This deed is made to vest title to said property in the said party of the second part in pursuance of instructions from John J. Hughes, from whom the said party of the first part received his title to the same."

Both defendants filed demurrers to the amended complaint. Both demurrers were overruled.

Defendant Dunn denied, by answer, that when decedent executed the warranty deed he believed he was in danger of death; denied the alleged instruction of decedent to Leonard; denied that Leonard believed John J. Hughes was about to die at the time of the filing of the warranty deed for record; denied that the deeds were without consideration or were executed to circumvent the law or in fraud of the rights of the plaintiff. For a second defense, she set up a contract of separation between Hughes and his wife of date July 29, 1907. This contract recites, among other things, that by reason of "unhappy differences" the husband had left his wife in October, 1906, since which time they had lived apart, and that the husband refuses to return to his wife and home; that, "for the purpose of making and having a complete settlement of all the property rights and financial obligations between them," the home and its furnishings should be deeded to the wife, $400 in cash paid to her, and, in addition thereto, $50 per month for ten months—

"The party of the second part agrees and is hereby obligated to support and maintain herself, and not hereafter at any time nor in any manner call upon party of the first part, his heirs or lawful representatives, for any contribution of money or property whatsoever for her future needs, nor ask for, seek or demand in any manner whatsoever any part of the property or fruits of the labor of the party of the first part, either alimony or otherwise; and it is agreed that in the event of the death of either of the parties hereto the other party shall not ask for, seek, demand or receive, or have any claim upon or interest in any part of the estate of the other party, by virtue of the marriage relation existing between them, either as widower or widow or heir, under any provision of law, statutory or otherwise, now in force or which may hereafter be enacted, so long as said parties shall continue to live separate and apart."

Defendant further alleges that this contract was filed for record September 19, 1907; that decedent complied with its terms; and that, by reason thereof, plaintiff has waived any rights she might otherwise have in this property in question and is estopped from making any claim thereto.

Defendant Leonard answered, disclaiming any interest.

Plaintiff, by replication, admitted the making of the contract. She further alleged that when she was in ill health her husband had deserted her and left her penniless; had attempted to coerce her into an action for divorce, and, while she was suffering physically and mentally, she acquiesced, through her attorney, in a plan of separation; that a contract was drawn by her counsel, but that the contract, as signed, was dictated by her husband, who represented to her that he was a poor man, that there was a judgment of $12,000 against him, which stood as a lien against all his property, that he would give plaintiff no more money, and that she could take what the contract gave her or nothing; that she believed her husband would fight her to the end, would cause litigation to be prolonged, and eventually leave her destitute; that she did not sign the agreement of her own free will; that its conditions are unjust; that there is a lack of sufficient consideration; that there was, in fact, no judgment against her husband; that he was worth approximately $100,000; that the residence conveyed to her under the contract was not then worth over $6,000, and is not now worth over $4,000, and the furniture, etc., $300; that the $400 paid her in cash was for the payment of bills for her support; and that all these things were known to the husband at the time of the signing of the contract.

Other pleadings were filed, and rulings thereon made by the trial court, not now necessary to notice.

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Trial was to the court without a jury. Plaintiff moved for default against the defendant Leonard, which motion was denied. At the close of plaintiff's case, defendant moved for a nonsuit, which motion was granted. September 14, 1916, motion for new trial was overruled, and final judgment was rendered in favor of the defendants dismissing the amended complaint and for costs, and from said judgment this writ of error is prosecuted.

Plaintiff was called as a witness in her own behalf. Objection was made to her being sworn or testifying on the ground that she was an incompetent witness under the statute. This objection the trial court sustained, on the ground of the decision of this court in Conner v. Root, 11 Colo. 183, 17 Pac. 773. Thereupon, her counsel made an offer to prove by her substantially the matters set out in her pleadings. A portion of that offer is as follows:

"That she consulted an attorney, Mr. Keeler, as to what she should do, and he advised her to go ahead and buy what she wanted for her support, and that her husband would pay for it. * * * That she again consulted Mr. Keeler, and he advised her to wait a year and sue for divorce. That, when she stated to him that she did not want a divorce, he advised her, or suggested to her, that her husband go to Nevada and get a divorce from her. That thereupon she lost confidence in said attorney and turned to Mr. Bottom. * * * That her attorney, Mr. Bottom, called upon her husband, and advised her that her husband had stated: 'What I want is separation papers, if she won't get a divorce, and I won't give her any money for her support until then.' * * * That during all of said time (from the summer of 1907 until the time of the beginning of this action, in October, 1915) she was afraid to bring any action in court against her husband, because she knew his character and disposition thoroughly, and she verily believed that, if she did, he would make away with his property or wear her out with litigation, so that she would obtain no relief. * * * That she has never considered said agreement to be binding upon her, and that she did not attack it during the lifetime of her said husband because she feared and verily believed that, if she should cause said agreement to be set aside, what of her husband's property was not spent in litigation would be so disposed of by him that she would not be benefited by such proceeding. That she had no accurate knowledge of her husband's means, but understood that he was very well off; that she knew that he owned considerable real estate, but did not know whether the same was incumbered, and that he owned considerable mining stock. That he was then engaged in dealing in mining stocks, and that she frequently, before the separation, saw letters to him inclosing checks for dividends upon such stocks."

Mr. Bottom, a witness for plaintiff, and her counsel in the negotiations with her husband, testified: That he prepared an agreement, which did not suit Mr. Hughes, who later came to Mr. Bottom's office with the one set out in the pleadings. "Mr. Hughes told Mrs. Hughes that she would have to sign this agreement or he would not give her a cent." That, in one interview which witness had with Hughes in the Brown Palace hotel, Hughes stated that the only property he owned was two or three pieces of real estate, one of which was the home; that he was in debt for a larger amount than the value of all of it; that he had a judgment against him which would wipe out all of the real estate. That he refused to give the wife anything except the home. That witness reported this conversation to Mrs. Hughes, and the result thereof was that Hughes brought in the contract in question.

Sara Huddart, a witness for the plaintiff, testified that she had a conversation with Hughes in August, 1910 (almost five years before the death of Hughes, and more than five years before the filing of this suit), in which Hughes said:

"I was too cute for her. I was getting ready to leave her five or six years ago, and I covered my property so she would not ever get anything, and she would not have gotten the house if she had not homesteaded it."

This testimony was stricken out on motion of the defendant.

John T. Bottom, Thomas J. Dixon, and N. Walter Dixon, all of Denver, for plaintiff in error.

Hughes & Dorsey, E. I. Thayer, and Berrien Hughes, all of Denver, for defendants in error.

BURKE, J. (after stating the facts as above). [1] The first question for consideration is the validity of this contract of separation. There is nothing in it which, under the laws of Colorado, is against public policy. Attorneys for plaintiff in error urge that, inasmuch as this contract fails to set forth a good cause for the separation, the contract is invalid. They admit that, if a separation is "inevitable," whether a property settlement is made or not, then a separation agreement settling the property rights of the parties may be made without violating public policy; but they further contend that such separation must, in the first instance, be by agreement of the parties. In this we think they are in error. If it appears, as here, that such separation had first been definitely determined upon by one of the parties, that it had in fact thereafter taken place, and that no prospect of a reconciliation appeared, then such separation would be just as "inevitable" and furnish as good a basis for a separation agreement as if it had originally taken place by mutual consent. Mrs. Hughes could not compel her husband to live with her or remain in his home. If she were not at fault, she could compel him to support her in such

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circumstances as his means justified. If she were without personal knowledge of such means, our statutes afforded her an ample remedy to compel her husband to disclose them. Under these conditions, the cause of the separation and the reasons for the execution of the contract were exclusively for the determination of the parties. By their contract they found them sufficient, and, if the wife were not coerced into its execution, if no unfair advantage were taken of her by her husband, that contract is her own determination of the fact that a separation was "inevitable," and is a complete bar to her action. We think every question necessary to this conclusion has been settled, and correctly settled, by the opinion of Judge Sanborn in Daniels v. Benedict, 97 Fed. 367, 38 C. C. A. 592.

If the plaintiff were coerced into making this contract, or if any unfair advantage was taken of her by her husband, those allegations must depend for their proof upon the testimony hereinbefore set out. If the ruling of the trial court excluding the testimony of the plaintiff was erroneous (a question which it is unnecessary to determine herein), was the plaintiff prejudiced thereby?

[2] It is not presumed that counsel for plaintiff, in his offer of proof, set forth in detail what her testimony would be, but it is presumed that, having made the offer, he set it forth in substance; that, if her testimony would be material to any issue in the case, his offer would disclose that materiality. On the contrary, the offer convinces us of the immateriality of the excluded testimony. Plaintiff contends that she was coerced into the making of this contract: First, by her husband's threats to alienate his property in case of her refusal; second, that she was misled by his statements that he was a poor man and that there was a judgment against him of $12,000, which was a lien against his property. Under our law, the husband had a perfect right to alienate this property during his lifetime, subject to the prohibition of the rule laid down in Smith v. Smith, 22 Colo. 480, 46 Pac. 128, 34 L. R. A. 49, 55 Am. St. Rep. 142, and his threat to do what it was his lawful right to do cannot be held to be coercion. That plaintiff was not misled by her husband's allegations of poverty is clearly shown by her counsel's offer of her testimony, "that she had no accurate knowledge of her husband's means, but understood that he was very well off." She further contends that at the time of the making of this contract she was ill and incompetent, physically and mentally, to execute such an agreement. The evidence of such incompetence is of itself very unsatisfactory, and is more than overcome by the fact that she was at all stages of her negotiations represented by counsel. She further attempts to show that the same influence by which she was induced to enter into this contract kept her silent and inactive from the date of its execution to the day of her husband's death. This contention is set forth in her pleadings, but more particularly in the offer of her counsel, "that during all of said time she was afraid to bring any action in court against her husband because she knew his character and disposition thoroughly, and she verily believed that if she did he would make away with his property or wear her out in litigation so that she would obtain no relief." It cannot be presumed that the courts would permit him to make any defense which, under the law, he was not entitled to make, or unreasonably prolong the litigation, or fail to make proper provision for the support, maintenance, and suit money of the wife if she were without means; and since, during his lifetime, it was his right and privilege to make such disposition of his property as he saw fit, the fears of the wife which deterred her from protecting her rights were merely fears that the husband would do what, under the law, he had a perfect right to do.

So far as the testimony of witnesses Bottom and Huddart is concerned, it is to the same effect as the offered testimony of the plaintiff. For the same reason, it is immaterial, and the ruling of the court excluding it could not have been prejudicial.

[3-5] Furthermore, we think the conduct of the plaintiff, as here shown, is a ratification of her contract; and she is likewise prohibited by the proper application of the rule of laches from now impeaching it. No express ratification is necessary. Any act of recognition of the contract (retaining the fruits of it through many years) has the effect of an election to affirm. Acts of dominion exercised over the property received under the contract "after knowledge of the ground of rescission" amount to a ratification. Laches need not be specially pleaded, and, without such plea, it is entirely within the power of the court, either at the trial or upon review, to dismiss an action upon that ground. French v. Woodruff, 25 Colo. 339-352, 54 Pac. 1015; Hagerman v. Bates, 24 Colo. 71-80, 49 Pac. 139; Reed v. Reed, 52 Mich. 117, 17 N. W. 720, 50 Am. Rep. 247.

When a court sees neglect on one side and injury therefrom on the other, it is a ground for denial of relief. Bement v. La Dow (C. C.) 66 Fed. 185.

One who, knowing his rights, takes no steps to enforce them until the condition of the other party has in good faith become so changed that he cannot be restored to his former state if the rights be then enforced, is estopped by the doctrine of laches from assertion of the rights. Chase v. Chase, 20 R. I. 202, 37 Atl. 804.

Certainly Mrs. Hughes, long prior to the death of her husband, knew her rights. Certainly she took no steps to enforce them. Certainly, the condition of Hughes has be-

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come so changed that he cannot be restored to his former state.

Plaintiff says she was coerced by her husband's threat to do a lawful thing into entering into a solemn contract with him settling all their property rights. She took the property and money given her under that contract and pretended to be satisfied. She says she made that pretense to prevent her husband from dealing with his property as he had a right to do, and for the purpose of convincing him that all financial questions growing out of their marriage relations were settled; that she bided her time in silence, with no intention of keeping her contract, until death had stopped her husband's mouth, and she now claims the right to what must of necessity be an ex parte hearing on her principal allegations, and the right to reap the fruits of her watchful waiting. The husband had deserted her (she says without cause) and welcomed a suit for divorce or separate maintenance. According to her testimony, he seemed to have no fear as to what such an action would reveal as to his own conduct. It was this plaintiff who then saw fit to accept what she could get, rather than submit her claims and her conduct to the tribunal whose aid she now seeks when there is no one to dispute her contention. Certainly here, if ever, must the doctrine of laches be applied.

[8] Again, plaintiff's whole claim to a recovery is based upon an alleged fraud perpetrated on her by her husband. A well-settled rule of law required her, in such case, to take proper steps to set aside her contract within a reasonable time after the fact of the fraud became known to her. The fraud, if any, consisted in her husband's misrepresentations to her as to his financial standing. An essential element of recovery is that she believed such representations and was misled thereby to her detriment. She makes no such allegation in her pleadings, introduces no evidence thereof, and makes no offer of such proof. In fact, her pleadings and her offer of proof show the contrary. If she were so misled at the time of the execution of this contract, there must have been some time between that date and the date of the bringing of this action when the facts became known to her. We search this record in vain for any pleading, or for the offer of evidence, of any such discovery.

From the foregoing, it must be concluded that the evidence offered and rejected by the court was immaterial; that plaintiff was not injured by that ruling; that she ratified the contract; that she is now prohibited by the doctrine of laches from impeaching its validity; that, granting the truth of all her testimony, rejected or received, there is no evidence of her having been misled by any material false representations made to her by her husband; and that she pleaded no facts upon which such evidence could be admitted.

The judgment of the trial court is, accordingly, affirmed.

(66 Colo. 384)

SWANBROUGH v. ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA. (No. 9030.)

(Supreme Court of Colorado. April 7, 1919.)

1. INSURANCE ⟸726—MUTUAL BENEFIT ASSOCIATIONS — CERTIFICATES—CONSTRUCTION.

In determining the meaning of words and phrases in a certificate of membership in a mutual benefit association, they must be considered in the light of the common and general understanding of the terms at the time the certificate was written.

2. INSURANCE ⟸787—MUTUAL BENEFIT ASSOCIATIONS—"RIDING OR DRIVING RACES."

Under a provision in a certificate of membership in a mutual benefit association to the effect that the association should not be liable in event of death, disability, or loss resulting from "riding or driving races," the association was not liable where a member was killed while engaged in racing in an automobile.

3. INSURANCE ⟸726—CONSTRUCTION OF CONTRACT—AMBIGUITIES.

The words "riding or driving races" in a provision of a certificate of membership in a mutual benefit association providing that the association should not be liable where a member was killed or disabled as a result of riding or driving races are not so ambiguous, when applied to automobile racing, as to require the application of the rule that ambiguities in insurance policies which may tend to work a forfeiture of the policy, or limit or defeat liability thereunder, should be construed most strictly against the insurer and most favorably toward the insured.

Teller and Burke, JJ., dissenting.

En Banc.

Error to District Court, Denver County; H. S. Class, Judge.

Action by Carrie Swanbrough against the Order of United Commercial Travelers of America. Judgment for defendant, and plaintiff brings error. Affirmed.

Dayton & Denious and O'Donnell, Graham & O'Donnell, all of Denver, for plaintiff in error.

Archibald A. Lee and Watt G. Sheldon, both of Denver, for defendant in error.

SCOTT, J. Edward W. Swanbrough was a member of the Order of United Commercial Travelers of America, a fraternal benefit society, and carried a benefit certificate therein. He was killed in an automobile accident on the 25th day of September, 1914.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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The plaintiff in error, plaintiff below, widow and beneficiary of Swanbrough, brought this suit to recover on his benefit certificate. The benefit certificate was in the following words:

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"This certificate witnesseth that Edward W. Swanbrough has been duly enrolled in the Grand Commercial Army, and is a member in good standing of Pikes Peak Council, No. 15, at Denver, Colorado.

"He is hereby insured in a sum not exceeding sixty-three hundred ($6,300.00) dollars, provided he shall sustain, during the continuance of his membership, and while in good standing, bodily injury effected through external, violent, and accidental means, which alone shall occasion death immediately or within six months from the happening thereof, subject to the provisions, conditions and requirements of the constitution of the Order of United Commercial Travelers of America. He is further entitled to all the rights and privileges of membership accruing to him under the constitution, and he is hereby recommended to the fraternal courtesy of the brotherhood wheresoever dispersed."

"In witness whereof we have affixed our signatures, and the Seal of the Supreme Council in the name of the beneficent Father of All, this 21st day of August, 1908."

This certificate was qualified by the following exemptions:

"Benefits under this article shall not cover nor extend to any death, disability, or loss received while the insured member is acting as an aviator or balloonist, sailor or soldier, or is playing professional baseball, or is under the influence of liquor or narcotics in any degree; nor shall such benefits cover or extend to any death, disability, or loss resulting from fighting, riding or driving races, overexertion (unless in an effort to save human life), riot, the moving or transportation or use of gunpowder or dynamite or other explosive substances, medicinal or surgical treatment (except when the surgical treatment is made necessary by the accident), mining, the intentional taking of medicine or drugs, the violation of any law, immoral conduct, intentionally self-inflicted injuries (fatal or otherwise) self-destruction (while sane or insane), inhaling of gas or asphyxiation (voluntary or involuntary, conscious or unconscious), murder or disappearance, injuries (fatal or otherwise) intentionally inflicted by others (except where such injuries are inflicted for the sole purpose of burglary or robbery or by an insane person, the intent to commit burglary or robbery to be established by the claimant and the insanity to be established by a court having competent jurisdiction), or from voluntary exposure to danger; nor shall benefits cover or extend to any one of the following conditions, whether caused by accidental means or not, to wit: Appendicitis, fits, epilepsy, mental infirmity, ivy poisoning, ptomaine poisoning or other poisoning, bite or sting of an insect, or any infection (unless the infection is introduced into, by, and through an open wound, which open wound must be caused by external, violent, and accidental means and be visible to the unaided eye), hernia, orchitis, inguinal adenitis, venereal diseases, cerebral or meningeal or spinal hemorrhage, heat prostration, sunstroke, or sunburn."

The certificate was also made subject to a rule of construction as follows:

"This certificate, the constitution, by-laws, and articles of incorporation of said order, together with the application for insurance signed by said insured member, shall constitute the contract between said order and said insured member and shall govern the payment of benefits, and any changes, additions, or amendments to said constitution, by-laws, or articles of incorporation, hereafter duly made, shall bind said order and said insured member and his beneficiary or beneficiaries, and shall govern and control the contract in all respects."

It seems that the provisions of the certificate were based on like provisions of the constitution and by-laws of the society. The defense of the society was that Swanbrough met his death while driving a race, and by voluntary exposure to danger, both prohibited by the terms of the exemptions to the certificate.

The only testimony in the case was that of the plaintiff, whose testimony may be epitomized as follows:

"I was present when Mr. Swanbrough was killed in an automobile accident on September 25, 1914, at Overland Park track. I saw the accident. It occurred in the course of a race in which Mr. Swanbrough was running an automobile. I was in the grand stand. I do not know how fast he was running. He was running around the mile track in front of the grand stand. There were about a half dozen other automobiles in the race. I had seen the car on the morning of the race, and knew at that time that Mr. Swanbrough was going to enter one or more races at Overland Park that afternoon. It was in the course of one of these races that Mr. Swanbrough was killed. It was the second race he had driven that afternoon."

At the close of plaintiff's testimony the defendant society moved a nonsuit, which motion was sustained by the court, and the case was dismissed. This judgment is before us for review.

The specific exceptions relied on by the defendant are, "nor shall such benefits cover or extend to any death, disability, or loss resulting from fighting, riding or driving races, nor," etc., and "or from voluntary exposure to danger," etc. The sole contention of the plaintiff is that the words "riding or driving races" refer exclusively to horse racing and horse races, and not to automobile races or similar contests; that this is the common and ordinary understanding of the ordinary person.

No decided case is cited to sustain this contention, but many definitions of the words "races," "riding," and "driving" are set forth, covering a period from the time of Jehu to modern times, and which are urged as supporting that view.

[1] The certificate was written in 1908,

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and we think the term "riding or driving races" must be considered in the light of the common and general understanding of the term at that time. It is a very broad and general expression, and, unless it can be said to have been generally confined in its common use to the technical or exclusive meaning of riding or driving horse races, we cannot so limit it.

While, before the invention and general use of automobiles, bicycles, motorcycles, and other means of locomotion, there may have been some justification for the contention that the term "riding and driving races" should be held to refer to horse races only, such a contention cannot be justified at this period of history. Courts hold themselves ignorant of the common knowledge that now and for many years last past automobile and bicycle races are as common, if not much more so, than horse races. This fact is not only common knowledge, but the terms, as applied to "driving" and "racing" with automobiles and bicycles, have been generally written in city ordinances, state statutes, and so treated in judicial decisions.

[2] Neither can we overlook the fact, which is common knowledge, that automobile racing is as dangerous, in that accidents are as frequent and the results as serious at least as horse racing, and was so long prior to the writing of the certificate. Then by what authority may we construe the general term to be limited to horse racing, any more than we may limit it to automobile racing? Clearly the broad term "driving races," as commonly understood, may include automobile races as well as horse races.

In volume 18, Enc. Britannica, p. 916, we have a very general account of automobile racing, from which we quote:

"Progress in the improvement of design was slow until the year 1894, when a great impetus was given to the French industry by the organization, by the Petit Journal, of a trial run of motor vehicles from Paris to Rouen. The measure of success attained by the cars caused considerable surprise, and in the year 1895 a race was organized from Paris to Bordeaux and back, a distance of 744 m., when the winning vehicle covered the journey at a mean speed of 15 m. per hour. From that date onward until 1908 racing played an important part in the development of the motorcar; in fact it is not going too far to say that up to 1904 it played a vitally important part therein."

And again:

"But it stood out in bold relief when an English car wrested the international trophy from its French rivals in 1902. The Automobile Club of Great Britain and Ireland (now the Royal Automobile Club) at once secured parliamentary sanction for the use of certain roads in Ireland for a limited period, and proceeded to organize a race worthy of the issue at stake. The race was won by the Mercedes car, the latest production of the famous house of Daimler."

The terms "driver" and "driving," as applied to an operator of an automobile, was and has been in common use, in general conversation, in newspapers, in statutes of regulation, and in judicial opinions, for many years before the date of the certificate in question. It is so used in the Denver Municipal Code of 1906 and in our state statute (chapter 114, Laws 1913). It is so defined in 28 Cyc. p. 24. It has been so used without question or quibble in the decisions of our own appellate courts long prior to the issuance of the certificate in question.

In the case of Hannan v. St. Clair, 44 Colo. 134, 96 Pac. 822, published in the same year that the certificate was written, it was said, among other references to the "driver" of the automobile:

"The testimony was, we think, sufficient to sustain the judgment. It clearly showed negligence on the part of the driver of the automobile. The driver was on the wrong side of the street."

See, also, Kent v. Treworgy, 22 Colo. App. 441, 125 Pac. 128; Kent v. Cobb, 24 Colo. App. 264, 133 Pac. 424; Gibson v. Dupree, 26 Colo. App. 324, 144 Pac. 1133; Phillips v. Denver Tramway Co., 53 Colo. 458, 128 Pac. 460, Ann. Cas. 1914B, 29.

The term has been so used by the appellate courts of other states without exception, and, in so far as we have been able to ascertain, without question.

It is said in Berry on the Law of Automobiles (1916 Ed.) § 204:

"The words 'ride or drive,' as used in a statute providing a penalty for 'riding or driving' faster than a common pace in the compact part of any town, are not limited in their application to persons riding or driving animals. Anything ridden or driven comes within the purview of the act. The words apply to the operation of automobiles, and it is not material that automobiles were unknown to the legislators at the time the act was passed."

It was held as early as 1879 by the Court of Queen's Bench, 4 Q. B. D. 228, construing a statute prohibiting "furiously driving a carriage," that one may be convicted for "furiously driving a bicycle." It was said by Mellar, J.:

"I am of opinion that the decision of the magistrates was right. The words of the section are, 'if any person riding any horse or beast, or driving any sort of carriage, shall ride or drive the same furiously so as to endanger the life or limb of any passenger.' The expressions used are as wide as possible. It may be that bicycles were unknown at the time when the act passed, but the Legislature clearly desired to prohibit the use of any sort of carriage in a manner dangerous to the life or limb of any passenger. The question is whether a bicycle is a carriage within the meaning of the act. I think the word 'carriage' is large enough to include a machine such as a bicycle which carries the person who gets upon it, and

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I think that such person may be said to 'drive' it. He guides as well as propels it, and may be said to drive it as an engine driver is said to drive an engine. The furious driving of a bicycle is clearly within the mischief of the section, and seems to me to be within the meaning of the words, giving them a reasonable construction."

So here it is clearly the object of the exemption to exclude liability in case of hazardous risks. Particularly is this made apparent by the contract provision of nonliability in case of "voluntary exposure to danger."

Swanbrough was an automobile salesman. The society was a salesman's society, and his certificate was under class A, containing the specified exemptions. In the light of his necessary understanding of the subject at the time, we cannot say that he did not read the exemption in the light of the plain language in which it was written.

The only case decided by any of our appellate courts called to our attention wherein the precise principle of construction was involved is that of State v. Thurston, 28 R. I. 265, 66 Atl. 580. This case was reported in 1908, and construed a penal statute enacted in 1901. The court said:

"Gen. Laws, c. 74, § 5, as amended by Pub. Laws, c. 925, November 26, 1901, provides: 'Every person who shall ride or drive faster than a common traveling pace in any of the streets of Newport or Providence or in the compact part of any town or village in the state, or in any road leading from Pawtucket to the compact part of Providence, shall, unless justifiable cause be made to appear for such riding or driving, be fined not less than five dollars nor more than twenty dollars or imprisoned not exceeding ten days for each offence.' * * *

"The language used in this section is exceedingly broad: 'Every person who shall ride or drive faster than a common traveling pace.' The words 'ride or drive' are not confined to animals; they are not limited in any manner whatsoever. Anything capable of being ridden or driven comes within the purview of the act. It is argued that the words 'ride or drive' are apt words in a statute designed to limit the fast driving of horses upon the highways of the state. They are apt, but they are not restricted to horses by the terms of the section. They are also apt in the case of bicycles, motorcycles, or automobiles when ridden or driven. In construing statutes of this kind it is usual and proper to consider the scope and purpose of the act and the danger or mischief that it was intended to guard against. The act was evidently passed for the protection of the public against the dangers incident to fast riding and driving of any sort, not only of the kind with which the legislators were familiar at the time, but also any kind of dangerous riding or driving."

As inimitably described by Lew Wallace, his hero, Ben Hur, was driving a race; 2,000 years later Barney Oldfield, midst like plaudits of the multitude, was driving a race—the one driving a chariot race; the other driving an automobile race. Both races alike were hazardous to the driver. Neither intervening time nor the fact that the carriage of the one was propelled by Arabian horses of pure blood, while the carriage of the other was propelled by most delicately adjusted mechanical power, can alter the plain understanding that each was engaged in the driving of a race. Neither can all the definitions written in the centuries between change the common understanding of men that linked together in thought these men engaged in driving races. This is not only the fact, but it is the common understanding of the fact, according to the usage and custom of the times.

So that we cannot in reason, nor in the exercise of any just power, insert by construction in the exemption clause of the certificate, and before the word "races," any definitive or descriptive word. In this case it is as reasonable for us to so insert the word "automobile" as the word "horse." We must construe the contract as of the plain meaning that its words imply.

[3] Counsel urge the application of the rule which obtains in this court, applicable to purely benefit accident policies, as well as to the ordinary accident policy, that where there is ambiguity in the policy, all provisions, conditions, or exceptions which may tend to work a forfeiture of the policy, or limit or defeat liability thereunder, should be construed most strongly against the insurer and most favorably toward the insured; more definitely, that when the exemption from liability is reasonably capable of two different constructions, that one most favorable to the insured should be adopted.

But the language in the exemption here considered is not ambiguous, nor is it reasonably capable of two different constructions.

We said in Brown v. Knights of the Protected Ark, 43 Colo. 289, 96 Pac. 450:

"If the contract were ambiguous or doubtful and were fairly subject to different interpretations, it would be construed most strongly against the insuring association. But courts are required to enforce these contracts as they are written; in this respect they do not materially differ from other contracts; when they are voluntarily entered into and their terms are reasonably plain, the courts have no alternative; the fact that a particular provision may operate harshly or inequitably in particular cases does not justify a judicial disregard or reconstruction of the same."

It was said in Standard Life & Accident Ins. Co. v. McNulty, 157 Fed. 224, 85 C. C. A. 22:

"The natural obvious meaning of the provisions of a contract should be preferred to any curious hidden sense which nothing but the exigencies of a hard case and the ingenuity of a

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trained and acute intellect would discover. Delaware Ins. Co. of Philadelphia v. Greer, 57 C. C. A. 188, 193, 120 Fed. 916, 921, 61 L. R. A. 137. The reasonable and probable meaning of a stipulation in an agreement should be preferred to one that is irrational and improbable. Pressed Steel Car Co. v. Eastern Ry. Co. of Minnesota, 57 C. C. A. 635, 637, 121 Fed. 609, 611."

It is certain that the parties to this contract, excepted from indemnity injuries sustained while the insured was driving a race, and to say that he was not driving a race, when he met his death, is to distort the meaning of the English language, as commonly and generally understood.

In Delaware Ins. Co. v. Greer, 120 Fed. 916, 57 C. C. A. 188, 61 L. R. A. 137, the Court said:

"Contracts of insurance, however, are not made by or for casuists or sophists, and the obvious meaning of their plain terms is not to be discarded for some curious, hidden sense, which nothing but the exigency of a hard case and the ingenuity of an acute mind would discover."

In order that fraternal insurance societies may be preserved, and their membership as a whole protected, it is as imperative that each member shall fairly observe the rules of the society and the requirements of his contract of insurance, as that the society should meet its obligations when such requirements are observed by the insured.

The judgment is affirmed.

TELLER, J. (dissenting). The majority opinion treats the words "riding" and "driving" as present participles governing "races," while to my mind they are clearly adjectives qualifying the noun "races." The former construction is based in the opinion wholly on the fact that persons operating automobiles are properly described as "driving" them, and that automobile races were common when the certificate in question was issued.

This entirely overlooks the contention of plaintiff in error that the exemption clause, as a whole, makes the second named construction necessary.

The first provision of the exemption clause is that the benefits promised shall not extend to death, etc., "while the insured member is acting as aviator," etc., "or is playing professional baseball," etc. It should be noted that this clause expressly exempts from benefits members injured "while" doing specified acts, present participles being used with the auxiliary verb "is," forming sentences grammatically complete and requiring no construction.

In the next line the construction changes, and it is provided that such benefits shall not "cover or extend to any death, disability, or loss resulting from fighting, riding or driving races, overexertion (unless in an effort to save human life), riot, the moving or transporation or use of gunpowder," etc.

Here there is excluded from the exemption specified acts or events designated in each class by one word, a noun, governed by the preposition "from," but followed by a class of events not expressed by one word, as before, but by a present participle and its object, which participle, "moving," is, according to the rules of good English, preceded by the article "the," and followed by the preposition "of"—e. g., "the moving of gunpowder." Further along in this clause we find, "the intentional taking of medicine or drugs," etc.

Why should it be supposed that one who thus wrote according to good usage should in a preceding line have written bad English? How does it happen that the language is not "the riding or driving of races," if the writer was using the two words as participles? Again, why should the writer adopt the barbarous locution "from driving races," when he everywhere else in the instrument shows a knowledge of good English, and introduces his present participles with the conjunction "while"? Ordinary usage requires that the phrase be "driving in a race," if "driving" be used as a participle.

The word "races," without qualification, always and everywhere is taken to mean horse races. If one is mentioned as "following the races" or "playing the races," every one understands that horse races are meant. There are two kinds of horse races—one in which the participating horses are ridden, and the other in which they are driven. All other races are designated by the name of the class to which they belong, e. g., automobile races, boat races, and foot races. This usage is general, if not universal.

To treat "riding" and "driving" as participial adjectives is to give this clause its ordinary and natural meaning, and make it grammatical and harmonious. This is the meaning which the words had in policies long before automobiles were invented.

The construction adopted by the majority opinion makes "races" include all speed contests which may be ridden or driven; but no reason is apparent why other races, e. g., yacht races, boat races, swimming races, etc., should not be included in the list.

The fact that insurance policies or certificates like the one in this case are sold on solicitation by agents of the insurer, who is responsible for the language used, is a potent reason for applying the rule that, in case of doubt as to the meaning of an instrument, such doubt should be resolved against the one who drew it. Such a doubt exists here, as is shown by the difference of opinion by members of the court.

In a case recently decided by this court (Finding v. Ocean A. & G. Co., 177 Pac. 142) the opinion, written by the writer of the ma-

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jority opinion in this case, contains the following:

"In Wood on Fire Insurance, at section 59, it is said: 'It is the duty of the insurer to clothe the contract in language so plain and clear that the insured cannot be mistaken or misled. * * * Having the power to impose conditions, and being the party who draws the contract, he must see to it that all conditions are plain, easily understood, and free from ambiguity. * * * Failing to employ a clear and definite form of expression, the benefit of all doubts will be resolved in favor of the assured.'"

From Preferred Accident Ins. Co. v. Fielding, 35 Colo. 19, 83 Pac. 1013, 9 Ann. Cas. 916, the opinion quotes as follows:

"It is now a well-recognized rule that, where the terms of a policy of insurance are not clear or are capable of two constructions, the one which is most favorable to the insured will be adopted."

If the language under consideration is not capable of two constructions, and so, within the rule thus stated, there could be no reason for an extended discussion of it in the majority opinion.

The judgment should be reversed.

BURKE, J. (dissenting). I am of the opinion that the conclusion reached by Justice TELLER in this case in his dissenting opinion is the correct one, and that his reasoning is irrefutable from the standpoint of grammatical construction. But, as grammatical construction is often disregarded by the courts if a different construction will give effect to the intention of the parties as disclosed by a consideration of the entire instrument (Jackson v. Topping, 1 Wend. [N. Y.] 388, 19 Am. Dec. 515), it seems to me that illustration will here serve us better than argument.

The language in this policy over which this contention arises either means "resulting from riding or driving in any races," or "resulting from any riding or driving races." It is common usage, when speaking of an automobile race, to speak of "driving" such a race, whereas no one ever speaks of an automobile race as "a driving race." Hence, if the first interpretation is correct, the accident in question came within the exception; if the second, then it did not. To reach either conclusion requires careful analysis and construction. The meaning of this clause in this policy is, therefore, to say the least, a matter of grave doubt. When such a doubt exists as to the interpretation of such a contract, it must be resolved in favor of the assured, as has been held by this court. Finding v. Ocean A. & G. Co., 177 Pac. 142; Preferred Accident Ins. Co. v. Fielding, 35 Colo. 19-26, 83 Pac. 1013, 9 Ann. Cas. 916.

Hence the judgment should be reversed.

(107 Wash. 25)

In re JOHNSTON'S ESTATE (two cases). (No. 15151.)

(Supreme Court of Washington. May 13 and Aug. 5, 1919.)

1. EXECUTORS AND ADMINISTRATORS ⟸509(1) —ORDER APPROVING ACCOUNT AND DECREE OF DISTRIBUTION—VACATION—STATUTE.

Under Rem. Code 1915, § 464, subds. 3, 4, 8, heirs and legatees of decedents could attack, by petition to vacate in the court where made, an order approving the final account of the administrator with the will annexed and the decree of distribution, a final order, and therefore appealable, where there were many irregularities in the administration proceedings approved by the orders or decrees sought to be vacated, though there was no fraud.

2. EXECUTORS AND ADMINISTRATORS ⟸121 (1)—SALE OF LOTS—"UNJUSTLY MADE" — STATUTES.

In view of location and character of property, incumbrances, and condition of the market at the time, *held*, that sale of lots of estate by an administrator with the will annexed was not "unjustly made" to render the administrator liable to heirs and legatees under Rem. & Bal. Code, §§ 1532, 1544, and 1545.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Unjustly.]

3. EXECUTORS AND ADMINISTRATORS ⟸118— LOSSES FROM IRREGULARITIES IN DEALING WITH CORPORATE STOCK.

Despite irregularities in the handling of corporate stock of a decedent's estate, administrator with the will annexed *held* not chargeable with the appraised value of the stock for the benefit of heirs and legatees; the estate having realized $7,500 in cash from the stock, which never really was salable, and has become worthless.

4. EXECUTORS AND ADMINISTRATORS ⟸281— IRREGULAR PAYMENT OF CLAIMS.

Claims against a decedent's estate paid by the administrator with the will annexed, some of which were presented after expiration of the statutory time, and some of which bore no indorsement of approval of either the administrator or the judge, were irregularly paid.

5. EXECUTORS AND ADMINISTRATORS ⟸281— IRREGULAR PAYMENT OF CLAIMS—RIGHT OF HEIRS AND LEGATEES.

Heirs and legatees of a decedent, in a proceeding to set aside order approving the final account of the administrator with the will annexed and the decree of distribution, *held* not entitled to charge the administrator with the amounts of claims twice approved by the court and irregularly paid only because held back from presentation to help the estate through its financial difficulties, etc.

6. EXECUTORS AND ADMINISTRATORS ⟸111(6) —ATTORNEY'S FEES—VALUE OF ESTATE.

Attorney's fees of $1,025 earned while acting for the executrix of an estate appraised

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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as upwards of $144,000 *held* excessive, and to be reduced to $500; the actual value of estate having been hardly more than a fourth of its appraised value.

7. EXECUTORS AND ADMINISTRATORS ⟸496(2) —STATUTORY FEES—VALUE OF ESTATE.

Statutory administrator's fees should not have been based upon the appraised value of the estate, which is only prima facie evidence of the real value, but on such real value, where there was ample evidence thereof.

8. EXECUTORS AND ADMINISTRATORS ⟸488— RIGHT TO STATUTORY FEES.

An administrator who, though guilty of irregularity, has been guilty of no fraud or misappropriation, and has shown great resourcefulness and ability in handling and conserving the estate while in financial difficulties, is entitled to statutory administrator's fees.

9. EXECUTORS AND ADMINISTRATORS ⟸495 (2)—FEES—PROPERTY NOT PART OF ESTATE.

Administrator is not entitled to compute his fees on the value of certain household property which did not pass into his possession as administrator of the estate; it having been inventoried and commissions paid upon it as part of the estate of decedent's husband, of whom the administrator was also personal representative.

10. EXECUTORS AND ADMINISTRATORS ⟸509 (4)—FINAL ACCOUNT — VACATION FOR IRREGULARITY.

Order setting aside the final account of an administrator with the will annexed *held* justified by irregularity in reporting certain items, household property and corporate stock, as part of decedent's estate, and in claiming administrator's fees thereon.

11. EXECUTORS AND ADMINISTRATORS ⟸313 —MONEY IN HANDS OF ADMINISTRATOR— INTEREST.

Payment of money to a legatee by administrator out of a balance in his hands, on which interest was allowable, must be credited as of the time payment was made.

Department 1.

Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

In the matters of the estates of David Steele Johnston and Marie Helen Johnston. Proceeding by heirs and legatees to set aside orders approving the final accounts of the administrator with the will annexed and the decree of distribution and to obtain an accounting. From orders directing that exceptions to the administrator's reports be overruled, and that his last report in each case be approved, the objectors appeal. Judgment reversed, with directions.

L. B. Da Ponte and Ellis, Fletcher & Evans, all of Tacoma, for appellants.

Hayden, Langhorne & Metzger and Bates & Peterson, all of Tacoma, for respondent.

TOLMAN, J. This is a proceeding brought by the heirs and legatees of David Steele Johnston to set aside the order approving the final account of the administrator with the will annexed and the decree of distribution, and to obtain an accounting from such administrator; also a like proceeding on behalf of the legatee of Marie Helen Johnston, based largely upon the same facts. It appears from the petition in the D. S. Johnston estate that the decedent died in Pierce county, Wash., on August 11, 1913, leaving a nonintervention will, by the terms of which he bequeathed to the petitioners James Ronald Simon and George Howard Simon, minor grandsons, the sum of $5,000 each. The household effects, jewelry, and silverware were left to the widow; and the remainder of the estate was devised in certain allotted shares to the widow and certain children and grandchildren of the testator. The widow was named as executrix, without bond. The will was admitted to probate in Pierce county. The widow, Marie Helen Johnston, was confirmed as executrix, and entered upon her duties as such. On September 6, 1913, an inventory and appraisement were filed, showing the total value of the estate to be $144,900, but no order of solvency was ever obtained. An order to publish notice to creditors was made, and, without any other proceedings appearing of record in the estate, the executrix died on February 24, 1914, leaving a will, by the terms of which she bequeathed her interest in the estate to Howard A. Johnston. Thereafter, with the consent of all interested, the respondent, Walter M. Harvey, a practicing attorney of Pierce county, who had theretofore been the attorney and close personal friend of the deceased in his lifetime, and who was the attorney for the executrix up to the time of her death, was appointed administrator with the will annexed of both estates, and duly qualified as such. Respondent proceeded by petition and order of court based thereon to convey certain real estate belonging to the D. S. Johnston estate, appraised at $24,000, to the National Bank of Tacoma, in consideration of the assumption by the bank of $12,000 of mortgage indebtedness secured thereon, and the release and satisfaction of $10,200 of indebtedness due to it from that estate. This is the only act of the administrator not attacked or questioned by the petitioners.

The main contentions grow out of the manner in which the administrator handled some 347 vacant and unimproved lots lying in Woodlawn addition to Tacoma, appraised at $15,000, and 1,200 shares of the capital stock of Eilers Music House, a corporation, appraised at $100,000. We have with infinite care accomplished the herculean task of carefully reading and considering the 387 pages of printed briefs and the 177 pages of the abstract of the record; and, the abstract proving to be argumentative and partisan, we have also been obliged to give the same painstaking study to the 151 pages of the record, the 306 pages of the statement of facts, and the voluminous files in both pro-

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bate proceedings as would have been required had no abstract been furnished. The points raised are so many and the irregularities complained of are so numerous that it is manifestly impossible to discuss or even mention each of them without unduly extending this opinion; but whether mentioned or not, each has been given a careful study. The further facts will sufficiently appear as we proceed.

The trial court, after a full hearing upon the petitions, so far sustained them as to direct that the final report and account of the administrator and the decree of distribution in both estates be vacated, and the administrator was directed to file a new report and full accounting within 20 days. With this order the administrator complied, and filed new final accounts, not differing materially from the accounts which had been previously attacked and set aside. To these accounts or reports petitioners filed objections and exceptions, raising the same issues as were previously raised by the petitions; and, the matter coming on to be heard upon the exceptions in a different department and before another judge, upon the testimony previously taken, the trial court, after consideration, made an order to the effect that it was improper for him to review the rulings of an associate judge still sitting, or to express his views upon a matter already passed upon in another department of the same court, and directed that the exceptions be overruled, and that the last report of the administrator in each case be approved as his former reports were approved in the other department, from which order in each case this appeal is prosecuted.

The motion to dismiss the appeal is not well taken, and will be denied without a discussion of the reasons therefor.

[1] It is contended by respondent that the order approving the final account and decree of distribution was a final order, and therefore appealable, and that petitioners should have appealed therefrom instead of attacking it by petition to vacate in the court where made. It may be conceded that such is the rule where it is sought to correct an error of law made by the trial court. Sound Inv. Co. v. Fairhaven Land Co., 45 Wash. 262, 88 Pac. 198, and cases there cited. But these authorities in no wise limit the force of our statute (Rem. Code, § 464) with reference to the vacation and modification of judgments. Appellants in filing their petition were apparently proceeding under subdivisions 3 and 4 of that statute, and perhaps also under subdivision 8; and they certainly charge every conceivable form of irregularity and make many harsh charges of fraud. Without going into detail, we find that the charges of irregularity were amply sustained, and that the court had in the order and decree under attack approved the payment of claims against the estate which were not presented within one year, had never been indorsed with the approval of the administrator or the judge, and could not then be found in the court files, as well as many other irregularities. In fact, it may be said that irregularity was the rule and regularity the exception, as is abundantly shown by the record now before us, though we think the charges of fraud which were repeated and renewed in this court are wholly unsustained and unproven. These irregularities, which unfortunately abound, bring the case within the purview of the statute, and place it without the rule laid down in Sound Inv. Co. v. Fairhaven Land Co., supra. It was said in Re Doane Estate, 64 Wash. 303, 116 Pac. 847:

"We are not holding in this case that the superior court has not jurisdiction to set aside a decree settling a final account upon a proper showing."

Nor has the plain language of the statute been anywhere limited by construction, so far as we are now advised. Since we have found that there was no fraud proven, but that the irregularities, which cannot be denied, are sufficient under the statute to justify the vacation of the order and decree, we need not consider those cases in which it was sought to set aside a decree on the ground of fraud, after the expiration of the time fixed by the statute, either by direct or collateral attack. If, then, the trial court was justified in setting aside the order and decree because of irregularities in obtaining it, arising from the failure to comply with the statutes then in force governing the presentation, allowance, and filing of claims against the estate, whereby the decree was caused to recite the approval of, and the approval of the payment of, claims which the record failed to disclose, and which could not then be legally enforced, we must now inquire whether, after the filing of a new account and the taking of evidence touching all of the charges made by the petitioners, and the objections and exceptions to the final account, in which proceeding all parties in interest were represented, the final account should have been approved.

We cannot discuss, or even state, many of appellant's contentions; but those not stated or discussed have been fully considered and found to be without merit. Confining this opinion to the principal contentions, we will very briefly refer to the following:

[2] 1. The lots in Woodlawn addition were appraised at $15,000, the greater part being covered by a mortgage for $3,800, upon which there was considerable accrued interest, and all being subject to taxes and assessments amounting to approximately $2,000. Shortly after respondent qualified, proceedings to foreclose the mortgage were commenced. Re-

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spondent appeared in the foreclosure action, and as a matter of favor, and by dilatory tactics, considerably delayed the foreclosure. In the meantime he tried diligently to find a purchaser for this property, in whole or in part, without success, and finally, without authority from the heirs or from the court, he employed an agent to sell the lots at retail on contract, mostly with a small payment down, and the balance in monthly installments, agreeing to convey good title by deed when the purchase price was fully paid; the agent to receive 25 per cent. of the sale price of each lot as his commission. About 140 lots were sold by this method, and written contracts were entered into with the purchasers. Respondent received from the agent, after the commissions had been deducted, $1,474.75, and, in addition, there was paid to him direct by the purchasers $475. Not having realized enough money to pay off the mortgage and the tax liens, so as to clear the title and enable him to perform his contracts with the purchasers, and fearing that he would lose the property entirely through the expiration of the time for redemption, he, in connection with the loan which he was obtaining from the same source, which will be referred to later, conveyed all of the Woodlawn property by means of a deed in blank, executed by the adult heirs some time before, in anticipation of a possible sale of the lots in bulk, which sale did not materialize, to a representative of the Eilers Music House, upon condition that respondent should furnish $2,000 out of the loan which he was then negotiating toward the payment of the incumbrances on the lots, and the Eilers Music House should pay off the remainder of such incumbrances, so that the property would be freed from liens, and that part which had been sold on contract could be conveyed to the several purchasers. After this arrangement was completed, respondent sold the contracts which he then held for the lots previously sold, upon which there was still unpaid some $3,400 or $3,500, to the Eilers Music House for $2,850, but later took back a contract for $1,000, returning that much of the consideration, so that Eilers Music House actually paid him $1,850 for such of the contracts as they finally received. All of this was carried through without advising the heirs, and without any authority from the court, though after it was all completed, and on or about May 10, 1916, shortly before attempting to finally close the estate, these facts, with the exception of the sale and assignment of the contracts, were reported to the court by respondent, and on ex parte hearing without notice an order approving the acts reported was made by the court. No books of account were kept by respondent covering this or any other of his financial transactions, and even the money received was sometimes deposited to his individual credit in the bank, instead of being all carried in a trust account; a course of conduct which must be condemned severely, whether or not loss follows. And yet counsel for appellants have not by a long and skillful cross-examination, or by any other evidence, been able to present anything which raises even a doubt that all the money thus received by respondent has not been fully accounted for. Petitioners, while contending that these sales are void, are not here seeking to recover the lots sold, as indeed they could not in any action to which the purchasers are not parties. But their object is to hold the administrator for the appraised value of the Woodlawn lots, under sections 1544 and 1545, Rem. & Bal. Code, then in effect. The latter section provides:

"* * * If any has been sold for less than the appraisement, he shall not be responsible for the loss if the sale has been unjustly [justly] made."

From which it is argued that, if the sale has been unjustly made, the administrator will be held to be liable. It will be observed that the intent of the statute is to create liability only when a sale has been unjustly made and not when irregularly made. It must be conceded that these sales were irregularly made, but our careful study of the facts convinces us that, in view of the location and character of the property, the incumbrances thereon, and the condition of the market during the period in question, not only is there no evidence that the sales were unjustly made, but, on the contrary, the course followed by the administrator was probably the only course which would have enabled the estate to realize anything out of this property; and, therefore, there is no liability under the statute referred to. Still less is there a double liability under section 1532, Rem. & Bal. Code.

[3] 2. The 1,200 shares of the capital stock of Eilers Music House, appraised at $100,000, were never sold, and shortly after the appraisement was made the Eilers Music House became, if it was not already, involved in financial difficulties, and a committee of its creditors took charge of its affairs and remained in control for some time. True this committee was discharged before the estate was closed, but the corporation shortly thereafter went into bankruptcy, and at no time since the death of Mr. Johnston has it paid any dividends, nor has the stock had a market value. If it were ever salable at all, which is extremely doubtful, it could have been sold only to some one already identified with the business, and presumably at a price not greater than its real value; and it is not reasonable to suppose that any person connected with the business, and familiar with the affairs of the corporation, would at any time have paid any substantial sum for the stock. The administrator, the heirs, and

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those connected with the Eilers Music House seemed to have hoped that the corporation would work out of its difficulties, and that its stock would some time in the future become valuable. The stock was held by and with the consent of the heirs, in the hope that eventually something substantial might be realized therefrom. Without fully advising the heirs as to the conditions, and without previous authority from the court, the administrator pledged this stock to the Eilers Music House to secure a loan to the estate of $7,500 then obtained in cash, in connection with the transfer of the Woodlawn lots hereinbefore referred to, and also pledged the stock at the same time to secure payment of the claim of Eilers Music House against the estate, which had existed prior to Mr. Johnston's death, then amounting to upwards of $14,000. Since by this proceeding the estate actually realized $7,500 in cash from an asset which never was salable, and has since become worthless, and the remainder of the estate has been freed from the previously existing indebtedness due the Eilers Music House, notwithstanding the irregularities complained of, we can see no justice in the demand that the administrator be charged with the appraised value of this stock.

[4, 5] 3. The claims against the estate which were paid by the administrator amounting to $2,934.50, some of which were presented after the expiration of the statutory time, some of which bore no indorsement of approval of either the administrator or the judge, were, no doubt, irregularly paid. If the question were presented here by the holder, attempting to enforce payment upon a claim lacking something which the statute required him to do, we should be obliged to hold that the law would give him no relief. Butterworth v. Bredemeyer, 89 Wash. 677, 155 Pac. 152; In re Estate of Parks, 178 Pac. 830.

These claims which were not presented within the year were a claim of one of the petitioners herein, who was a son of the deceased, and the McKenna claim, both of which were apparently held back out of a desire to assist the estate through its financial difficulties and until the claimants were advised that the administrator was prepared to pay. All of the other claims were duly presented; and each creditor did all that the statute then required him to do. The failure to approve, have the court approve, and file was that of the administrator, who relies upon his approval shown in his final report and the approval of the court in the order approving his final report. And, under the peculiar conditions existing here, the petitioners should not be permitted to profit by the irregularity. These claims have all been paid, and the payment has been twice approved by the court below, and, except in one instance, there is no contention but what they were just claims, and the creditors were morally entitled to their money. Shall we then take from the creditors that which was rightfully theirs, though irregularly received, and give it to one who has no right thereto? Or shall we compel an administrator who has irregularly paid a just debt, because only of such irregularity, to again pay the money, not to the creditor, but to one who has no right thereto, either legally or morally? We think there is no warrant in law or equity for such a course. The one and only claim which is disputed is that of respondent for services rendered deceased in his lifetime, amounting to $450. This claim was presented within the year, was approved by the court, was on file, and is supported by respondent's testimony, drawn out by petitioners' own examination. There is no evidence in the record disputing its justness or validity.

4. The penciled memorandum in the inventory of "money, $631.49," is not shown to have been money coming into the hands of the administrator. Respondent was appointed on April 4, 1914, and his inventory, which is a duplicate of the inventory theretofore filed by his predecessor, is dated January 3, 1915. The record contains no explanation of this item, respondent seemed wholly unable to explain it, and the only plausible explanation which occurs to us, supposing the memorandum to have been made by respondent in his own handwriting, is that during the time which elapsed between the making of the first inventory and the making of the second inventory this amount of money had been realized from some of the other items shown on the inventories. Petitioners do not attempt to show that any such amount of money was due the estate from any source, or ever came into respondent's hands; and we think the only fair inference is that, if it be a memorandum of money received, it was money realized from the other property inventoried.

[6] 5. The court, in approving the final account, allowed respondent $1,025 as attorney's fees, earned as attorney for Marie Helen Johnston during the time she acted as executrix; and it is stipulated that three well-known and reputable members of the Pierce county bar would testify that the services were worth that sum. The allowance was made, and this testimony would have been given, upon the theory that the estate had assets of upwards of $144,000; while, as we have seen, by reason of there having been but little, if any, real value in the Woodlawn lots, and in the Eilers Music House stock, the actual value of the estate was hardly more than one-fourth that amount. The value of the estate being always an item to be taken into consideration in fixing fees, we think the allowance here made was too much; and in view of what

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the value of the estate has proved to be, as well as considering what the services were, and the time over which they extended, as shown by the record, we think $500 an ample allowance for such fees.

[7, 8] 6. The court allowed the statutory administrator's fees, based upon the appraised value of the estate. While the appraised value may be the prima facie value, if nothing to the contrary is shown, here we have ample evidence of the real value, and the fees should have been based thereon. It is contended, however, that under the authority of In re Anderson, 97 Wash. 688, 167 Pac. 71, no fees whatever should be allowed. We hold, however, from the whole record, that no fraud or misappropriation whatever has been shown. The respondent here had to and did show great resourcefulness and ability in handling and conserving the estate. His fault lay in not keeping proper records and accounts, in not procuring authority before he acted, in unintentionally, we think, misleading the heirs in his correspondence and reports, which was due primarily to his failure to keep accounts, and refer to them for the facts in writing to the heirs, and in claiming excessive compensation. Our study of the record convinces us that a final account should be approved and an allowance of fees made as follows:

Money received from the sale of lots in Woodlawn addition through the sales agent	$ 1,474 75
Money received on such contracts, paid direct to the administrator	475 00
Received from Eilers Music House from sale of uncollected contracts	1,850 00
Received from Dr. Balabanoff	900 00
Total realized from Woodlawn lots	$ 4,699 75
Less amount paid by the administrator toward removing incumbrances	2,000 00
Amount actually received from sale of lots in Woodlawn addition	$ 2,699 75
To this should be added the loan from Eilers Music House, secured by stock as collateral	7,500 00
Deposited in National Bank of Tacoma	131 49
Collected from Eilers Music House debt due deceased	2,000 00
Received from Howard A. Johnston as advances	400 50
Total cash received from all sources	$12,731 74

Disbursements on account of lots in Woodlawn addition:

Payment of taxes, commission, and attorney's fees	$ 152 43
Expenses of administration, taxes, inheritance tax, guardian ad litem fees, and attorney's fees as reduced	3,117 69
Payment of claims against estate	2,934 50
Total disbursements	$6,204 61
Net cash on hand	$6,527 13

For the purpose of fixing the administrator's fees, the following items should be considered:

Total cash received by administrator from all sources, as before set forth, less advances by Howard A. Johnston, which were not a part of the estate	$12,331 24
Value of real estate conveyed to National Bank of Tacoma in satisfaction of debts	24,000 00
Appraised value of household goods	3,500 00
Total value of estate	$39,831 24
Statutory fees on this amount	$ 1,633 24

This fee should be divided between respondent and the estate of Marie Helen Johnston, in the same proportion as the fee heretofore allowed was divided. Upon respondent's final report, as originally presented, and apparently at his request, and certainly with his consent, of the fee then claimed, approximately 17½ per cent. was found to have been earned by the executrix prior to her death; and, applying the same percentage here, $286 out of the $1,633.24 allowed as fees should be paid to the estate of Marie Helen Johnston and there accounted for. Deducting the $1,633.24 allowed as fees to the executrix and administrator with the will annexed from the cash on hand of $6,527.13 leaves in the hands of the administrator to be distributed under the terms of the will $4,893.89.

[9, 10] With reference to the estate of Marie Helen Johnston, deceased, the respondent, as administrator with the will annexed, inventoried as assets of that estate $1,025 as commissions allowed the deceased as executrix of the estate of D. S. Johnston, which amount we have seen must be reduced to $286. The administrator also included in the inventory and claimed commissions upon the household furniture, etc., belonging to the estate of D. S. Johnston, which, as we have seen, was administered in that estate. Fees have been allowed thereon, and it must be held that such household property did not pass into the respondent's possession as administrator of the Marie Helen Johnston estate, and he is not entitled to compute administrator's fees again upon the value of that property. Respondent also inventoried and was allowed fees upon 200 shares of the capital stock of Eilers Music House, being the one-sixth interest in the 1,200 shares belonging to the estate of D. S. Johnston, deceased, which might have come to Marie Helen Johnston had the same ever been freed from the debts of the D. S. Johnston estate and distributed. This one-sixth interest, or 200 shares, was given an appraised value of $11,866. Manifestly the estate of Marie Helen Johnston never received any part of these shares, and the irregularity in reporting these items and claiming administrator's fees thereon, which approaches the nearest to bad faith of anything we have found in the record, was sufficient to justify the order setting aside the final account. The record convinces us that respondent's final report to

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the following effect may be approved, and fees allowed him as herein stated:

Cash collected on Detroit mortgage	$528 66
Fees as executrix of the estate of D. S. Johnston, deceased	286 00
Total cash received and total value of estate	$814 66

From which should be deducted the following disbursements:

Premium on bond	$ 66 67
Clerk's fees	10 75
Publication of notice to creditors	5 00
Filing final account and publication of show cause order	10 00
Statutory administrator's fees	57 02
Total disbursements	$149 44
Leaving on hand and subject to distribution under the terms of the will	$665 22

The judgment appealed from is reversed, with directions to proceed in harmony with the views herein expressed. Appellant will not be permitted to recover costs of the abstract.

CHADWICK, C. J., and MITCHELL, MACKINTOSH, and MAIN, JJ., concur.

PER CURIAM. [11] The decision in this case is silent on the matter of interest, and also fails to make mention of a payment of $500 made by the administrator with the will annexed of the estate of Marie Helen Johnston to Howard A. Johnston, the legatee. Interest is properly allowable upon the balance in the hands of the administrator on July 1, 1916, at the legal rate, and, of course, the payment to the legatee, which is not disputed, must be credited as of the time it was made. This expression of the views of this court may be read in connection with the original opinion, so that there may be no uncertainty as to its meaning upon these points.

(106 Wash. 659)

DANIEL v. DANIEL et ux. (No. 14951.)

(Supreme Court of Washington. May 12, 1919.)

1. PLEADING ⇐279(3)—SUPPLEMENTAL COMPLAINT—SETTLEMENT PENDING SUIT—SETTING ASIDE.

In daughter's action against her father and stepmother to recover her interest in her deceased mother's share of community property, where settlement was entered into pending the action, court properly permitted plaintiff before action had been dismissed pursuant to agreement to file supplemental complaint, alleging that settlement had been procured by fraud, and asking that agreement to dismiss and quitclaim deed executed pursuant thereto be set aside.

2. EQUITY ⇐39(1)—RELIEF.

Equity, having jurisdiction of a controversy, can in one proceeding afford complete relief.

3. HUSBAND AND WIFE ⇐274(4)—COMMUNITY PROPERTY—RIGHT OF HEIR—SETTLEMENT—FRAUD.

In daughter's action against father to recover her interest in deceased mother's share of community property and to avoid purported settlement upon ground of fraud, the entire transaction with reference to the settlement, including the oral agreement leading up to the writings entered into pursuant thereto, may be shown.

4. HUSBAND AND WIFE ⇐274(4) — HEIR'S INTEREST IN COMMUNITY ESTATE—SETTLEMENT—FRAUD—EVIDENCE.

In daughter's action against father to have her interest in deceased mother's share of community property set aside, where supplemental complaint was filed to set aside, upon ground of fraud, purported settlement entered into pending action, evidence *held* convincing that father, in inducing daughter to make settlement agreement, did not act in good faith, but intended to procure daughter's interest without giving her actual benefits she was led to believe she would receive as consideration therefor.

5. HUSBAND AND WIFE ⇐274(1)—CHILD'S INTEREST IN MOTHER'S ESTATE—SETTLEMENT WITH FATHER—FRAUD.

Where daughter brings action against father and stepmother to have her interest in deceased mother's share of community property set aside, and pending action father induces daughter to enter into settlement agreement without intending to actually give daughter such benefits of the agreement, the settlement is fraudulent, entitling daughter to vitiate it.

6. JUDGMENT ⇐203 — SEPARATE JUDGMENT ON SUPPLEMENTAL COMPLAINT — FRAUDULENT SETTLEMENT.

Where daughter, suing father and stepmother to have her interest in deceased mother's share of the community property set aside, filed supplemental complaint to set aside purported settlement made pending the action on ground of fraud, court was not required to enter formal judgment upon finding that settlement was fraudulent, so that an appeal could be taken therefrom, but could proceed to try case upon issues as raised by original complaint, answer, and reply, and enter decree at the conclusion of the trial; only one judgment being necessary, since there was but one action.

7. EVIDENCE ⇐273(3)—OWNERSHIP OF PROPERTY—DECLARATIONS AND ADMISSIONS.

On an issue between plaintiff and defendant as to ownership of property, defendant's acts tending to show ownership on his part and his declarations and admissions of ownership are admissible, though acts occurred or admissions were made prior to the time the controversy between the parties arose.

8. EVIDENCE ⇐222(1) — ADMISSIONS BY PARTY.

In a civil action the admissions by a party of any fact material to the issue are always competent evidence against him, wherever, whenever, or to whomsoever made.

9. HUSBAND AND WIFE ⇐254 — PROPERTY RIGHTS — TRUST RELATION — COMMUNITY PROPERTY.

Where husband purchased property and had deed executed to and title taken in name of another party, his relation to wife as to such property was not that of a trust relation, but property became community property, under the Community Property Law (Rem. Code 1915, § 5917).

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10. TRUSTS ⟸43(1)—EXPRESS TRUST—PAROL EVIDENCE.

An express trust in real estate cannot be established by parol evidence.

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11. LIMITATION OF ACTIONS ⟸104(1)—ACTION TO ESTABLISH INTEREST IN COMMUNITY PROPERTY—CONCEALMENT BY FATHER.

Daughter's action against father and stepmother to have her interest in deceased mother's share of community property established was not barred by limitations under Rem. Code 1915, § 786, because of failure to bring action within seven years from mother's death, where father concealed his interests in the property, and deed was not recorded until within seven years from commencement of action.

12. APPEAL AND ERROR ⟸889(2)—AMENDMENTS REGARDED AS MADE.

In action to have interest in property established and set aside, defects in complaint *held* not fatal on appeal, where such defects were amendable, in which case the amendment will be considered as made.

13. HUSBAND AND WIFE ⟸274(4) — COMMUNITY PROPERTY — SUFFICIENCY OF EVIDENCE.

In daughter's action against father and stepmother to have her interest in deceased mother's share of the community estate set aside, involving issue of whether such property was community property or had been acquired by father subsequent to mother's death, evidence *held* to preponderate in favor of the daughter.

14. TENANCY IN COMMON ⟸28(1)—COTENANT IN POSSESSION—IMPROVEMENTS—RIGHT TO PROFITS.

Where one tenant in common enters on the common estate, which in its then condition yields no profit, and so improves it as to make it productive, he is entitled to all the profits produced by means of his improvements.

15. TENANCY IN COMMON ⟸37—COTENANT IN POSSESSION—PROFITS—ACCOUNTING.

Where profits from common property are the result of the individual labors of tenant in possession, and no demand for an accounting has been made, an accounting will not be decreed.

16. HUSBAND AND WIFE ⟸274(1) — COMMUNITY PROPERTY—PROFITS — ACCOUNTING.

Daughter, in having her interest in deceased mother's share of the community property set aside after father had withheld such interest from daughter under an adverse claim, is entitled to an accounting for her share of the income from the common property since mother's death, where property was productive at time daughter's interest attached.

17. HUSBAND AND WIFE ⟸274(1) — COMMUNITY PROPERTY — DEATH OF WIFE—INTEREST OF SURVIVING CHILD.

Daughter's interest in community property upon mother's death is that of a tenant in common with the father.

18. COURTS ⟸18—JURISDICTION—REAL ESTATE.

Action involving the question of title and right of possession to land must be tried in the state where the land is situated.

19. HUSBAND AND WIFE ⟸265—COMMUNITY PROPERTY—ACCOUNTING.

There can be no accounting between husband and wife as to community property, at least until after its dissolution of the community interest by divorce or some other method authorized by law.

20. HUSBAND AND WIFE ⟸274(1) — COMMUNITY PROPERTY—INTEREST OF SURVIVING CHILD—MORTGAGES.

Mortgages placed upon community property after wife's death, as between husband in possession and surviving child whose interest in the property is being withheld, are liens only as to the husband's interests.

Department 2.

Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Action by Hazel Daniel against J. I. Daniel and wife. From decree rendered, all parties appeal. Affirmed.

Cyrus Happy and O. C. Moore, both of Spokane, for appellants.

George W. Belt and Fred M. Williams, both of Spokane, for respondent.

FULLERTON, J. This action was instituted by Hazel Daniel, as plaintiff, against the defendants, John I. Daniel and Ella Mona Daniel, his wife, to have established and set aside to her an interest in certain described real property, situated in part in the state of Washington and in part in the state of Arizona. The plaintiff claims as heir of her deceased mother, formerly the wife of the defendant John I. Daniel, who is her father. The other defendant is the present wife of John I. Daniel. In the complaint it is alleged that certain of the property in the state of Washington, namely, lot 2 of block 10, resurvey and addition to the city of Spokane, was the property of the community consisting of the defendant John I. Daniel and the plaintiff's mother, owned and held by them at the time of the mother's death, and that the other property in this state was acquired by the defendant subsequent to the mother's death from the rents, issues, and profits of the community property. The property in Arizona was in part entered as a homestead under the laws of the United States during the lifetime of the mother, and commuted subsequent to the mother's death. The remainder of the property in that state was subsequently purchased by the defendant John I. Daniel with the proceeds, it is alleged, of the community property mentioned. The answer of the defendants put in issue the allegations of the complaint con-

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cerning the manner and time of the acquisition of the property, and affirmatively averred that the property was acquired subsequent to the death of the plaintiff's mother, and that it was the separate property of the defendant John I. Daniel. In the answer the statute of limitations was also pleaded. To the answer a reply was filed, putting in issue its affirmative allegations.

With the issues thus framed and before a trial was entered upon, the plaintiff and defendants purported to settle the differences between them. The written evidences of the purported settlement consisted of some five separate instruments: (1) A writing signed by the plaintiff, entitled after the manner of the pleadings, in which, after reciting that since the commencement of her action she had become convinced that it was without merit and that she had been misled in starting the same, she consented to its dismissal, further agreeing that the dismissal should "be res adjudicata" of any further cause of action, and that she would not thereafter directly or indirectly prosecute any further suit for the recovery of the property, and that the writing should be sufficient authority for the court to make an order dismissing the action; (2) a quitclaim deed signed and acknowledged by the plaintiff purporting to convey to the defendant her interest in all of the property described in the complaint situated in the state of Washington; (3) a quitclaim deed signed and acknowledged by the plaintiff purporting to convey to the defendant all her interests in the property described in the complaint situated in the state of Arizona; (4) a writing on a printed blank form for a quitclaim deed, signed by the defendants, but otherwise defectively executed, purporting to convey to the plaintiff 40 acres of the homestead property situated in the state of Arizona; and (5) an agreement signed by the defendant John I. Daniel in which he agreed to pay the plaintiff's schooling, board, laundry, room rent, buy her clothing, give her $10 per month spending money, for a term of "one year, but not more than two," while she was in attendance upon some school not named. The writing authorizing the dismissal of the action was filed in the cause on November 16, 1916, some three months after the filing of the reply.

The action was not dismissed on the agreement, and later on the respondent obtained leave of court and filed a supplemental complaint. In this complaint she charged the defendants with fraud in procuring the writing authorizing a dismissal, setting forth in detail the facts upon which the charge was founded, and asking that the agreement to dismiss and the quitclaim deeds executed by her be set aside and held for naught. To this complaint the defendants demurred, and, on their demurrer being overruled, answered, putting in issue its allegations. The cause was then tried upon the issues made by the supplemental complaint and the denials thereto, at the conclusion of which the trial court announced that the allegations of the complaint had been sustained, and that he would in the final judgment, should the allegations of the principal complaint be sustained, set aside and hold for naught the agreement to dismiss and the quitclaim deeds issued contemporaneously therewith. To these conclusions the defendants excepted, and moved that the court's findings be reduced to writing, and that a judgment be then entered embodying the court's holding, that an appeal therefrom might be taken and perfected. This motion the court denied, whereupon the trial proceeded upon the issues made by the original complaint, the answer thereto, and the reply to the answer. At the conclusion of the trial the court entered a decree setting aside the written agreement for a dismissal of the action, the quitclaim deed from the plaintiff to the defendant John I. Daniel for the property in the state of Washington, decreeing the plaintiff to be the owner of an undivided one-twelfth interest in the lot hereinbefore specifically described, and directing that an accounting be taken for a one-twelfth interest in the rents and profits of the property received by the defendant John I. Daniel since the death of the plaintiff's mother. It was further decreed that the plaintiff had no interest in the other property described in the complaint situated in the state of Washington. While the decree made no specific reference to the Arizona lands, the court early in the trial held that it was without jurisdiction over them, and admitted evidence only as tending to elucidate the respective contentions of the parties. Both parties appeal.

[1, 2] Taking up the appeal of the defendants, the first question to be noticed arises on the ruling of the court permitting the appellant to file the supplemental complaint. It is claimed that this was error because the matter set forth therein was not in aid of the cause of action pleaded in the original complaint; that is, it did not bring before the court new matter pertaining to the cause of action originally set forth arising subsequent thereto, but was a matter independent of the original cause of action, tending to defeat it, and hence must be itself the subject of an original cause of action. But, conceding the effect of the matter set forth in the complaint to be as the defendants contend, we think nevertheless, there was no error in permitting it to be filed in and tried out as a part of the original action. If a controversy had arisen between the parties over the ownership of the land and a purported settlement had been agreed upon between them before action was begun thereon in which the defendants had overreached and defrauded the plaintiff, manifestly the plain-

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tiff could in a single suit in equity set aside the purported settlement and establish her interest in the property. She would not have been compelled to institute two suits for that purpose. Equity, having jurisdiction over the controversy, could in one proceeding afford complete relief. The fact that the purported settlement was had in the instant case after suit begun does not change the situation in this respect. The plaintiff must, of course, set aside the settlement before she can proceed with the main action, but she would have had to do this in the case supposed. Since, therefore, the original action in the case before us was not actually dismissed, and since the settlement was made subsequent to the commencement of the original action, no reason exists why it cannot be brought before the court in a supplemental complaint. More than this, the statute (Rem. Code, § 308) expressly provides that the court may, on motion, allow supplemental pleadings showing facts which occurred after the former pleadings were filed, and we think one of the purposes of the pleadings therein provided for is to permit questions such as are here presented to be tried out in the original action. True, this court, in common with other courts, has held that a premature action cannot be ripened into an existing cause of action by a supplemental complaint showing facts arising after the commencement of the action. Keeler v. Parks, 72 Wash. 255, 130 Pac. 111. But this is not the condition presented here. The complaint in this instance stated a valid cause of action. By an agreement made afterwards the action was apparently destroyed. Clearly it violates no principle of the case cited to show by a supplemental complaint that the agreement was procured by fraud.

[3] Another contention under this head is that the court erred in permitting the plaintiff to show the entire transaction with reference to the purported settlement, the oral agreement leading up to the writings, as well as the entirety of the writings; the contention being that the testimony should have been confined to the single instrument authorizing the dismissal of the action. But this is not the rule. The charge was fraud in procuring the agreement. To establish this the appellant was permitted, under the well-established rule, to show the entire transaction. Gordon v. Hillman, 91 Wash. 490, 158 Pac. 96.

A third contention is that the evidence does not justify the conclusion that the settlement was induced by fraud. We do not feel inclined to discuss this phase of the case at any length, yet there are certain salient features concerning it, either undisputed or clearly proved, which may be mentioned. The settlement contemplated that the plaintiff should be permitted to attend a school in California. The papers were not presented to her for signature until the afternoon of the day her departure for that state was arranged for. The papers were executed in the office of the brother of the defendant John I. Daniel, the brother officiating as notary. The plaintiff alone represented her side of the controversy, and, when she suggested showing the papers presented for signature to her attorney, was dissuaded from so doing. The only ones of the instruments that are drawn with technical skill are the instruments passing from the plaintiff to the defendants. The agreement to dismiss is in technical language, and the deeds executed by the plaintiff are carefully drawn and regularly executed. The instruments delivered to the plaintiff were prepared either by the defendant John I. Daniel or by him with the aid of his brother. In the purported deed to her of the land in Arizona, all of the words of grant are carefully erased, a condition is inserted in it which would render it nugatory as a deed even were it sufficient otherwise, and the notary neglected to authenticate the acknowledgment with his official seal, although no such oversight occurred in the execution of any of the other instruments. The body of the instrument and the body of the acknowledgment bear a date later than the day it was actually executed. The plaintiff was not permitted to retain the deed, but it was carried to Arizona either by the defendant John I. Daniel or by a brother of the plaintiff ostensibly to be recorded. After reaching Arizona, the defendant wrote a letter to his codefendant in which he told her to tell the plaintiff that—

"We have lost our roll of bedding and many other things on the said desert and the quitclaim deed of hers tell her it was no good any way as unkle Geo. forgot to put his seal on it and also the year was left out and there was no money consideration so the loss to her was nothing. * * * Be sure and tell her all these things as we had rather you would than to say anything to her."

The part of the letter containing these words was sent by the codefendant to the plaintiff, and afterwards the plaintiff brought the matter to her father's attention. But neither then nor at any time did he make or offer to make a new conveyance to take its place. Subsequent events developed that the instrument was not lost, as it was afterwards put into the evidence from the defendant's possession. True, he explains that it was carried by a brother of the plaintiff, who mislaid it and reported it as lost. This, however, but hooks him with another horn of the dilemma. It shows, if true, that he knew at the time of its execution of its defects, and that he did not then see fit to have the defects corrected. In this connection it may be mentioned that the quitclaim deed from the plaintiff to the defendant described as part of the land conveyed the 40-acre tract

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which the defendant purported to convey to the plaintiff by this instrument. The evidence makes it clear also that the contract with reference to the schooling was not intended for delivery. The evident surprise of the defendant John I. Daniel when he found that the plaintiff had possession of it is too obvious to be overlooked, and to overcome its effect he denied that it bore his signature. He was compelled to admit, however, that the body of the writing, with the exception of the concluding sentence, was in his handwriting, and that it was one of the instruments prepared in contemplation of settlement; his evidence being that another instrument more specific in its terms was actually delivered. The plaintiff testified that the instrument was written out and signed by her father, and that the disputed line was put in by him after she had read it over and suggested that no definite time during which she might attend school was fixed, and that no other or different instrument was given her. The instrument is a part of the evidence, and its perusal leaves no doubt as to the genuineness of the signature, nor does it leave in doubt the truthfulness of the plaintiff's testimony as to the added line. The necessity for questioning its genuineness is made clear when it is understood that it disputes much of the oral testimony given by defendant concerning this part of the transaction.

[4, 5] The conduct of the parties subsequent to the execution of the instrument is gone into in much detail. This we shall not review. On the whole the evidence is convincing that the defendants did not act in good faith with the plaintiff, but intended to procure such interests as she had in the property without giving her the actual benefits she was led by them to believe she would receive as a consideration for her interests. But the defendants contend that, taking the plaintiff's version of the transaction at its full worth, nothing more is shown than the execution of a contract and its subsequent breach, and that this does not establish a preconceived intention not to perform. But, while we freely concede that the conclusion here drawn correctly follows the premise as stated, we cannot concede that the evidence bears the construction put upon it. To our minds the evidence is convincing, if not conclusive, that the defendants never intended an honest settlement, that they not only did not intend to carry out the purported agreement, but that they did not intend that the plaintiff should have or retain the written evidences of the settlement purported to be executed in her favor. This is fraud vitiating the settlement, not a mere breach of a contract of settlement.

"We have no doubt that the weight of authority sustains the appellant's contention that, if the promise is made merely as a means of deceiving and with no intention to perform, it constitutes such fraud as will support an action for deceit and entitle the injured party to a rescission." Hewett v. Dole, 69 Wash. 163, 124 Pac. 374.

[6] There was no error in refusing to enter a formal judgment at the conclusion of this part of the hearing so that an appeal could be taken therefrom. There was but one action, and one judgment is all that was necessary.

Having reached the conclusion that the plaintiff is not estopped to maintain her action by the attempted settlement, we pass to the question of her interest in the property. To an understanding of this branch of the controversy a further statement of the facts is necessary. The property in this state, asserted to have been formerly the community property of John I. Daniel and the plaintiff's mother, was formerly the property of one Cyrus Happy. In September, 1899, Mr. Happy leased the property to one Jay Daniel, a brother of the defendant John I. Daniel, for a term of three years, with the privilege of renewal for a like period. At that time the lot was vacant, and the lease granted the lessee the privilege of constructing a building on the lot. The lease was not placed of record. Shortly after the execution of the lease a building was erected on the lot; the contract therefor being let by the lessee to a firm of builders. In November, 1900, the lessor and a real estate broker approached Mr. Happy with a proposition to purchase the lot. The terms offered were satisfactory, and at their request he deeded the property to one Charles Crosby; the consideration being paid by the check of the broker. Mr. Happy had no negotiations with Crosby, and does not remember of having met him until after the commencement of the present action. Crosby placed a mortgage on the property after obtaining the deed; both instruments being filed for record at the same time by the broker. Crosby held the legal title to the property until January 18, 1904, when he deeded it to Rolland B. Reed. Reed deeded the property to J. H. Ross on March 10, 1904, and he in turn deeded it to the defendant by a deed dated May 17, 1907, which was recorded on November 26, 1909. While Ross held the legal title he placed a number of mortgages upon it, and these instruments, together with the deeds mentioned, are the only recorded instruments which affected the title to the property since its acquisition from Happy. In addition to these instruments, however, a number of unrecorded instruments pertaining to the title were introduced in evidence: (1) An agreement dated March 11, 1904, entered into betweeh Jay Daniel and John I. Daniel in which it is recited that the property is the property of Jay Daniel, and in which he agreed to sell and does sell to John I. Daniel an undivided

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half interest in the property for a stated consideration, a part to be paid in cash and the balance in installments; the agreement further provides that J. H. Ross shall act as trustee for both parties, that John I. Daniel shall have the management of the property, and that J. H. Ross shall execute a deed to a one-half interest in the property to John I. Daniel, which shall be attached to the agreement and placed in escrow with G. P. Daniel, "and to be delivered upon request of both parties present"; (2) a deed dated March 11, 1904, from J. H. Ross to John I. Daniel for an undivided half interest in the property; (3) a deed dated April 10, 1906, from J. H. Ross to Jay Daniel for an undivided one-half interest in the property; and (4) a power of attorney dated March 11, 1904, from J. H. Ross to John I. Daniel, empowering Daniel to lease the property mentioned, collect the rents, and to transact all business pertaining thereto. It is conceded, or, if not conceded, overwhelmingly proven, that neither the broker who paid the purchase price for the property to Happy, Crosby, to whom the property was then deeded, Reed, who received title from Crosby, or Ross, the grantee of Reed, ever had any interest in the property. The broker was the person who negotiated the loan by which the purchase price was procured, and Crosby and Ross were related by marriage to the Daniel brothers. Of Reed nothing is shown further than that he appeared before G. P. Daniel at the time of the execution of his deed to Ross.

It is the plaintiff's contention that John I. Daniel has had at all times since the acquisition of the lease from Happy an interest in the property; that this interest was a half interest up to the time he received a conveyance of the full legal title from Ross in 1907, and from thence on the entire interest. It is the defendant's contention that the defendant John I. Daniel first acquired an interest in the property on March 11, 1904, by purchase from Jay Daniel, evidenced by the written agreement entered into between them bearing that date.

In support of her contention the plaintiff relies, in addition to the record chain of title from Happy to John I. Daniel, and the concession that the intermediary title holders had no beneficial interest in it, upon acts and declarations of John I. Daniel concerning the property prior to his acquisition of the legal title. The testimony intended to connect the defendant with the title was in brief this:

First, that of O. R. Stockwell. This witness testified that, when the lease from Happy was in contemplation, opposition was met from another brother who owned a lot in the block in which the property was situated, and who desired the property himself; that Jay Daniel and John I. Daniel together approached the witness and requested that he see the other brother and endeavor to have him withdraw his opposition.

Second, that of the witness Hastie. This witness testified that he was one of the contractors who constructed the building after its lease to Jay Daniel; that during the course of the work John I. Daniel was around the building overseeing the construction work; that he directed such alterations to be made in the manner of construction as were made; and that he went with the witness to a neighboring village to purchase lumber, explaining his acts by saying he had an interest in the property, was putting up most of the money, and desired to get it as cheaply as possible.

Third, that of James R. Congleton, from whom the lumber was purchased. This witness could not recall the circumstance attending the purchase of the lumber, but testified that after a portion of it had been delivered a complaint was made concerning the character or quality of the lumber purchased, and that he visited the building then in the course of construction and adjusted the difficulty with the defendant John I. Daniel.

Fourth, that of James Cleveland. This witness testified that at the time the building was being constructed he operated a hotel on a lot adjacent to the building; that he repeatedly saw the defendant about the premises; that he had a conversation with him concerning the sewer connections with the building; that the building as then constructed did not cover the entire lot; and that the defendant endeavored to sell him the uncovered portion.

Fifth, that of Claudia St. Vitieux and her husband, who testified to leasing a portion of the building from and paying rent to the defendant John I. Daniel.

Sixth, that of J. H. Ross and his wife, who testified to declarations made by John I. Daniel, indicating ownership in him of an interest in the property from the time of the execution of the lease by Happy.

Seventh, that of the plaintiff herself, who testified to statements made by her father to the effect that she had money coming to her from her mother's estate.

In addition to the foregoing there were acts and circumstances shown which we shall not detail, consistent with ownership, but perhaps not inconsistent with some other or different relation.

[7-10] The foregoing testimony went into the record in the court below over the objection of the defendants, and in this court they urgently insist that it was inadmissible. It is argued, first, that "it is an attempt to establish an interest in land in derogation of the written title, and in violation of the fundamental rule against the varying of written instruments by oral testimony." But we can-

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not believe the evidence open to these objections. Subsequent to the deed from Happy to Crosby and prior to the time the defendant Daniel acquired the legal title, the holders of the legal title were not the actual owners of the property. They held it in trust for another or for others, and who that other was or who those others were is the principal issue in the present controversy. If the defendant, now asserting the contrary, was such actual owner, the plaintiff has an interest in the property; if he was not such actual owner, she has no interest. Plainly, on an issue between the plaintiff and the defendant as to the ownership of the property, the defendant's acts tending to show ownership on his part and his declarations and admissions of ownership are admissible. Nor is it material that the acts occurred or the admissions were made prior to the time the controversy between the parties arose. They were made at the time when ownership is sought to be shown, and "in a civil action the admissions by a party of any fact material to the issue are always competent evidence against him, wherever, whenever, or to whomsoever made." Reed v. McCord, 160 N. Y. 330, 54 N. E. 737. Nor is it merely impeaching evidence to be introduced in contradiction of the testimony of a party to the record; on the contrary, it is independent, substantive evidence tending to prove the issue, and may be given by a party as part of his evidence in chief. Hart v. Pratt, 19 Wash. 560, 53 Pac. 711. Nor was there here a trust relation between the defendant and the plaintiff's ancestor. Their relation arose from the operation of law—the community property law (Rem. Code 1915, § 5917)—and if John I. Daniel, prior to his wife's death, procured a beneficial interest in the property, the interest was community property, which the plaintiff could inherit. Hence the evidence in no way tended to establish a trust relation, much less an express trust, which cannot be established by parol.

[11] Another contention is that the action is barred by the statute of limitations. This contention is founded on the provisions of section 786 of the Code (Remington's), which provides that all actions brought for the recovery of real property of which any person may be possessed by actual, open, and notorious possession for seven successive years, having a connected title deducible of record from the United States, shall be brought within seven years next after such possession is taken. But it will be remembered that the defendant first came into open and notorious possession of the property when the deed from Ross to him was recorded on November 26, 1909. Prior to that time he kept his interests concealed, dealing with the land through others who were the ostensible and record owners. The possession such as he exercised prior to the record of the deed was not so open and notorious as to start the running of the statute. The action was commenced well within the seven-year period after the deed was recorded, and in consequence is not barred by the statute cited.

[12] Other contentions are that the complaint does not state and the proofs do not establish a cause of action. As to the complaint little need be said. Conceding that it is defective, the concession is not fatal to the plaintiff's right of recovery. The defects were amendable and we are admonished by the statute to treat all amendments which could have been made as actually made. The rule is especially applicable to cases of this sort which are tried in this court de novo.

[13] As to the sufficiency of the evidence, we are not disposed to disturb the findings of the trial court. The strongest proofs on the defendant's behalf is perhaps the written instruments between the defendant John I. Daniel and his brother Jay, wherein the defendant purported to acquire his first interest in the property. This instrument bears a date subsequent to the death of the plaintiff's mother, and, if it is genuine, conclusively establishes that the plaintiff has no interest in the property. But the trial court concluded that this was only another indicia of the defendant's fraud; that it was not what it purported to be, but was executed for evidentiary purposes—possibly to show want of necessity for administration upon his wife's estate. It is significant that on this question Jay Daniel, the other party to the instrument, was not called as a witness, although the record shows him to have been within the reach of the process of the trial court. But we think it unnecessary to discuss the evidence further. Taking it as a whole, and giving full effect to the defendant's denial and his very plausible version of the evidence militating against him, we cannot say that the evidence does not preponderate in favor of the plaintiff.

[14, 15] The concluding contention is that the court erred in adjudging the plaintiff entitled to an accounting of the rents, issues, and profits of the property subsequent to the death of the mother. Cases are cited from this court where such accountings have been denied. But whether an accounting will or will not be allowed depends upon the facts of the particular case. Where one tenant in common enters upon the common estate which in its then condition yields no profit, and so improves it as to make it productive, he is entitled to all of the profits produced by means of his improvements. Leake v. Hayes, 13 Wash. 213, 43 Pac. 48, 52 Am. St. Rep. 34. And also when the profits are the result of the individual labors of the tenant in possession, and no demand for an accounting has been made, an accounting will not be decreed.

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Crodle v. Dodge, 99 Wash. 121, 168 Pac. 986. But the general rule is to the contrary; the instances where an accounting is refused being exceptions to, and not expressive of, the general rule. Eckert v. Schmitt, 60 Wash. 23, 110 Pac. 635; Schuster v. Schuster, 84 Neb. 98, 120 N. W. 948, 29 L. R. A. (N. S.) 224, 18 Ann. Cas. 1078, and notes.

[16] In this case we think the court rightly decreed an accounting. The property was productive at the time the plaintiff's interest was acquired. It has been withheld from her under an adverse claim. At no time would a demand for her share of the income have availed her anything, and, furthermore, the tenant in possession occupied towards her a fiduciary relation. The case is thus within the rule, not an exception to the rule.

The decree as entered by the trial court decrees the plaintiff to be the owner of an undivided one-twelfth interest in and to the property hereinbefore specifically described, and to be entitled to an accounting for one-twelfth of the rents, issues, and profits thereof received by the defendant J. I. Daniel since the death of the plaintiff's mother on December 14, 1903. It further decrees that in such accounting it be ascertained what mortgages existed on the property at the death of the mother and that now exist on the property placed thereon subsequent to the death of the mother, "and that it likewise be ascertained what use and disposition was made by defendant J. I. Daniel of the funds received from any such mortgage so found to exist against such property, and that to the extent of any part of the money so received, if any, that may have been used or diverted to some purpose other than the payment of valid mortgage lien or liens and the improvement or maintenance or to the payment of taxes and assessments against said property, the plaintiff be and is hereby given a lien on the undivided eleven-twelfths of said property owned by the defendants, in proportion as plaintiff's interest therein may be affected by such existing lien." It was further decreed that the plaintiff has no interest in the other property described in the complaint, and the defendants were decreed to be the owners of such property, free and clear of any claim of the plaintiff.

The court refused the request of the plaintiff to decree with reference to the land in the state of Arizona, and refused to direct an accounting of the profits of the land awarded to the plaintiff prior to the death of her ancestor.

[17, 18] The plaintiff's appeal questions certain of these rulings, the first of which is the refusal to decree with respect to the Arizona land, but there was no error in this respect. The plaintiff's interest in the land, if any she has, is that of a tenant in common with the defendant. She has no record title. No question of trust is involved. The defendant is in possession asserting absolute title in himself. The question involved therefore is title and right of possession in plaintiff, and the rule is fundamental that title and right of possession to real property must be tried in the state where the land is situated. The trial court rightly determined that it was without jurisdiction. Olympia Mining & Milling Co. v. Kerns, 64 Wash. 545, 117 Pac. 260; Lindsley v. Union Silver Star Mining Co., 26 Wash. 301, 66 Pac. 382; 15 C. J. p. 742.

[19] A second contention is that the plaintiff is entitled to an accounting of the rents, issues, and profits of the property accruing prior to her mother's death. But we think the contention unfounded. The plaintiff took her interest in the property as the heir of her mother; that is, such an interest as her mother had and no other. Her mother's interest was a community interest, and between members of the community there can be no accounting, at least until after its dissolution by divorce or some other method authorized by law. Death, however, is not such a method, and since the mother had no right to an accounting for these profits, her heirs could acquire none by inheritance. The plaintiff's learned counsel, to sustain the contention, assert the principles involved in trust estates, but clearly there was here no trust of any sort. On the death of the mother the defendant John I. Daniel and the plaintiff became tenants in common of the property. When, therefore, Daniel took possession of the property, he became a tenant in common in possession, and the plaintiff's rights are such and such only as pertain to such a situation. She has the right to recover her interest from the cotenant in possession, and the right to recover her proportionate share of the profits accruing during the possession which have been taken and appropriated by the tenant in possession. The profits were not trust funds to be followed into other property.

[20] Some question is made concerning the provisions of the decree in relation to the existing mortgages upon the property. As to the validity of these mortgages between the mortgagee and the appellant the question, of course, is not here for determination. As between the plaintiff and the defendants it is equally clear that they are liens only upon the defendant's interests. The decree, as we understand it, does nothing more than recognize these principles, and we see no necessity for directing its modification in that respect.

The decree is affirmed.

MAIN, MOUNT, HOLCOMB, and PARKER, JJ., concur.

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(180 Cal. 338)

VARCOE v. LEE et al. (S. F. 7980.)

(Supreme Court of California. May 8, 1919.)

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1. NEW TRIAL ⟸70—GROUNDS—SUFFICIENCY OF EVIDENCE.

In negligence action, based on reckless driving of automobile at excessive speed, evidence that automobile was brought to a stop within 10 feet after it struck child does not warrant setting aside verdict for plaintiff on ground that it demonstrates that automobiles was traveling at a speed of 10 miles or less, since jury may have disbelieved that automobile came to a stop within 10 feet, or that it could not be stopped within that distance if traveling more than 10 miles an hour, or may have disbelieved both propositions.

2. MUNICIPAL CORPORATIONS ⟸706(7)—USE OF STREETS — CONTRIBUTORY NEGLIGENCE—CONDUCT OF CHILD.

A child who, after waiting for wagons and street cars to pass, ran, instead of walked, across street, was not, as a matter of law, guilty of contributory negligence.

3. APPEAL AND ERROR ⟸1004(1)—DISCRETION—DAMAGES.

Appellate court's power over excessive damages exists only when the facts are such that the excess appears as a matter of law, or is such as to suggest at first blush passion, prejudice, or corruption on the part of the jury.

4. DEATH ⟸99(3) — EXCESSIVE DAMAGES—DEATH OF CHILD.

Verdict of $5,000, given parent for death of child killed by automobile, is not excessive as a matter of law, or such as to suggest passion, prejudice, or corruption on the part of the jury.

5. APPEAL AND ERROR ⟸1050(1)—REVIEW—HARMLESS ERROR—EVIDENCE.

In a negligence action, based on driving of automobile at excessive speed, the admission of traffic ordinance limiting speed to 15 miles an hour was harmless, where Motor Vehicle Act, § 22, subd. "b," which was applicable to case, limited the speed at place where accident took place to 15 miles an hour.

6. APPEAL AND ERROR ⟸1064(2)—REVIEW—HARMLESS ERROR.

In action for child's death by automobile, instruction that that portion of the street at which the accident took place was a business district, if on weight of the evidence, was harmless, where it was a matter of common knowledge, and was an undisputed fact, that such street at such point was a business street.

7. EVIDENCE ⟸1—JUDICIAL NOTICE—APPELLATE COURT.

An appellate court can properly take judicial notice of any matter of which any court of original jurisdiction may properly take notice.

8. EVIDENCE ⟸3—JUDICIAL NOTICE.

That trial judge has actual knowledge of a fact, or that fact is a matter of common knowledge and notoriety, does not warrant him taking judicial knowledge thereof, where fact is not indisputable.

9. EVIDENCE ⟸1—"JUDICIAL NOTICE"—DEFINITION.

"Judicial notice" is a judicial short cut, a doing away, in the case of evidence, with the formal necessity for evidence, because there is no real necessity for it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Judicial Notice.]

10. EVIDENCE ⟸5(1) — JUDICIAL NOTICE—MATTERS OF COMMON KNOWLEDGE.

The power of judicial notice as to matters of general knowledge is to be used with caution, and if there is any doubt whatever, either as to the fact itself or as to its being a matter of common knowledge, evidence should be required.

11. EVIDENCE ⟸5(1) — JUDICIAL NOTICE—MATTERS OF COMMON KNOWLEDGE—TEST.

Where it is sought to avoid or excuse production of evidence, because the fact to be proven is one of general knowledge and notoriety, the test is whether the fact is one of common everyday knowledge in the particular jurisdiction, which every one of average intelligence and knowledge of things about him can be presumed to know, and whether it is certain and indisputable.

12. EVIDENCE ⟸1—JUDICIAL NOTICE—DISCRETION OF COURT.

There is no error or impropriety in requiring evidence as to a fact, even though it be a matter of judicial cognizance.

13. EVIDENCE ⟸10(1) — JUDICIAL NOTICE—CHARACTER OF STREET.

In an action being tried by superior court of city and county of San Francisco, relating to an automobile accident on Mission street, between Twentieth and Twenty-Second streets, the court will take judicial notice that such portion of Mission street is a business district; its character as a business street being well known to people of San Francisco.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Stella Varcoe, substituted for J. J. Varcoe, deceased, against Cuyler Lee and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Redding, Boalt & Pier and John T. Ryan, all of San Francisco (Joseph D. Redding, and Fletcher G. Flaherty, both of San Francisco, of counsel), for appellants.

Marcel E. Cerf, C. H. Sooy, and H. W. Glensor, all of San Francisco, and U. S. Webb, Atty. Gen. (William F. Herrin, of San Francisco, of counsel), for respondent.

Albert Lee Stephens, City Atty., and Wm. P. Mealey, Deputy City Atty., both of Los Angeles, George Lull, City Atty., and Mau-

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rice T. Dooling, Jr., Asst. City Atty., both of San Francisco, amici curiæ.

John W. Stetson, of Oakland, for California State Automobile Ass'n.

David R. Faries and Ivan Kelso, both of Los Angeles, for Auto Club of Southern California.

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OLNEY, J. This is an action by a father to recover damages suffered through the death of his child, resulting from her being run over by an automobile of the defendant Lee, driven at the time by the other defendant, Nichols, the chauffeur of Lee. The automobile was going south on Mission street in San Francisco, and was approaching the crossing of Twenty-First street, when the child, in an endeavor to cross the street, was run over and killed. The cause was tried before a jury, which returned a verdict of $5,000 for the plaintiff. From the judgment upon this verdict, the defendants appeal.

The alleged negligence, upon which plaintiff's right to recover is predicated, consisted in the speed at which it is claimed the automobile was proceeding. In the opening brief for the appellants it was contended, first, that the evidence demonstrated that the automobile was not proceeding at a negligent rate of speed; second, that the child was guilty of contributory negligence; and, third, that the amount of damages is excessive. None of these contentions requires particular consideration.

[1] The contention that the evidence demonstrated that the machine was not traveling at a negligent rate of speed is based on testimony that it was brought to a check stop 10 feet after it struck the child, and that a machine of the weight of that involved could not be brought to a stop in 10 feet if it were proceeding more than 10 miles an hour. On the other hand, there was testimony that the machine was going at a high rate of speed, from 30 to 40 miles an hour. It cannot be said that the testimony relied on demonstrates a speed of 10 miles or less, so that the verdict of the jury to the contrary must be set aside, assuming that a speed of 10 miles an hour could not under the circumstances of the case be considered negligence. The jury may well have disbelieved, either that the car came to a stop in 10 feet, or that it could not be stopped within that distance if traveling more than 10 miles an hour, or it may have disbelieved both propositions.

[2] The claim that the child was guilty of contributory negligence is based on the fact that she ran across the street, instead of walking, and was looking the other way when she got in front of the car. There was testimony that she was seen waiting on the left-hand side of the street, with relation to the chauffeur, for some wagons and a street car going north to pass, and that as soon as they passed she started to run across the street. Not improbably she ran across, thinking it the safest way to get across. Certainly there is nothing to justify taking from the jury the question as to whether or not her conduct amounted to contributory negligence, particularly in view of her youth.

[3, 4] As to the claim that the verdict of $5,000 is excessive, "our power over excessive damages exists only when the facts are such that the excess appears as a matter of law, or is such as to suggest at first blush, passion, prejudice, or corruption on the part of the jury." Bond v. United Railroads, 159 Cal. 270, 286, 113 Pac. 366, 373 (48 L. R. A. [N. S.] 687, Ann. Cas. 1912C, 50). The present case hardly comes within this rule.

In appellants' reply brief a further question is raised for the first time. As we have stated, the claim of negligence is based upon the speed at which the machine was going. On this point the testimony was sharply conflicting. The plaintiff offered, and the court over the objection of the defendants admitted, a copy of the San Francisco traffic ordinance specifically providing that Mission street between certain limits, which include the point of accident, is a heavily traveled street and the speed of vehicles shall not exceed 15 miles an hour. When he came to charge the jury, the trial judge instructed them that, if they found that the defendant Nichols was running the automobile along Mission street at the time of the accident at a greater speed than 15 miles an hour, he was violating the city ordinance, and also the state Motor Vehicle Act, and that such speed was negligence in itself. The trial judge then read to the jury the portion of subdivision "b" of section 22 of the Motor Vehicle Act (St. 1913, p. 639), which provides that it shall be unlawful to operate a motor "in the business district" of any incorporated city or town at a greater speed than 15 miles an hour, and defines (see section 1) a business district as "territory * * * contiguous to a public highway, which is at that point mainly built up with structures devoted to business." Having read this definition, the court proceeded with its charge as follows:

"That is the situation on Mission street between Twentieth and Twenty-Second streets, where this accident happened, so that is a business district and the maximum legal rate of speed on that street at the time of the happening of this accident was 15 miles an hour."

In connection with the admission in evidence of the ordinance mentioned, and the giving of the foregoing instructions, it is contended by appellant, first, that the state law superseded the municipal ordinance and rendered the latter inapplicable; and, second, that the instruction that Mission street at the point in question was a business district and therefore the maximum legal speed

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there was 15 miles an hour was a charge as to a question of fact and an invasion of the province of the jury.

On the first point, as to whether or not the state law superseded and rendered inoperative the city ordinance, elaborate briefs have been filed by third parties interested in the question so presented. By reason, however, of our views upon the second point we need not decide it. It is manifest that the jury was not concerned with the reason why a speed in excess of 15 miles an hour was illegal. They were concerned only with the proposition that it was in truth illegal. If it were, they were not misled in the discharge of their function, no matter how erroneous the reason given may have been.

[5] The situation is that either the city ordinance or the state law applies, or both. If the ordinance applies, either alone or concurrently with the state law, no question arises, for the provisions of the ordinance specifically cover the place of accident. If it does not apply, but the state law does exclusively, and under the latter's provisions a speed at the point of accident in excess of 15 miles an hour was illegal, there was still no prejudicial error. We are brought, therefore, to the second point, that the trial judge erred in charging the jury that the location of the accident was in "a business district" as those words are defined in the state act, with the consequent result that 15 miles an hour was the maximum legal speed.

So far as the record itself goes, there is little to show what the character of Mission street between Twentieth and Twenty-Second streets is. The defendant Nichols himself refers to it in his testimony as part of the "downtown district," undoubtedly meaning thereby part of the business district of the city. The evidence shows incidentally that at the scene of the accident there was a drug store, a barber shop, a haberdashery, and a saloon. If there had been any issue or question as to the character of the district, the record in this meager condition would not justify the taking of the question from the jury, as was undoubtedly done by the instruction complained of.

[6] The actual fact of the matter is, however, that Mission street, between Twentieth and Twenty-Second streets, is a business district, within the definition of the Motor Vehicle Act, beyond any possibility of question. It has been such for years. Not only this, but its character is known as a matter of common knowledge by any one at all familiar with San Francisco. Mission street, from its downtown beginning at the water front to and beyond the district of the city known as the Mission, is second in importance and prominence as a business street only to Market street. The probabilities are that every person in the courtroom at the trial, including judge, jury, counsel, witnesses, parties, and officers of the court, knew perfectly well what the character of the location was. It was not a matter about which there could be any dispute or question. If the court had left the matter to the determination of the jury, and they for some inconceivable reason had found that it was not a business district, it would have been the duty of the court to set aside the verdict. We are asked now to reverse the judgment, because the court assumed, without submitting to the jury, what could not be disputed, and what he and practically every resident in the county for which the court was sitting knew to be a fact. If error there was, it is clear that, upon the actual fact, there was no prejudice to the defendants.

It would have been much better if counsel for the plaintiff or the trial judge himself had inquired of defendants' counsel, before the case went to the jury, whether there was any dispute as to the locality being a business district within the meaning of the state law. There could have been but one reasonable answer, and, if any other were given, the matter could have been easily settled beyond any possibility of question. But this was not done, and we are now confronted by the question whether either this court or the trial court can take judicial notice of the real fact.

[7] An appellate court can properly take judicial notice of any matter of which the court of original jurisdiction may properly take notice. Pennington v. Gibson, 16 How. 65, 14 L. Ed. 847; Salt Lake City v. Robinson, 39 Utah, 260, 116 Pac. 442, 35 L. R. A. (N. S.) 610, Ann. Cas. 1913E, 61; 15 Ruling Case Law, 1063.

In fact, a particularly salutary use of the principle of judicial notice is to sustain on appeal, a judgment clearly in favor of the right party, but as to which there is in the evidence an omission of some necessary fact which is yet indisputable and a matter of common knowledge, and was probably assumed without strict proof for that very reason. Campbell v. Wood, 116 Mo. 196, 22 S. W. 796.

The question, therefore, is: Was the superior court for the city and county of San Francisco, whose judge and talesmen were necessarily residents of the city, entitled to take judicial notice of the character of one of the most important and best-known streets in the city? If it were, the court was authorized to charge the jury as it did. Section 2102, Code Civ. Proc.

[8] It should perhaps be noted that the fact that the trial judge knew what the actual fact was, and that it was indisputable, would not of itself justify him in recognizing it. Nor would the fact that the character of the street was a matter of common knowledge and notoriety justify him in taking the question from the jury, if there were any

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possibility of dispute as to whether or not that character was such as to constitute it a business district within the definition of the statute applicable. If such question could exist, the fact involved—whether the well-known character of the street was sufficient to make it a business district—was one for determination by the jury. But we have in this case a combination of the two circumstances. In the first place, the fact is indisputable and beyond question. In the second place, it is a matter of common knowledge throughout the jurisdiction in and for which the court is sitting.

[9] A consideration of the reasons underlying the matter of judicial notice and its fundamental principles leaves, we believe, but little doubt as to its applicability here. Judicial notice is a judicial short cut, a doing away, in the case of evidence, with the formal necessity for evidence, because there is no real necessity for it. So far as matters of common knowledge are concerned, it is saying there is no need of formally offering evidence of those things, because practically every one knows them in advance, and there can be no question about them. The rule in this respect is well stated in 15 R. C. L. 1057, as follows:

"It may be stated generally with regard to the question as to what matters are properly of judicial cognizance that, while the power of judicial notice is to be exercised with caution, courts should take notice of whatever is or ought to be generally known, within the limits of their jurisdiction, for justice does not require that courts profess to be more ignorant than the rest of mankind. This rule enumerates three material requisites: (1) The matter of which a court will take judicial notice must be a matter of common and general knowledge. The fact that the belief is not universal, however, is not controlling, for there is scarcely any belief that is accepted by every one. Courts take judicial notice of those things which are common knowledge to the majority of mankind, or to those persons familiar with the particular matter in question. But matters of which courts have judicial knowledge are uniform and fixed, and do not depend upon uncertain testimony; as soon as a circumstance becomes disputable, it ceases to fall under the head of common knowledge, and so will not be judicially recognized. (2) A matter properly a subject of judicial notice must be 'known'; that is, well established and authoritatively settled, not doubtful or uncertain. In every instance the test is whether sufficient notoriety attaches to the fact involved as to make it safe and proper to assume its existence without proof. In harmony with that view it has been said that courts must 'judicially recognize whatever has the requisite certainty and notoriety in every field of knowledge, in every walk of practical life.' (3) A matter, to be within judicial cognizance, must be known 'within the limits of the jurisdiction of the court.'"

The three requirements so mentioned—that the matter be one of common and general knowledge, that it be well established and authoritatively settled, be practically indisputable, and that this common, general, and certain knowledge exist in the particular jurisdiction—all are requirements dictated by the reason and purpose of the rule, which is to obviate the formal necessity for proof when the matter does not require proof.

[10] It is truly said that the power of judicial notice is, as to matters claimed to be matters of general knowledge, one to be used with caution. If there is any doubt whatever, either as to the fact itself or as to its being a matter of common knowledge, evidence should be required; but, if the court is of the certain opinion that these requirements exist, there can properly be no hesitation. In such a case there is, on the one hand, no danger of a wrong conclusion as to the fact—and such danger is the reason for the caution in dispensing with the evidence—and, on the other hand, purely formal and useless proceedings will be avoided.

Little assistance can be had by a search of the authorities for exactly similar cases. The one perhaps nearest to it that we have found is State v. Ruth, 14 Mo. App. 226. What may be a proper subject of judicial notice at one time or place may not be at another. It would be wholly unreasonable to require proof, if the fact became material, as to the general location in the city of San Francisco of its city hall before a judge and jury made up of residents of that city and actually sitting in the building. But before a judge and jury in another county proof should be made. The difference lies in the fact being one of common knowledge in one jurisdiction and not in the other. Similarly it has been held repeatedly that courts will judicially notice the general doctrines of any religious denomination prevalent within its jurisdiction, and yet it was held by an Ohio court, and properly held, in the early days of Christian Science, that notice would not be taken of the doctrines of that sect. Evans v. State, 9 Ohio St. C. Pl. Dec. 222, 6 Ohio N. P. 129. Now that the sect has grown to large numbers, and its general doctrines are a matter of common knowledge, it is as proper to notice them as to notice those of older denominations. As is well said by Wigmore (4 Wigmore on Ev. § 2580):

"Applying the general principle (ante, section 2565), especially in regard to the element of notoriousness, courts are found noticing, from time to time, a varied array of unquestionable facts, ranging throughout the data of commerce, industry, history, and natural science. It is unprofitable, as well as impracticable, to seek to connect them by generalities and distinctions; for the notoriousness of a truth varies much with differences of period and of place. It is even erroneous, in many, if not in most instances, to regard them as precedents. It is the spirit and example of the rulings, rather than

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their precise tenor, that is to be useful in guidance."

[11, 12] The test, therefore, in any particular case where it is sought to avoid or excuse the production of evidence because the fact to be proven is one of general knowledge and notoriety, is: (1) Is the fact one of common, everyday knowledge in that jurisdiction, which every one of average intelligence and knowledge of things about him can be presumed to know? and (2) is it certain and indisputable? If it is, it is a proper case for dispensing with evidence, for its production cannot add or aid. On the other hand, we may well repeat, if there is any reasonable question whatever as to either point, proof should be required. Only so can the danger involved in dispensing with proof be avoided. Even if the matter be one of judicial cognizance, there is still no error or impropriety in requiring evidence.

[13] Applying this test to the facts of the case, the matter is not in doubt. The character of Mission street is as well known to San Franciscans as the character of Spring street to residents of Los Angeles, or of State street to residents of Chicago, or of Forty-Second street to residents of New York, or of F street to residents of Washington. It is a matter of their everyday common information and experience, and one about which there can be no dispute.

The conclusion follows that the charge of the trial court that Mission street, between Twentieth and Twenty-Second streets, was a business district, was not error. The judgment is therefore affirmed.

We concur: SHAW, J.; LENNON, J.; LAWLOR, J.; MELVIN, J.; WILBUR, J.

ANGELLOTTI, C. J. (concurring). I concur in the judgment, and also in the opinion, except upon the question of judicial notice, a determination of which question appears to be considered by the majority opinion as essential to a conclusion that the trial court did not err in instructing the jury that Mission street, at Twenty-First street, was a "business district," within the meaning of the provision of the Motor Vehicle Act limiting speed in such a district to not exceeding 15 miles an hour. I am not satisfied that the opinion does not carry the doctrine of judicial notice to an unwarranted extent. It seems to me, after a careful consideration of the record, that the instruction referred to may fairly be upheld upon the theory that there was no question in the trial court as to the place of the accident being within such a district, and that this was something practically conceded on all hands. Certainly every scrap of evidence tending to throw any light whatever on the matter so tended to show, and the trial court apparently took the matter as granted. No complaint whatever was made as to these instructions until the closing brief of appellants was filed in this court. I do not think they should now be held erroneous.

(40 Cal. App. 582)

LAPIQUE v. SUPERIOR COURT OF LOS ANGELES COUNTY et al. (Civ. 2947.)

(District Court of Appeal, Second District, Division 1, California. April 5, 1919. Rehearing Denied May 5, 1919.)

APPEAL AND ERROR ⟹609—FURTHER TRANSCRIPT—TIMELY DEMAND AND SHOWING.

Where petitioner's demand upon reporter for further transcript was not made until after trial judge had regularly allowed and settled transcript, and demand upon judge for allowance and settlement of further reporter's transcript was not made until after certified transcript had been filed in Supreme Court, petitioner, without any special showing, is not entitled to settlement of an additional statement based upon reporter's certificate; the trial court's authority to settle transcript having been exhausted.

Application by John Lapique for a writ of mandate to compel L. H. Valentine, Judge of the Superior Court of Los Angeles County, to certify to the correctness of a reporter's transcript. Proceeding dismissed.

John Lapique, of Orange, in pro. per.
H. L. Dunnigan, Haas & Dunnigan, and J. J. Wilson, all of Los Angeles, for respondents.

CONREY, P. J. Application by John Lapique for a writ of mandate to compel the respondent judge to certify to the correctness of a reporter's transcript made pursuant to the demand of said Lapique, against whom judgment had been entered in an action wherein he was defendant, from which judgment he has an appeal pending in the Supreme Court. After alternative writ issued and an answer filed by the respondents, this matter has been submitted upon evidence taken by this court.

The judgment was entered on the 18th day of December, 1917. Within 10 days thereafter, Lapique served and filed his notice of intention to move for a new trial, and filed his notice to the clerk requesting a reporter's transcript.

The petition herein alleges that the court reporter made a transcript and certified to the truth and correctness thereof; that thereafter, on July 2, 1918, petitioner believed said transcript to be full, true, and correct, and that on that day respondent judge,

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who tried the case, made an order settling and allowing said transcript as a part of the record, but that said order was made without notice having been given as required by section 953a, Code of Civil Procedure; that on or about August 1, 1918, petitioner found that said reporter's transcript was defective, and on August 15, 1918, he demanded of the reporter a further transcript, in response to which the reporter did, on the 29th day of August, 1918, certify a further reporter's transcript; that on August 30, 1918, a notice was served on plaintiffs' attorneys and filed, stating that said reporter's transcript would be presented for allowance and settlement before the court on the 4th day of September, 1918; that on the 4th day of September the matter was continued until the 5th of September, 1918, and on the 5th of September was continued until the 6th day of that month; that at the hearings thereof Haas & Dunnigan, attorneys for the plaintiffs, did not appear; that on the 6th day of September, 1918, the trial judge refused to certify to the truth and correctness of said reporter's transcript on the grounds, "first, that the order appealed from is not an appealable order, and, second, that the transcript is not complete in that it does not set forth the title of the court and cause"; that said reporter's transcript is a full, fair, and correct transcript of the various proceedings described in the demand for transcript.

The evidence received herein shows that, as stated in the petition, an order of settlement was made by the judge on July 2, 1918, and that the same was made without notice; that on the 3d day of July, 1918, Lapique filed in the superior court an affidavit setting forth the fact that said order of July 2, 1918, had been made without notice, and thereupon an order was made, which was duly served upon the plaintiffs' attorneys, requiring them to appear before the court on the 6th day of August, 1918, at 9:30 a. m., to show cause why the reporter's transcript, "settled and allowed by the trial court without notice on the 2d day of July, 1918, should not be allowed to stand, settled and allowed by the trial court on July 2, 1918," in said action; that at the time specified in said action to show cause the matter was continued to Tuesday, August 13, 1918, at 9:30 a. m. The minutes of the court for August 13th showed that at the time to which said matter had been continued John Lapique appeared in court in propria persona, plaintiffs' attorneys not appearing, and "order to show cause granted by the court [Judge Valentine], and reporter's transcript settled and allowed by the court." Under that date a statement of such settlement and allowance, signed by the judge, appears at the end of the transcript. The evidence herein further shows that the reporter's transcript, certified, settled, and allowed as above stated, was filed in the Supreme Court on the 23d day of August, 1918. (Supreme Court No. L. A. 5837.)

It thus appears that petitioner's demand upon the reporter for a further transcript of the proceedings in question, which demand he alleges that he made on the 15th day of August, 1918, was not made until after the trial judge, after due notice and on request of the petitioner, had regularly allowed and settled the transcript which had been duly and regularly certified by the reporter, and that petitioner's demand upon the lower court and the judge thereof for allowance and settlement of such "further reporter's transcript" was not made until after the original duly certified transcript had been filed in the Supreme Court, where the appeal then was and now is pending.

The court's duty, as well as its authority, to settle a transcript, had been exhausted. If the order of settlement was made through mistake, inadvertence, surprise, or excusable neglect of the party who demanded the transcript, it may be that, upon application made as required by section 473, Code of Civil Procedure, he might have been relieved from such order. No such application appears to have been made. Petitioner seems to have relied upon the mistaken theory that, without any special showing of reasons for relief in the matter, he was entitled in the ordinary course of procedure to demand the settlement of an additional statement based upon the reporter's certificate to the correctness of a document containing matter additional to that contained in the settled transcript.

Petitioner's contentions herein are without merit, and the proceeding is dismissed.

We concur: SHAW, J.; JAMES, J.

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(40 Cal. App. 564)

CUNEO v. CUNEO. (Civ. 2776.)

(District Court of Appeal, First District, Division 2. California. April 4, 1919.)

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1. DIVORCE ⟸152 — FINALITY OF JUDGMENT—ENTRY IN DIVORCE SUIT.

In divorce suit entry upon minutes of court reading: "Plaintiff's prayer for a divorce is denied. Defendant's prayer for divorce is denied"—without the making and filing of findings upon issues tendered by the pleadings, and without such findings having been waived, is not final judgment.

2. JUDGMENT ⟸256(1)—FINDINGS TO SUPPORT—NECESSITY.

Where issues are tendered by the pleadings and findings thereon are not waived by the parties, there can be no rendition of judgment until such findings are made and filed with the clerk.

3. APPEAL AND ERROR ⟸130 — DECISIONS APPEALABLE—ORDER AS FINAL JUDGMENT.

Order denying motion for execution for alimony, made as court's entry upon minutes reading: "Plaintiff's prayer for a divorce is denied. Defendant's prayer for divorce is denied"—where findings upon the issues tendered by the pleadings were not waived by the parties and were not made and filed with the clerk, is not appealable; not being an order made after final judgment under Code Civ. Proc. § 963, inasmuch as such entry is not a final judgment.

Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by Anna Cuneo against John Cuneo. From an order denying plaintiff's motion for an order directing clerk to issue an execution for sum claimed to be due plaintiff as alimony, plaintiff appeals. Appeal dismissed.

Leon E. Prescott, of San Francisco, for appellant.

Joseph J. Bullock, of Redwood City, and Phil. J. Strubel, of San Francisco, for respondent.

HAVEN, J. In this action for divorce an order was made shortly after the filing of the complaint, requiring the defendant to pay to plaintiff's attorneys a certain sum on account of counsel fees, and further providing that defendant "pay forthwith to plaintiff personally the sum of $50 per month for the support and maintenance of the plaintiff pending this action, and the same sum every month thereafter pending this action, until the further order of this court." The action was subsequently brought to trial upon plaintiff's complaint, the allegations of which were denied by defendant's answer, and upon the cross-complaint of defendant; each party to the action seeking a decree of divorce against the other. On November 23, 1917, the following order was entered in the minutes of the court:

"This cause having been heretofore submitted to the court for consideration and decision, and now the court having considered the same and being fully advised herein, it renders the following decision: 'Plaintiff's prayer for a divorce is denied. Defendant's prayer for a divorce is denied.'"

On February 28, 1918, plaintiff made a motion for an order directing the clerk of the lower court to issue an execution in said action in favor of plaintiff and against the defendant for the sum of $150, claimed to be due her as alimony for three months, commencing December 16, 1917, and ending March 15, 1918. On March 18, 1918, the court made an order denying the said motion of plaintiff, from which latter order plaintiff attempts to prosecute this appeal.

[1-3] The entry in the minutes of the court on November 23, 1917, is not a final judgment in the action. Issues were tendered by the pleadings, and there is no showing that findings were waived. Consequently there could have been no rendition of judgment until such findings were made and filed with the clerk. Crim v. Kessing, 89 Cal. 478, 488, 26 Pac. 1074, 23 Am. St. Rep. 491. The record does not disclose that this has been done. The order from which this appeal is attempted to be taken is therefore not an order made after final judgment, and is not an appealable order under section 963 of the Code of Civil Procedure.

The appeal is dismissed.

We concur: LANGDON, P. J.; BRITTAIN, J.

(40 Cal. App. 623)

CLOVIS FRUIT CO. v. CALIFORNIA WINE ASS'N. (Civ. 2648.)

(District Court of Appeal, First District, Division 1, California. April 10, 1919. Rehearing Denied by Supreme Court June 9, 1919.)

SALES ⟸106 — NOTICE OF CANCELLATION—REASONABLE TIME.

In suit for defendant's alleged breach of contracts to purchase wine grapes raised by plaintiff's assignors, plaintiff's claim that defendant did not seasonably exercise his option to cancel contracts after brandy tax was raised was untenable in absence of showing of loss or prejudice to plaintiff by such delay.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by the Clovis Fruit Company, a corporation, against the California Wine Association, a corporation. Judgment for plaintiff, and defendant appeals. Reversed.

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Pillsbury, Madison & Sutro, of San Francisco (Alfred Sutro, of San Francisco, of counsel), for appellant.

Short & Sutherland, of Fresno, and Carl E. Lindsey, for respondent.

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KERRIGAN, J. Plaintiff, as assignor of 22 claims arising under as many separate contracts made by defendant with plaintiff's assignors for the purchase of grapes, brought suit against defendant for the alleged breach of the contracts. Plaintiff had judgment for $4,932.32, and defendant appeals.

The complaint consists of 22 separate causes of action. For the purposes of this appeal they may be said to be identical, as they grow out of similar action taken by defendant with regard to each of said contracts. The substance of each cause of action, of the answers thereto, and of the findings on the issues, is, it is conceded, correctly stated in defendant's opening brief, as follows: On a certain date plaintiff's respective assignor, mentioned in the particular cause of action, made an agreement with the defendant for the sale of the crops of wine grapes over a period of years at a fixed price per ton, grown on the respective vineyard of each assignor. In the vintage season of 1915, between August 15th and November 15th of that year, each respective assignor, it is alleged, raised and produced a certain tonnage of wine grapes, which he offered to deliver to defendant, but defendant refused to receive or to pay for the same. Each agreement is alleged to have been in full force and effect, and never to have been canceled, terminated, or ended. An assignment of each respective agreement to the plaintiff is alleged, and it is then alleged that plaintiff, by reason of the premises stated in each cause of action, has been damaged in a certain sum.

The answers to the causes of action may also, for the purpose of this appeal, be said to be identical. So far as material here the issues raised by the answer may be stated as follows: Defendant denied that any assignor offered to deliver any of the 1915 grapes to it, or that, in violation of the agreement, it refused to receive or pay for the grapes. It also denied that the agreement was in full force and effect, or that it had not been canceled or terminated or ended.

As a further and separate defense it averred that in each contract sued on it is provided that, should the United States laws be so modified that the tax on brandy used in fortifying should be greater than 6 cents per proof gallon, then the defendant might, at its option, cancel the contract by giving written notice of such cancellation to each respective assignor of plaintiff; that by the terms of the act of Congress of October 22, 1914, the United States laws were so modified that the tax on brandy used in fortifying was increased from 6 cents per proof gallon to 55 cents per proof gallon, and that on or about April 21, 1915, the commissioner of internal revenue of the United States ruled that on and after January 1, 1916, the tax on brandy used in fortifying would be increased to $1.10 per proof gallon, and that thereupon, and prior to the alleged tender of any grapes by each respective assignor of the plaintiff to the defendant, and prior to knowledge by the defendant of any assignment of the contract to plaintiff, defendant canceled or terminated the contract of each assignor by giving each assignor written notice of cancellation, and that each assignor accepted the notice, and thereafter treated the contract as canceled or terminated and of no force or effect.

The trial was by the court without a jury. The court found for the plaintiff, and made findings in accordance with the allegations of the complaint; it also found the averments of the separate and special defense of the answer to be true, except that it found that the defendant did not give notice of cancellation of the contracts within a reasonable time after the act of October 22, 1914, was passed, and that the contracts were therefore not canceled, but were in full force and effect.

At the trial plaintiff offered no evidence to sustain its allegation of a tender and offer of performance, taking the position that such evidence was unnecessary because of the fact that it appears from the matter set forth in defendant's further and separate defense that such an offer would have been futile. Against the objection of the defendant the court accepted this view, and at the conclusion of plaintiff's case denied defendant's motion for nonsuit. Thereupon in support of the allegations of its separate defense the defendant introduced evidence, from which it appeared that the plaintiff's various assignors had been given written notice, under date of June 1, 1915, of the cancellation of the contract.

It is conceded that an averment of performance will not be supported by proof of a legal excuse for nonperformance. Estate of Warner, 158 Cal. 441, 445, 111 Pac. 352. It is also conceded to be a general rule of pleading that a defendant may plead inconsistent defenses, and that where there are several answers an admission made in one is not available to destroy the efficacy of the averments or denials of the others. Miles v. Woodward, 115 Cal. 308, 46 Pac. 1076. These fundamental rules of pleading were ignored in the trial of this case, but the consequence of the failure to observe them, and several minor questions involving the correctness of rulings upon matters of evidence, need not be here considered, in view of the conclusion we have reached on a question which goes to the merits of the case.

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The principal question raised by the appeal is whether or not the defendant within a reasonable time exercised its option to cancel the contracts after the concurrence of the event giving it the right to do so. On this phase of the case the evidence is without conflict. Summarized, it shows that each of the contracts in question provided that if the tax on brandy used in fortifying wines should be increased from 6 cents a gallon the defendant might at its option terminate the contract by giving notice to that effect; that by an act of Congress of October 22, 1914, the tax on such brandy was increased from 6 to 55 cents per proof gallon; that on June 1, 1915, defendant gave written notice of cancellation of the contract. The contracts called for deliveries of grapes for the years from 1913 to 1917. It was agreed that the vintage season each year is from August 15th to November 15th, from which it is evident that no delivery of grapes could be made before the first-mentioned date.

What is a reasonable time in any case depends upon the circumstances of the particular case. Smith v. Pelton Water Wheel Co., 151 Cal. 394, 90 Pac. 934; Salmon Box Co. v. Helena Box Co., 147 Fed. 408, 77 C. C. A. 586. In the case of Colfax County v. Butler County, 83 Neb. 803, 120 N. W. 444, it is held that a reasonable time, when no time is specified, is a question of law, and depends upon the subject-matter and the situation of the parties.

Time, in the abstract, is not essential. It is material so far only as, when associated with other circumstances, it may produce injury or unjust consequences. The great object of the rule of law on this subject is to prevent injury or wrong; and the main question in each case should be, Is there any just cause, because of delay, to object to the cancellation? Hogan v. Tucker, 116 Ky. 918, 77 S. W. 197, 199. Here, while the notice of cancellation was given about 7 months after the occurrence of the event giving rise to the right of cancellation, it was yet 2½ months before the commencement of the vintage or crushing season and about 5 months before its close; and there is no evidence in the record to show that any of plaintiff's assignors were prejudiced because the notice was not sooner given. No witness testified that had earlier notice been given the assignors of plaintiff could have disposed of their grapes to better advantage than they actually did. Uncontradicted evidence introduced by the defendant was to the effect that according to the custom in Fresno county (the place in which these contracts were to be executed) contracts for the sale of grapes are made each year during the vintage season; and, indeed, the first witness called by the plaintiff, one of its assignors, testified that he made no attempt to sell his 1915 crop of grapes until September of that year. For aught that appears in the record the defendant may have had a very good reason for not sooner giving the notice of cancellation, which reason may have related to the mutual interest of the parties. It certainly does not appear that the delay was for any unfair purpose. But however that may be, plaintiff cannot base its claim that the notice was not timely upon a mere surmise or some possibility which has no foundation in fact. To substantiate its position that the notices were not seasonably given, plaintiff must base the same upon some competent evidence showing the assignors of plaintiff to have been injured or to have suffered loss or prejudice. This the plaintiff has not done, and the finding of the trial court that the notice of cancellation was not given within a reasonable time is not sustained by the evidence.

The judgment is reversed.

We concur: WASTE, P. J.; RICHARDS, J.

(40 Cal. App. 680)

SAN FRANCISCO BAR ASS'N v. McCLELLAN. (Civ. No. 2504.)

(District Court of Appeal, First District, Division 1, California. April 11, 1919.)

1. ATTORNEY AND CLIENT ⟸3(2)—DISBARMENT PROCEEDINGS — CONFLICTS IN EVIDENCE—RESOLVING IN FAVOR OF ACCUSED.

In a disbarment proceeding, a conflict in the evidence should be resolved in favor of accused.

2. ATTORNEY AND CLIENT ⟸44(2)—DUTY OF ATTORNEY—ACCOUNTING.

It is the duty of an attorney to notify his client with reasonable diligence of the collection by him of money due his client, and to promptly pay over the same upon settlement of his fee, and under no circumstances is he warranted in falsely stating that the money has not been received.

3. ATTORNEY AND CLIENT ⟸44(2)—DISBARMENT—GROUNDS.

Conduct of accused in failing to notify his client of collection of money due client until two months after receipt of money, while blameworthy, *held* not to require disbarment.

Proceedings by the San Francisco Bar Association for the disbarment of Clifford McClellan, an attorney and counselor at law. Accusation dismissed.

Frank S. Brittain, Nathan Moran, and Bert Schlesinger, all of San Francisco, for bar Ass'n of San Francisco.

Edward Lande, of San Francisco, for respondent.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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PER CURIAM. This is a proceeding instituted by the Bar Association of San Francisco for the disbarment of Clifford McClellan, an attorney and counselor at law.

The accusation contains three separate charges:

(1) That the accused misappropriated funds belonging to his client in the course of professional employment.

(2) Willful concealment and denial on his part of the moneys collected.

(3) The making of a false and fraudulent claim to a portion of the money received.

The accused denied all the charges.

[1] The evidence presented upon the first and third counts of the accusation is voluminous. Under it a conflict exists which should be resolved in favor of the accused. No useful purpose, therefore, would be subserved by narrating or closely analyzing it.

In support of the second count, however, and the one mainly relied upon for the penalty sought to be imposed, the evidence shows that the accused was employed by one Elizabeth Douglas, a widow, to collect the proceeds of an insurance policy on the life of her deceased husband. Payment of the policy was at first refused by the insurance company, but finally the accused received a check in settlement of the claim for the sum of $1,189.75. The check was received by him on November 20, 1917, and he deposited the same in his personal bank account, but failed to advise his client that he had received payment until some two months later, when demand was made upon him for a settlement, after his client had received information that the claim had been paid. The demand was made by attorneys employed by Mrs. Douglas, and a settlement was had between them and the accused, whereupon the amount agreed upon was paid, which amount, Mrs. Douglas testified, was satisfactory to her.

[2] Accused does not deny that he failed to advise his client of the receipt of the money, but he seeks to justify his tardiness in turning over the amount on the ground that his accounts with her were confused, and that he was ignorant of the exact amount to which he was entitled, and that the stress of business prevented him from informing himself upon the subject. There is also testimony to the effect that the accused informed his client that he had not collected the money at a time when it was in his possession. This the accused denies. It is true that the accused was entitled to a portion of the fund collected as compensation for his services, the amount of which had not been definitely fixed and determined. While the retention of this portion was justified it did not free him from his duty of advising his client that the collection had been made. It is the plain duty of an attorney to notify his client with reasonable diligence of the collection by him of money due his client, and to promptly pay over the same upon the settlement of his fee, and under no circumstances is he warranted in falsely stating that the money has not been received.

[3] The conduct of the accused is blameworthy for its laxity in this particular; yet we do not feel from a careful review of the evidence that it calls for the drastic measurement of disbarment. His delay, however, as shown by the evidence, was a gross neglect to fulfill his obligation, and constituted unprofessional conduct, which calls for the censure of this court. It is to be hoped that the bringing of these proceedings by the Bar Association of San Francisco, prompted by a high sense of duty, may prove a warning to the accused, and cause him to so acquit himself in the future as to avoid the slightest appearance of infidelity to professional duty.

The accusation is dismissed.

(40 Cal. App. 566)

DAMIANO v. BUNTING et al. (Civ. 2652.)

(District Court of Appeal, First District, Division 1, California. April 4, 1919. Rehearing Denied by Supreme Court June 2, 1919.)

1. CORPORATIONS ⟸239 — LIABILITY OF STOCKHOLDER—TORTS.

A cause of action exists against the stockholder of a corporation under the laws of this state upon a corporate liability arising out of a tort.

2. ABATEMENT AND REVIVAL ⟸57—SURVIVAL OF STOCKHOLDERS' LIABILITY—SURVIVING DEATH OF STOCKHOLDER.

A stockholder's liability for a corporate tort survives the death of the stockholder.

3. CORPORATIONS ⟸264 — ACTION AGAINST REPRESENTATIVES OF DECEASED STOCKHOLDERS—LIMITATIONS—CONSTRUCTION OF STATUTE.

Under Code Civ. Proc. § 359, which limits the time of beginning actions against the directors and stockholders of corporations to recover a penalty to three years after liability accrues, and provides that no other section of the title shall be applicable to its provisions, section 353, as to suits against personal representatives of decedents on causes of action which survive within year after beginning of administration, has no application.

4. CONSTITUTIONAL LAW ⟸70(3)—LIABILITY OF STOCKHOLDERS FOR CORPORATE TORT—LEGISLATIVE POLICY—REVIEW BY COURT.

In an action to enforce liability for corporate tort against the representatives of a deceased stockholder, Code Civ. Proc. § 359, expressly limiting such action to three years, may not be disregarded, on the ground that the policy is unwise.

5. CORPORATIONS ⟸264 — ACTION AGAINST STOCKHOLDER FOR CORPORATE TORT.

An action against a stockholder for corporate tort resulting in personal injuries must

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be brought within three years from the time of such injuries, under Code Civ. Proc. § 359, and such time limit cannot be extended to three years after the recovery of judgment against the corporation for such injuries.

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Appeal from Superior Court, Alameda County; William H. Donahue, Judge.

Action by Giuseppe Damiano against Fieda O. Bunting, as executrix of the estate of John A. Bunting, deceased, and others. Judgment for defendants, and plaintiff appeals. Judgment affirmed.

James A. Bacigalupi and Edmund Nelson, both of San Francisco, for appellant.

Thomas C. Huxley, of Oakland, for respondents.

RICHARDS, J. This is an appeal from a judgment in defendants' favor after the order sustaining their demurrer to the plaintiff's complaint without leave to amend. The following are the facts of the case as shown by said complaint:

On May 13, 1913, one John A. Bunting was the owner of 180,000 shares of a total issue of 200,000 shares of a mining corporation known as the Birchfield Mining Company. On said May 13, 1913, the plaintiff was an employé of said corporation, and was injured in an accident occurring in the course of his employment. John A. Bunting died on May 1, 1916. Thereafter, and on May 17, 1916, the defendants were appointed the executors of his estate. Notice to creditors was duly ordered and published May 27, 1916. On February 27, 1917, the plaintiff herein presented his claim against said estate for the sum of $10,900.32, alleged to be due upon the proportionate statutory liability of said John A. Bunting, deceased, as a stockholder in said corporation. The claim being rejected, the plaintiff commenced this action on March 31, 1917.

To his complaint setting forth the foregoing facts the defendants demurred upon the general ground, and also upon the grounds that the cause of action was barred by the provisions of subdivision 3 of section 340 of the Code of Civil Procedure, and also by the provisions of section 359 of the same Code. The court sustained the defendants' said demurrer generally and without leave to amend. The judgment followed, from which the plaintiff prosecutes this appeal.

[1] Three questions are presented upon this appeal, the first being as to whether a cause of action exists against the stockholder of a corporation under the laws of this state upon a corporate liability arising out of a tort. This question has, we think, been settled in favor of the existence of such liability on the part of a stockholder for the torts of the corporation by the case of Miller & Lux v. Kern County Land Co., 134 Cal. 586, 66 Pac. 856, and by the case of Lininger v. Botsford, 32 Cal. App. 386, 163 Pac. 63, upholding such liability.

[2] The second question which arises herein is as to whether the cause of action upon such stockholder's liability survives the death of the stockholder. This question was also determined in favor of the survival of such cause of action in the case of Lininger v. Botsford, supra, and to the reasoning and conclusions of that case we adhere.

[3] The third and final question arising herein is as to whether this action is barred by the provisions of section 359 of the Code of Civil Procedure relied upon in the defendants' demurrer, and which reads as follows:

"This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created."

The foregoing section of the Code of Civil Procedure is one of the sections embraced in chapter 4 of title 2 thereof, which relates to the time of commencing civil actions. Section 353 of the same chapter and title contains this provision:

"If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his representatives, after the expiration of that time, and within one year after the issuing of letters testamentary or of administration."

[4] It is the contention of the appellant herein that the provision of the Code last above quoted takes his case out of the operation of the first above quoted section of the Code, and gives him an extension of the period within which he otherwise must have commenced his action, arising out of the fact of the death of John A. Bunting a few days before the three-year period of limitation would have expired. This contention, however, is answered by the case of King v. Armstrong, 9 Cal. App. 368, 99 Pac. 527, in which Mr. Justice Shaw, of the Second appellate district, quite clearly points out that section 359 of the Code of Civil Procedure is so explicit in its terms expressive of the inapplicability of any of the other provisions of the title of that Code of which it is a part to actions against stockholders of corporations to enforce the liability created by law as to leave no room for any other construction. The conclusion arrived at in this case is fully enforced by the reasoning of the Supreme Court in the case of Hunt v. Ward, 99 Cal. 612, 34 Pac. 335, 37 Am. St. Rep. 87,

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wherein the court, with direct reference to the application of section 359 of the Code of Civil Procedure to the liability of stockholders of corporations in this state, says:

"It must be remembered that the right to pursue the stockholder at all does not exist at common law, but is solely the creature of the written law; and that it must be exercised upon the conditions and within the limits which the written law prescribes. The invocation by respondent of the clause of the state Constitution declaring the liability of stockholders of corporations does not strengthen his position; for the statement of a right in a Constitution is always subject to reasonable statutory limitations of the time within which it may be enforced, unless otherwise declared in the Constitution itself; and three years is certainly not an unreasonable period of limitation. We see, therefore, no reason for disregarding the plain language of section 359. We need not inquire into the policy of the section; but, as certificates of stock of many corporations pass frequently from hand to hand, it may well be assumed that the Legislature intended to protect temporary stockholders from the power of officers of corporations and their creditors, to indefinitely extend the enforcement of liabilities created while they happened to be holders of stock. If the policy be unwise or bad, it is for the Legislature to change it."

See, also, Bank of San Luis Obispo v. Pac. Coast St. Co., 103 Cal. 594, 37 Pac. 499.

[5] In the reply brief of appellant it is attempted to be argued that, regardless of the liability of said stockholder arising at the time of the plaintiff's injuries, he is entitled to rely upon a liability which was created by the alleged fact that appellant had in an action commenced by him against the corporation recovered a judgment for damages for his said injuries within the period of three years prior to the commencement of the instant action. It suffices to say that the cases of Hunt v. Ward and Bank of San Luis Obispo v. Pac. Coast St. Co., supra, furnish a complete answer to this contention.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

(40 Cal. App. 578)

INGRAHAM v. INGRAHAM. (Civ. 2653.)

(District Court of Appeal, First District, Division 1, California. April 5, 1919.)

1. DIVORCE ⟸109—REFUSAL TO HAVE MATRIMONIAL INTERCOURSE—BURDEN OF PROOF.

In divorce suit based on Civ. Code, § 96, as to persistent refusal to have matrimonial intercourse being desertion, plaintiff had the burden of showing that health or physical condition of defendant did not make refusal reasonably necessary.

2. DIVORCE ⟸150(2)—FINDINGS—NECESSITY.

In divorce suit based on Civ. Code, § 96, as to persistent refusal to have matrimonial intercourse being desertion, there must be a finding as to whether just cause exists for refusal.

3. DIVORCE ⟸179—OBJECTION TO COMPLAINT—AVAILABILITY ON APPEAL.

In suit for divorce, general allegation as to desertion, in the absence of a demurrer for a definite statement of facts, is not subject to the objection for the first time on appeal that it does not inform defendant that the desertion was intended to be established under the first provision of Civ. Code, § 96.

Appeal from Superior Court, Alameda County; Stanley A. Smith, Judge.

Action by Ida Ingraham against George A. Ingraham. Plaintiff was granted an interlocutory decree of divorce on the ground of willful desertion, and defendant appeals. Reversed.

M. L. Rawson, of San Leandro, and Geo. Ingraham, of Oakland, for appellant.

John W. Stetson and A. T. Shine, both of Oakland, for respondent.

WASTE, P. J. Plaintiff was granted an interlocutory decree of divorce, on the ground of willful desertion, and defendant appeals. The original complaint alleged that—

"Defendant willfully and without cause or provocation deserted and abandoned plaintiff, with intent to desert said plaintiff, and ever since said time has continued to live separate and apart from plaintiff without her consent, and against her will, and with intent to desert and abandon her, and without fault of plaintiff."

An amended and supplementary complaint was filed, setting forth the ground of desertion in the same form, and adding a second count, based on allegations of extreme cruelty. Defendant answered, denying the allegations of the complaint, and at the same time filed his cross-complaint, alleging willful desertion and extreme cruelty on the part of plaintiff.

The trial court found for the plaintiff on the ground of willful desertion alone, and decree followed. The finding as to willful desertion is couched in almost the identical language of the allegation hereinbefore quoted. Appellant attacks this finding upon the ground that the testimony introduced in the action, and on which the finding is based, is not sufficient to support the judgment or decree in that regard.

"Willful desertion is voluntary separation of one of the married parties from the other with intent to desert." Section 95, Civ. Code. Sections 96, 97, and 98 of the same Code set forth the different classes of facts which may manifest such desertion. Devoe v. Devoe, 51 Cal. 543. Section 96 is as follows:

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"Persistent refusal to have reasonable matrimonial intercourse as husband and wife, when health or physical condition does not make such refusal reasonably necessary, or refusal of either party to dwell in the same house with the other party, when there is no just cause, for such refusal, is desertion."

The proof adduced at the trial of this action established the fact that the plaintiff and defendant, for several years, and up to the time of the commencement of the action, continued to live in the same house, but occupying separate rooms. The desertion complained of by the plaintiff consisted of the gradual, and finally the persistent, refusal of the defendant to have any matrimonial intercourse with the plaintiff as husband and wife. The corroboration in this regard was merely the testimony of other witnesses that the parties occupied separate bedrooms in the house, and was not of the character and degree required by the Code section relating to corroboration in divorce cases. We are not unmindful of the fact that the secrets of the bedchamber are very frequently hard to substantiate by other witnesses than the parties themselves. Nevertheless, the parties to a divorce action are not thereby relieved from the necessity of complying with the mandate of the law.

From a careful reading of the lengthy record, the trial appears to have been conducted by the parties on the theory that extreme cruelty was the real issue between them. Near the conclusion of the trial, the court gave an intimation that the finding should be on the ground of desertion, predicated on the failure of defendant to grant the marital rights that the plaintiff was entitled to. The court reached the conclusion, and so stated, that "the testimony shows no adequate cause for an entire cessation of sexual relations, and the testimony fairly shows it."

[1, 2] From our examination of the lengthy record we must disagree with the learned judge of the court below. There was no testimony, nor were any facts elicited, tending to show that the health or physical condition of the defendant did not make his refusal to have reasonable matrimonial intercourse reasonably necessary. The burden of establishing this fact rested on plaintiff. Hayes v. Hayes, 144 Cal. 625, 78 Pac. 19. There must be a finding in such cases as to whether or not just cause for such refusal exists. Mayr v. Mayr, 161 Cal. 134, 118 Pac. 546. In the instant case plaintiff did not meet the burden imposed on her, and her case was not assisted by that of defendant, whose own testimony was against such a finding.

The finding of the court in the language of the complaint is not therefore a sufficient finding on the facts attempted to be proved. Devoe v. Devoe, supra. Furthermore, had the court used appropriate language in the finding to cover the facts required by the first portion of section 96, supra, the evidence would not be sufficient to support it.

[3] The general allegation of the complaint hereinbefore set forth, in the absence of a demurrer for a definite statement of the facts, is not now subject to the objection, for the first time on this appeal, that it does not inform defendant that the desertion was intended to be established under the first provision of section 96. Sheridan v. Sheridan, 134 Cal. 88, 66 Pac. 73.

As the case must be reversed for failure of the proof to support the finding as to the desertion, we will not comment in detail on the evidence relied on by respondent to corroborate the testimony of plaintiff as to her residence. Suffice to say that we are of the opinion that it is sufficient under the liberal rule laid down in MacDonald v. MacDonald, 155 Cal. 674, 102 Pac. 927, 25 L. R. A. (N. S.) 45. On a retrial of the case the corroborating evidence should appear in proper order and sequence. The appellate court should not have to minutely examine the testimony of a multitude of witnesses, that it may, here and there, pick out fragments of proof, which, when pieced together, will support a finding of the trial court.

No other points made on the appeal require examination.

The judgment and decree are reversed.

We concur: RICHARDS, J.; KERRIGAN, J.

(40 Cal. App. 658)

LUTGE v. DUBUQUE FIRE & MARINE INS. CO. (Civ. 2716.)

(District Court of Appeal, First District, Division 2, California. April 15, 1919. Rehearing Denied May 14, 1919; Denied by Supreme Court June 12, 1919.)

1. APPEAL AND ERROR ⟸1001(2)—REVIEW—VERDICT—PREPONDERANCE OF EVIDENCE.

Whatever the appellate court may think as to the preponderance of the evidence, it may not substitute its own opinion for that of the jury wherever there is a fair, reasonable ground for a difference of opinion.

2. INSURANCE ⟸235 — FIRE INSURANCE — CANCELLATION OF POLICY—SUFFICIENCY OF EVIDENCE.

In action on fire policy, defended on ground that policy had been canceled, and involving issue of whether the receipt signed by insured upon receiving payment for small loss which had occurred some time prior to the fire in question contained words, "Said policy is hereby surrendered for cancellation," evidence *held* sufficient to support verdict for plaintiff.

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3. NEW TRIAL ⟸104(1)—GROUNDS—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE.

A trial court does not abuse its discretion in refusing a new trial applied for on the ground of newly discovered evidence, where the new evidence is merely cumulative.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Richard Lutge against the Dubuque Fire & Marine Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Courtney L. Moore, Coogan & O'Connor, and Perry Evans, all of San Francisco, for appellant.

Thos. A. Allan and Geo. K. Ford, both of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment rendered against it in a suit to recover upon an insurance policy issued by defendant company covering loss by fire. The facts of the case are briefly these: The plaintiff was the owner of a building in San Francisco which was insured against fire by defendant. The policy had been in force for some years. The fire which caused the loss upon which suit is brought occurred on August 7, 1915. Prior to that time, to wit, on July 10, 1915, a small fire on the premises had occurred. The insurance company settled the claim therefor by paying the plaintiff $18, and it is claimed by the defendant that upon making this payment the policy was canceled by attaching to the draft sent to plaintiff a receipt which contained the statement, just above where plaintiff placed his signature, "Said policy is hereby surrendered for cancellation," and that Lutge by signing the receipt containing this statement consented to the cancellation of the policy. This is the one issue between the parties, and the appellant contends that the evidence is insufficient to justify the implied finding of the jury that the policy had not been canceled prior to the loss, and, further, that the trial court abused its discretion in denying to the defendant a new trial.

[1, 2] Appellant's argument upon the weight of the evidence has much force, but it is one that should properly be addressed to a jury. Whatever we may think as to the preponderance of the evidence, we may not substitute our opinion for that of the jury wherever there is a fair, reasonable ground for a difference of opinion. It is true that the claim of the appellant that the words purporting to cancel the policy were a part of the receipt at the time it was signed by the plaintiff is upheld by the testimony of the clerk in defendant's employ who prepared the draft, by the testimony of the general agent of the defendant company who signed it, and by the testimony of an insurance broker to whom it was sent by the defendant, and who in turn delivered it to plaintiff. There is the further testimony of the insurance broker to the effect that he specifically called plaintiff's attention to the fact that the insurance policy was canceled, and that plaintiff replied that he did not care. On the other hand, the plaintiff denied that the words "surrendered for cancellation" were on their receipt when he signed it, or that he had any notice of any kind that the policy was canceled, or that he consented to the cancellation in any way. There are the additional circumstances that the insurance company did not accompany its receipt alleged to have embodied the agreement for cancellation with any letter calling attention to the cancellation; that the policy was in the possession of the plaintiff at the time of the fire, and had never been surrendered, and its surrender had not been demanded by the defendant; that the defendant company had not offered, prior to the loss, to return to plaintiff the unearned premium paid upon the policy; that, after the loss occurred, plaintiff employed an insurance adjuster to present his claim, who notified the defendant of the loss and presented the preliminary proofs of loss on August 25th; that five days thereafter the defendant replied to this letter, making some technical objection to the proofs, but not intimating in any way that the policy had been canceled, and it was not until September 14th that the defendant asserted that the policy had been canceled and denied liability thereunder. We cannot, under such a condition of the evidence, hold that there was no substantial conflict in the evidence, and that the jury rendered a verdict which was unsupported by the evidence.

[3] The only other point made by appellant is that the motion of the defendant for a new trial should have been granted. The affidavits filed upon the motion are all to the effect that the printed receipt had been altered and the words "surrendered for cancellation" made a part thereof before it was signed by the plaintiff. The statements in the affidavits constituted material and valuable evidence for the defendant, but such evidence was merely cumulative, and it should have been produced upon the trial. Defendant did produce evidence upon this very question in the testimony of the clerk of the defendant company who prepared the draft, in the testimony of the general manager who signed it, and in the testimony of the broker who delivered it to the plaintiff. Defendant therefore anticipated that this would be an issue in the case, and, after the decision has been adverse to it, it may not retry the case in order to produce other and perhaps stronger evidence upon a question which was

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contested at the trial, when such evidence was available to the defendant at the time of the trial. A trial court does not abuse its discretion in refusing a new trial applied for on the ground of newly discovered evidence where the new evidence is merely cumulative. People v. Selby S. & L. Co., 163 Cal. 84, 124 Pac. 692, 1135, Ann. Cas. 1913E, 1267; In the Matter of the Estate of Walden, 166 Cal. 446, 137 Pac. 35; Wood v. Moulton, 146 Cal. 317, 80 Pac. 92; In the Matter of the Estate of Doolittle, 153 Cal. 29, 94 Pac. 240.

The judgment is affirmed.

We concur: BRITTAIN, J.; HAVEN, J.

(40 Cal. App. 638)

BRADLEY v. BRADLEY et al. (Civ. 2670.)

(District Court of Appeal, First District, Division 1, California. April 12, 1919. Rehearing Denied by Supreme Court June 9, 1919.)

1. DIVORCE ⟸245(2)—DECREE FOR ALIMONY—APPLICATION FOR MODIFICATION—MATTERS CONSIDERED.

Upon a motion to modify the alimony provisions of a final decree of divorce which has not been appealed from, only such facts as have arisen or become known to the party since its entry may be made the basis of the attack, and as to all other matters the judgment or decree is final after the period for appeal has expired.

2. DIVORCE ⟸286—DECREE FOR ALIMONY—MODIFICATION—APPEAL.

Upon defendant's appeal from an order granted upon his motion modifying the alimony provisions of a divorce decree, the defendant cannot be granted relief by the appellate court for the reason that the conditions of the parties have changed since the entry modifying the order was made, since those matters may only be taken advantage of by being first brought to the attention of the trial court upon proper motion for modification.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Suit by Emma Bradley against Richard Bradley for divorce and alimony, in which the Bradley Company was also made a defendant. Judgment for plaintiff. Defendants moved the court for an order modifying the final decree, and from an order reducing the alimony, defendant Richard Bradley appeals. Affirmed.

Richard Bradley, in pro. per.

Charles Baer, of San Francisco, for respondent.

RICHARDS, J. This appeal is from an order modifying a final decree of divorce between the parties hereto in so far as the provisions of said decree undertook to provide for the future maintenance of the plaintiff and respondent upon this appeal.

By the terms of the original final decree the plaintiff was granted a divorce from the defendant upon the ground of cruelty, and the defendant was directed to pay to the plaintiff the sum of $100 per month so long as she remained unmarried, and was further directed to give reasonable security for the payment of said sum. The decree recited that the defendant had, by virtue of the interlocutory decree, furnished a bond in the sum of $4,000 as and for such security, and said bond was by the final decree to remain in full force and effect. This decree was entered on October 7, 1915. On November 24, 1916, the defendant moved the court for an order modifying said final decree by the elimination therefrom of its provision respecting the plaintiff's further maintenance and support. Upon the hearing on said motion, affidavits and counter affidavits and also oral testimony pro and con were presented by the respective parties, going with much detail into the past and existing financial relations and abilities of the respective parties. These, it is almost needless to say, were strongly and decidedly in conflict as to almost every matter which was asserted or disputed therein. The trial court, having considered these, concluded to modify its former final decree by reducing the former amount of $100 to the sum of $85, to be paid monthly to plaintiff by the defendant. It is from the order making this modification that the defendant has prosecuted this appeal.

[1] In his briefs upon appeal, which the defendant has presented in propria personam, he attempts to discuss many matters which were the subject of controversy upon the main trial of the cause and which were concluded by the findings and decrees of the court therein, from which no appeal was taken. The appellant seeks to justify his attempt to reopen these matters by the claim that, the terms of the final decree as to the property rights of the parties and as to alimony being subject to future modification, these matters therein treated may always be relitigated. But this is not the rule, since upon a motion to modify a final decree of divorce in these respects which has not been appealed from it is only such facts as have arisen or become known to the party since its entry which may be made the basis of an attack upon its provisions. As to all other matters it is as final as any other final judgment or decree after the period for appeal has expired. In so far as the appellant's briefs have relation to facts arising since the entry of said final decree tending to show a change of condition in the defendant's financial ability to make the required payments,

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the evidence educed upon the motion for a modification of the decree was, as we have seen, in sharp conflict. The court had the parties before it, and not only read their conflicting affidavits, but both heard and saw their examination, and, having done so, saw fit to make the modification in the decree, which, in so far as it went, was in the defendant's favor. We are unable to say from the state of the record before us that the court in any way abused its discretion in the form or substance of the modifying order.

[2] The appellant finally contends that he is entitled to some measure of relief from the court for the reason that, since the entry of the modifying order herein appealed from, the court has had occasion to pass upon the merits of certain other appeals between the parties hereto involving certain aspects of their property rights and interests, and that this court should now take those matters into consideration in passing upon this appeal, but it is apparent that this cannot be done, since the matters concluded by those appeals were not before the trial court at the time its modifying order herein appealed from was made. This is not, therefore, the forum wherein the appellant may obtain relief depending upon any conclusions arrived at in those cases; for any advantage which he might derive therefrom could only be gained through a renewal of his effort to have said final decree modified in the trial court based upon such change in conditions as may have arisen or been established since the making of the present modification of said original degree.

Order affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

(40 Cal. App. 395)

AHLMAN v. BARBER ASPHALT PAVING CO. et al. (Civ. 1916.)

(District Court of Appeal, Third District, California. March 22, 1919. Rehearing Denied April 21, 1919; Denied by Supreme Court May 19, 1919.)

1. TRIAL ⟸396(7)—FINDING OUTSIDE OF ISSUES—COMPLAINT.

In action to quiet title and to restrain issuance of bonds on plaintiff's property for street work, where complaint inferentially alleged improvement district was described so as to be capable of identification, which was not denied, finding that description of district was not sufficient to identify it or was indefinite was outside of the issues.

2. APPEAL AND ERROR ⟸219(2) — REVIEW — FINDING OF FACT NOT IN ISSUE.

Though the finding of a fact not in issue is sometimes upheld on the theory the parties have waived the point by failure to object to evidence, the rule cannot be extended to the justification of a finding in favor of a party contrary to his allegation, which allegation is not denied by his adversary.

3. MUNICIPAL CORPORATIONS ⟸488, 489(5)—ASSESSMENT FOR STREET IMPROVEMENT—FAILURE TO OBJECT BEFORE CITY COUNCIL.

Appeals, by property owners assessed with the cost of a street improvement, to the city council, contemplate the correction of errors in the assessment, such as an improper charge for the cost of making it, and, if a property owner fails to avail himself of the privilege accorded him, he will be precluded thereafter from urging the objection, the presumption being that if he had objected the error would have been corrected.

4. MUNICIPAL CORPORATIONS ⟸513(3) — STREET IMPROVEMENT—ASSESSMENT—REMEDY FOR ERROR.

If proceedings to assess the cost of a street improvement on property owners were defective, in that a lot in the improvement district was omitted from the assessment, the remedy of an owner was by appeal to the city council, whereon the owner should have specified and designated the lot or lots claimed to have been omitted.

5. MUNICIPAL CORPORATIONS ⟸488, 489(5)—STREET IMPROVEMENT—ISSUANCE OF BONDS—RIGHT TO COMPLAIN.

Under Bond Act Feb. 27, 1893 (St. 1893, p. 33), a property owner who did not pursue the course specified in section 4 of the act, providing a simple procedure whereby the owner may prevent the issuance of any bond for the assessment on his lot, cannot complain of issuance of the bonds, which created no new liability, and merely provided for payment in installments and after a period of years.

6. TRIAL ⟸404(2)—FINDING—CONCLUSION OF LAW.

In suit by a property owner to restrain the issuance of bonds on his property for street work in the city, the finding that no sufficient legal resolution of intention was passed was a conclusion of law.

Appeal from Superior Court, Santa Clara County; W. A. Beasly, Judge.

Action by G. T. Ahlman against the Barber Asphalt Paving Company, Louis Lightston, as treasurer of the city of San Jose, and S. J. Farrell, as superintendent of streets of the city. From judgment for plaintiff and an order denying their motion for new trial, defendants appeal. Judgment and order reversed.

William H. Johnson, of San Jose, for appellants.

Beggs & McComish, of San Jose, for respondent.

BURNETT, J. This is an action to quiet title and to restrain the issuance of bonds upon plaintiff's property for street work in the city of San Jose. Similar actions were

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brought against the defendants by four other property owners. By stipulation, the actions were consolidated and tried together.

The only pleadings in the record before us are the complaint of the plaintiff, Ahlman, and an amendment thereto, and the answer of defendant the Barber Asphalt Paving Company. Respondent in his brief states that said answer was adopted by the other defendants, and we will so consider it, although there is a reference in appellants' specifications to a separate answer of the defendants Lightston and Farrell.

There is no denial in the answer of plaintiff's allegation of ownership of the property in question.

Paragraph 5 of the complaint alleges that the defendants and each of them claim some interest in or lien upon said property, but that such claims are wholly without right. The answer denies this allegation, and alleges that defendant, the Barber Asphalt Paving Company, does claim a lien upon said property, and that its claim is neither wholly nor at all without right. The court found in accordance with the allegation of the complaint.

Paragraph 6 alleges that "on April 14, 1913, the common council of the city of San Jose passed a resolution purporting to be a resolution of intention, and on April 16, 1913, the same was approved by the mayor of said city, wherein and whereby it was resolved that Market street, from San Carlos street to First street, in said city, be improved by constructing thereon a pavement consisting of two inches of asphalt," etc.; "that said resolution provided that the cost of said work should be charged against a district, and described the district, which district included the land of the plaintiff hereinbefore described, and said resolution further provided that 10-year serial bonds, bearing interest at the rate of 7 per cent. per annum, should be issued by the city treasurer to represent each assessment of $25 or more; that no sufficient or legal resolution of intention was ever passed for the doing of said work; that the said resolution did not sufficiently describe the work to be done, or which was done thereunder, nor did it comply with the conditions of the charter * * * or of the Vrooman act, so called, or of the said bonding act of 1893." The answer denied this allegation, and a copy of the resolution of intention was attached and made a part of the answer "for all particulars therein and thereby appearing," and there was also annexed "the notice of street work" posted and published by the superintendent of streets pursuant to said resolution of intention. The finding (III) adopted the allegation of the complaint down to and including the following: "That said resolution provided that said work should be charged against a district, and described the district," and continued: "But the description of the district as given in said resolution of intention was not sufficient to identify the same, but was indefinite, and such that it could not be located upon any particular land or lands within the city of San Jose; that said resolution purported to include the land of plaintiff herein described"; and "that no sufficient or legal resolution of intention was ever passed for the doing of said work, nor did it comply with the conditions" of the charter or of said street bonding act.

Paragraph 9 of the complaint alleged: "That on June 9, 1913, the mayor and common council passed a resolution ordering said work to be done in accordance with the plans and specifications passed and adopted * * * on February 17, 1913; that said resolution was posted from June 23 to June 27, 1913." The answer alleged that it was declared in said resolution "that the public interest and convenience required to be done the street work in said resolution and in said resolution of intention described," and a copy thereof was made a part of the answer. There was no finding of the court upon this point.

It is alleged in paragraph 10 that on June 20, 1913, the mayor and common council gave notice inviting proposals for the doing of said work, which was posted from June 23 to June 27 and not otherwise. Defendants made this notice a part of the answer, and alleged that it was "conspicuously posted near the chamber door of said mayor and common council on the 23d day of June, 1913, and was so kept posted thereafter for five consecutive days." The finding was in the language of the complaint.

Allegation 11 is that the defendant corporation put in a bid offering to do said work for certain specified prices. The answer amplified the allegation by enumerating the contents of said bid and stating that it was accompanied by a bond, etc. The finding followed the allegation of the complaint.

Paragraph 12 alleged the acceptance of said bid by the city authorities, the passage of the resolution awarding the contract to the corporation defendant, and that said company entered into a contract to do said work according to the resolution of intention and said plans and specifications. The answer went into further details and attached a copy of the notice of award. It then proceeded to set out the various steps taken by defendant preliminarily to doing the work, and alleged that it did perform the work to the satisfaction of said superintendent of streets. The finding was in the language of the complaint.

Paragraph 13 alleged that "the superintendent of streets made his warrant, diagram, and assessment whereby the land of plaintiff * * * was assessed for the sum of $951.69; that the total sum assessed upon

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said district contained large items, which are not legally chargeable upon said district, or the lands embraced therein." The answer went into details concerning the preparation of the diagram and the assessment, and denied the allegation concerning illegal charges. The finding was in the language of the complaint, and as to the last portion thereof it was: "That the sum of $25.00 for making said assessment" was not legally chargeable upon the district or the lands embraced therein.

In paragraph 14 it was alleged that the assessments were not uniform or equal, which allegation was denied by the answer. As to this there was no finding.

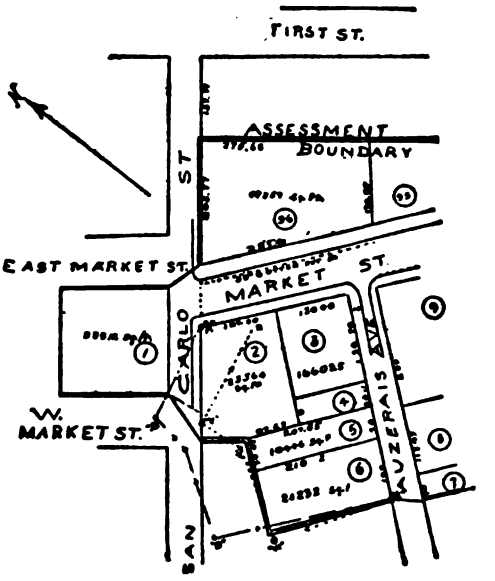
There is no reference in the answer to the remaining allegations of the complaint. As to these the court found: That within the time allowed by law certain owners of property within the district appealed to the mayor and common council from said assessment and specified the particulars in which it was alleged to be illegal, which are fully set out; that said appeal came on for hearing, but was denied by the mayor and common council. There was then a finding that prior to August 4, 1873, the portion of Market street in question had been constructed, repaired, and fully improved and duly accepted by ordinance, which provided "that thereafter the roadway of said portion of said street should be kept open and in repair by said city, and that the expense thereof should be paid from the general fund"; and that said ordinance has never been repealed. It was then found that it was not true that said diagram showed said land to be all within said district; that it was not true that the superintendent of streets estimated benefits arising from said work upon said lots within the district nor that he assessed the total sum upon the several pieces within said district; "but it is true that no assessment district was described in said resolution of intention * * * with sufficient certainty to identify the same."

The judgment was that plaintiff was the owner in fee of the property referred to free and clear of all claims of the defendants or either of them; that neither of the defendants has any claim of lien upon said property; and that plaintiff is entitled to recover from the Barber Asphalt Company his costs, taxed at $34.65.

1. The portion of finding No. 3, "that the description of the district as given in said resolution of intention was not sufficient to identify the same, but was indefinite," etc., is attacked by appellants.

In this connection the claim of respondent is not only that the description is indefinite, but that if it may be accepted at all, and the description contained in the resolution of intention had been properly delineated upon the diagram of the assessment district, there would have been included in said district a lot of land which is shown to have been excluded from the assessment.

Said description commences as follows: "Beginning at a point 160.45 feet westerly from the intersection of the westerly line of Market street with the southerly line of San Carlos street; running thence southerly 69.19 feet to a point; thence southwesterly 150.07 feet to a point; thence southerly a distance of 214.4 feet," etc. The last two calls in the description are: "Thence southerly along the easterly line of the west branch of Market street to its intersection with the northerly line of San Carlos street; thence southwesterly to the point of beginning." In respondent's brief is a diagram of the portion of the district in question, which we here reproduce:



"The heavy solid line," says the brief, shows the boundary of the district as shown on the diagram. The dot and dash line (B–C–D–E) shows where the boundary would have run if the description found in the resolution of intention had been followed. The dotted line (E–W–X–Y–Z) shows where the line would have run if traced backwards from the point "E" in the northerly line of Auzerais avenue, which is the first point definitely fixed by a physical description. Neither of these lines coincide with the boundaries shown on the diagram.

"The plat we furnish herewith shows that there is no assessment on the parcel of land bounded on the northerly side by the southerly line of San Carlos street and a portion of the line C–D; on the westerly side by a portion of the line D–E; on the southerly side by the northerly line of lots 6 and 5; and on the easterly side by a portion of the westerly line of lot 2."

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R. C. McComish, one of the attorneys for plaintiff, testified:

"I am familiar with First street, in this city, I know the course of that street. It is about 30 degrees west of north. It runs northwest and southeast and varies from north to south about 30 degrees. I am familiar with San Carlos street, in this city. It runs at right angles to First street."

Irving L. Ryder, city engineer, testified:

"I know First street varies to the west. Take the monument line, generally speaking, throughout the town, not for this particular street, but in the neighborhood of the angle, San Carlos street, there may be a variation of from one-half of a minute out, due to the variation of the monument, the general direction of the street. The streets are, generally speaking, at right angles to one another, but not absolutely; the variation of San Carlos between First and along past Market street is not more than one minute, at any rate, from a right angle to First street."

W. E. McIntyre testified on behalf of defendants:

"I assisted in preparing the description relative to the Market street improvement. I was city engineer at the time. In connection with the map I could answer as to the intention of the description; with the map the intention and the resolution is perfectly apparent. I am familiar with the resolution of intention. Beginning the description at the intersection of the southerly line of San Carlos street with the westerly line of Market street, the description at that point had to be referenced out, * * * and then the point begins 160.45 feet westerly from that point of intersection. * * * As I understood it, not knowing the technicality of law, the descriptions in cases of law, I understood westerly would naturally mean along the street line. * * * I made the diagram that was finally used by the superintendent of streets for the purpose of making the assessment. San Carlos avenue runs 80 degrees south of west."

The foregoing constitutes all the evidence in the record as to the description of said assessment district. It must be apparent that plaintiff's showing was quite meager. His diagram was not produced at the trial, nor, of course, introduced in evidence. It simply represents his deductions from the testimony of his own attorney, and has been submitted in his brief for the inspection of this court. It is apparent that, according to the diagram which was made by the city engineer and upon which the assessment was based, the starting point of the description was located on the southerly line of San Carlos street. This point was deemed to be 160.45 feet "westerly" from the intersection of said line with the westerly line of Market street. Respondent, however, claims that this point is not due west from said intersection, but that to satisfy said call you must go across San Carlos street to obtain the starting point as indicated on his diagram.

Following strictly the language of the description, we would probably have to agree with respondent's contention, although we consider it a fair conclusion from the whole record that the intention was to select said point in the southerly line of said San Carlos street as the starting point for the description of the district. We may add, further, that if an error was made in the description as claimed by respondent, it is, at least, doubtful whether it was of a prejudicial nature.

[1, 2] But, be that as it may, the finding as to the description is outside of the issues and is contrary to the allegation of plaintiff's complaint. While the complaint does not allege that the district was described so as to be capable of identification, we deem it susceptible of no other construction. Such is the necessary implication from the averment "that said resolution described the district."

While the finding of a fact not in issue is sometimes upheld upon the theory that the parties have waived the point by their failure to object to the evidence—in other words, because they have treated the case as though it were a material finding—the rule cannot be extended to the justification of a finding in favor of a party contrary to his allegation, which allegation is not denied by his adversary.

[3] 2. Appellants attack the finding of the court that the sum of $25 "for making said assessment" was not legally chargeable upon the district. The evidence disclosed that the item "was paid to the San Jose Abstract Company for search of record on the property to ascertain the exact frontage of the lots." It is not disputed that respondent's portion of this was one dollar, and such amount was added to his assessment. Several contentions in reference to it are made by appellants, but we may refer to one only, which is that respondent cannot question the validity of the assessment on this ground, for the reason that he did not present it to the council on his appeal to that body. In said appeal he urged seven different and distinct grounds, but did not even suggest that the assessment was too large or that it contained any improper or illegal item. Of course, it must be presumed that if he had called the attention of the council to the fact that his assessment was thus excessive to the extent of one dollar, that tribunal would have relieved him from the burden of this charge. Such appeals contemplate the correction of errors like this, and it is entirely just and right that, if a property owner fails to avail himself of this privilege thus accorded him by the law, he should thereafter be precluded from urging the objection.

The point is, indeed, covered by the decision of the Supreme Court in Boyle v. Hitchcock, 66 Cal. 129, 4 Pac. 1143, where it was

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held that "an objection to a street assessment in San Francisco, that it included an amount, as incidental expenses, for engineering and printing, is waived by a failure to appeal to the board of supervisors."

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[4] 3. Another point made in favor of the judgment is that a lot in the district was omitted from the assessment and for this reason the whole assessment was void. There is no specific finding as to this, the court basing its judgment upon the ground, substantially, that no district was created, since it could not be identified from the description. But if the point may be considered at all, it is sufficient to say that there is no such allegation in the complaint nor is there any evidence to support it. It is true that plaintiff's said diagram includes apparently a lot that was not assessed, but this diagram, as we have said, constitutes no part of the record. Besides, if such error was committed, the remedy was by appeal to the council. Buckman v. Landers, 111 Cal. 347, 43 Pac. 1125. It is true that an appeal was taken to said council and in support thereof it was alleged "that various parcels of property within the district upon which said work has been made a charge have not been assessed to pay their proportionate share of the cost of said work," but respondent should have specified and designated the lot or lots which he claimed were thus omitted. Moreover, the record does not show that he offered any evidence in support of this claim, the transcript simply showing that "the proceedings relative to the Market street paving was offered in evidence on appeal to the council; that said proceedings included all the records and proceedings in the office of the superintendent of streets connected with the assessment and were offered in evidence without argument." Manifestly, we cannot assume that any of those proceedings showed that any lot was improperly omitted from said assessment. In a matter of this kind it is as much incumbent upon the property owner to present evidence to the council to support his claim as it is to make the appeal. If he does not offer any such evidence, he must abide by the finding against him.

[5] 4. Another point urged in the briefs is as to whether the bond act of February 27, 1893 (Stat. 1893, p. 33), under which admittedly the bonds involved herein were issued, is applicable to the city of San Jose.

There is no dispute that said city is operating under a freeholders' charter (Stats. of 1897, p. 592); that this charter provides a system of street improvements and the collection of the costs thereof; that the improvement of streets is a municipal affair (Byrne v. Drain, 127 Cal. 663, 60 Pac. 433); and that municipal affairs are regulated and controlled by the charter where it provides therefor, and not by general laws passed by the Legislature (California Constitution, art. 11, § 6; Byrne v. Drain, supra). Said charter provides:

"An act of the Legislature of the state of California entitled 'An act to provide for work upon streets, lanes, alleys, courts, places, and sidewalks, and for the construction of sewers within municipalities,' approved March 18, 1885, as since amended, and as hereafter shall be amended, is hereby adopted as a part of this charter, and shall have the same force and effect as if incorporated at length herein, except where the provisions of said act conflict or are inconsistent with the provisions of this charter."

Said act of 1885, commonly known as the "Vrooman Act," as it existed at the date of the adoption of the San Jose charter, did not provide for the issuance of bonds for the payment of street assessments, although this scheme was thereafter included therein by amendment. The contention of respondent is therefore that the provisions of the Vrooman Act as they existed on March 5, 1897, became a part of said charter as though they had been expressly incorporated therein (Ramish v. Hartwell, 126 Cal. 443, 58 Pac. 920; 2 Lewis' Sutherland, Statutory Construction, 787); but that subsequent amendment to said Vrooman Act cannot be so regarded, notwithstanding the said language of the charter, for the reason that the charter cannot be amended in that manner (article 11, § 8), and the provision in the statute must yield to the rule laid down in the Constitution. The conclusion is reached that said bond act as a part of the general law is no part of said charter. Byrne v. Drain, supra; Fritz v. San Francisco, 132 Cal. 373, 64 Pac. 566; Sunset Telephone Co. v. Pasadena, 161 Cal. 265, 118 Pac. 796.

It is further claimed that said bond act was not adopted as a part of the charter by virtue of the reference in section 4, c. 1, art. 8, as follows:

"If bonds are to be issued pursuant to an act of the Legislature entitled 'An act to provide a system of street improvement bonds to represent certain assessments for the cost of street work and improvement within municipalities, and also for the payment of such bonds,' approved February 27, 1893, and any assessment less in amount than $50 remains unpaid for thirty days from the date of the warrant, or for five days after final decision on appeal, as provided in section 11 of said act, the mayor and common council may, by resolution, order such assessment paid from the street contingent fund, and the superintendent of streets shall thereupon release said assessment on the books of his office as upon payment in other cases."

There is force in the contention that such reference to the bond act is not sufficient to make it a part of the charter. There is certainly no clearly expressed intention to adopt it such as is found in reference to the Vrooman Act. Moreover, if the reference thereto

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be deemed sufficient to constitute it a part of the charter, then it would include said act as it stood in 1897. Said act at that time authorized the issuance of bonds only upon a finding by the council upon estimates of the engineer that the cost would be greater than $1 per front foot along each line of the street. Stat. 1893, p. 33. The complaint alleges that there was no such estimate or finding, and this was not denied. It would seem, therefore, that justification is not shown for the issuance of the bonds.

However, we are satisfied that the plaintiff is in no position to complain of the issuance of the bonds. Section 4 of said Bond Act provides a simple procedure whereby the property owner may prevent the issuance of any bond for the assessment on his lot. This course was not pursued. As stated in German S. & L. Soc. v. Ramish, 138 Cal. 126, 69 Pac. 92:

"The bond creates no new liability, and in effect provides for what by some would be regarded as more favorable payment, because in installments and after a period of years. However this may be, the lot owner cannot complain, since he may pay the assessment and prevent the issuance of the bond."

Of course, if plaintiff had made this objection, his land would still be subject to the assessment under the other provisions of the Vrooman Act.

It would be an unjust construction of the law that would permit the property owner to escape his obligation to pay for the improvement altogether, because a mistake may have been made in granting him the favor of payment for the benefit in installments. He is at least put to his election to choose which method of collection shall be pursued.

5. We have not noticed specifically the finding of the court that said Market street had been previously "constructed, repaired, and fully improved to the satisfaction of the mayor and common council," and accepted by an ordinance duly passed with a provision that it should thereafter be "kept open and in repair by said city," for the reason that respondent at the oral argument disclaimed reliance upon that finding.

[6] We may add that the finding that "no sufficient legal resolution" of intention was passed is manifestly a conclusion of law and it requires no specific consideration.

The proceedings awarding the contract were in all respects regular and there is no claim of fraud of any kind. The paving company performed its contract fully and justly; it improved and regraded the street to the satisfaction of the city; and it hardly seems right that it should lose any compensation for its services by reason of the technical objections that have been made to the assessment.

We think the judgment and order should be reversed. It is so ordered.

We concur: BUCK, Presiding Judge pro tem.; HART, J.

(40 Cal. App. 526)

TRUCKEE RIVER GENERAL ELECTRIC CO. v. ANDERSON et al. (Civ. 1927.)

(District Court of Appeal, Third District, California. April 2, 1919.)

1. ADVERSE POSSESSION ⟸19 — NECESSITY OF INCLOSURE—STATUTES.

In a suit to quiet title as against one who claimed by adverse possession, evidence that defendant had inclosed his land for less than five years is admissible as showing possession, Code Civ. Proc. § 325, as amended by St. 1877–78, p. 99, relating to adverse possession by one claiming title not founded on a written instrument, not requiring that the land claimed should be inclosed for five years before the commencement of the action, but merely that the land must have been occupied and taxes paid for such period.

2. ADVERSE POSSESSION ⟸114(1) — EVIDENCE—POSSESSION BY PLAINTIFF—STATUTES.

In a suit to quiet title as against one who claimed by adverse possession, evidence *held* insufficient to show that plaintiff had been seised or possessed of the property within five years before the commencement of the action, as required by Code Civ. Proc. § 318.

Appeal from Superior Court, Placer County; William M. Finch, Judge.

Action by the Truckee River General Electric Company against John Anderson and others to quiet title. Decree for plaintiff as to all the land, except that of defendants Bliss and Ferris, and plaintiff appeals; the appeal being prosecuted by the United States, which during the pendency of the action had acquired plaintiff's rights. Affirmed.

John W. Preston and Ed. F. Jared, both of San Francisco, for appellant.

Tuttle & Tuttle, W. J. Prewett, and Prewett & Chamberlain, all of Auburn, for respondents.

HART, J. Plaintiff commenced the action against John Anderson and a number of others to quiet its title to a tract of land in Placer county, containing about 54 acres. As to all of the defendants, except Bliss and Ferris, the action was either dismissed by plaintiff or default was taken against them for failure to appear. The decree of the court was in favor of plaintiff for all the land mentioned in the complaint, except that defendant Bliss was found to be the owner of a parcel thereof amounting to about one-

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fifth of an acre, and defendant Ferris of a parcel thereof amounting to about seven-eighths of an acre. It is stated in appellant's brief:

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"During the pendency of the action, the rights of the plaintiff were acquired by the United States of America, and this appeal is now prosecuted by the government."

The land in controversy is situated on Lake Tahoe and along the bank of the Truckee river near its source, which, throughout the record and in the briefs is spoken of as the "mouth of the Truckee river." Each of the defendants, Bliss and Ferris, claimed title by adverse possession. The findings of the court were in their favor, and it was also found that the action against defendant Bliss was barred by the provisions of section 318 of the Code of Civil Procedure.

There was documentary evidence received tending to prove title in the plaintiff corporation to the 54 acres, which included the two parcels awarded to Bliss and Ferris, the inception of said title being a patent from the United States to Central Pacific Railroad Company, dated April 18, 1870.

The Ferris Title.

C. B. Ferris testified that he had been living on the property claimed by him since 1896. The tract has a frontage of about 150 feet on the lake front, and it runs back from the lake about 80 feet. The witness testified:

"The improvements on the property are a house and a boathouse and a small garage on the hill above the house, and I have a wharf, a boat landing. The property that would be between the house and boathouse and wharf and the county road, I have used for a little of everything; piling wood, lumber, and whatever became necessary to put in there. * * * Below the wharf I have a toilet and outhouse. The toilet is probably 40 feet from my southwest line, and the ground in that distance I have used for a little of everything—storage, hauling boats, boat repairing."

The witness built a fence around the property, either in 1907 or 1908—he was pretty positive it was in June, 1908—and it has been maintained ever since. He stated that he had resided continuously on the property, winter and summer. It was stipulated at the trial that for the years 1908 to 1912, both inclusive, the taxes on the whole property were assessed to and paid by appellant, and that the parcel claimed by Ferris was assessed to him, and the taxes were paid by him, during the same period of time.

It is contended by appellant that, as Ferris did not occupy the land under color of title, but was a mere squatter, he would be subject to the provisions of section 325 of the Code of Civil Procedure, and must prove that the land "has been protected by substantial inclosure," and "has been usually cultivated or improved," and it is claimed that neither of these requirements has been met.

The complaint was filed on October 3, 1912, which was four years and four months after the construction of the fence in June, 1908. Section 325 of the Code of Civil Procedure, as adopted in 1872, read as follows:

"For the purpose of constituting an adverse possession by a person claiming title, not founded upon a written instrument, judgment, or decree, land is deemed to have been possessed and occupied in the following cases only:

"1. Where it has been protected by a substantial inclosure.

"2. Where it has been usually cultivated or improved."

In 1878 (Stats. 1877–78, p. 99), the section was amended by re-enacting the above language and adding thereto the following:

"Provided, however, that in no case shall adverse possession be considered established under the provision of any section or sections of this Code, unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, state, county, or municipal, which have been levied and assessed upon such land."

It will be noted that, as originally enacted, there was no provision in the section that the land in dispute should have been (1) "protected by a substantial inclosure," or (2) "usually cultivated or improved" for any period of time, nor did the amendment change those terms of the section. The five-year period provided by the amendment applies only to the occupancy and claim of the land and to the payment of taxes.

In Gray v. Walker, 157 Cal. 381, 108 Pac. 278, our Supreme Court said:

"The requirement of the statute that the land be 'usually cultivated or improved' means that it should be cultivated or improved in the manner or to the extent usual in the case of similar property. Allen v. McKay, 120 Cal. 332, 52 Pac. 828. If so improved, it is not necessary that it should be either cultivated or inclosed. Daniels v. Gualala M. Co., 77 Cal. 300, 19 Pac. 519."

In the case of Allen v. McKay, above cited, it was held that an instruction was properly given which stated that "a piece of property is said to be usually improved, or improved in the usual manner, when it is improved as similar property is improved," and in the Daniels Case it was held that the right of way of a railroad company, "improved in the usual manner of railroads with reference to their roadbed and right of way," constituted adverse possession, "though the land was not protected on all sides by a substantial inclosure."

[1] Inasmuch as section 325 does not require that the land should be inclosed for the period of five years before the commencement of the action, testimony tending to show that it was inclosed for a shorter pe-

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riod will be admitted as a fact tending to show possession. As it was stipulated that defendant, Ferris, for a period of five years prior to the commencement of the action, had paid the taxes assessed against the parcel of land claimed by him, and in veiw of the testimony showing acts of possession on his part, we conclude that the judgment in his favor should be affirmed.

The Bliss Title.

In 1879 or 1880, one John Branch, a fisherman on Lake Tahoe, squatted on the property claimed by defendant Bliss, and built a house upon it. He lived upon it until 1900. In 1881, or 1882 he built a fence with cedar posts around the tract "for the purpose of having a garden; he only kept his garden two or three years; the ground was not very good"—as testified by a witness. There was also a woodshed and a boathouse built upon the property. The place was commonly known in the neighborhood as "the Johnnie Branch Place," and was reputed to be his property. Branch died some time between 1900 and 1904.

In 1900, J. H. Pomin bought from Branch the house and his boats—"everything he had, lot and house," Pomin testified. This transaction was evidenced by the following document, which was admitted in evidence over plaintiff's objection:

"This is to certify that I, John Branch, do this 3d day of August, 1900, for the sum of one hundred and fifty ($150.00) dollars, which money has been paid me this day, and in consideration of which sum, I do transfer and sell to J. H. Pomin all right, title, and interest in the houseboats, fixtures, and whatsoever property is contained in said building or buildings on lot occupied by said buildings. The said property being located at the mouth of the Truckee river (west bank). This includes each and all property of whatsoever description formerly owned by me (Jno. Branch). Witness my signature. [Signed] John Branch. Witness: H. W. Wills. Tahoe City, Cal., August 8, 1900."

On the 14th day of November, 1912, H. W. Wills went before a notary public and acknowledged that John Branch had signed and executed said instrument.

Pomin testified that, when he bought the place, he had it rented for a couple of years; that the renter came on the place in 1901 or 1902, and stayed during one summer; that it was vacant for three or four years.

W. S. Bliss, a civil engineer, made a survey of the Branch property for his brother, the defendant Bliss, in 1907 or 1908, seven or eight years before the trial. He stated that he followed the outside boundaries of the land as shown by the old fence; that there was a fence there, but he did not know whether it was all standing or not.

The defendant Duane L. Bliss, Jr., was sworn as a witness and identified a deed, executed June 13, 1907, and acknowledged June 20, 1907, by J. H. Pomin, which conveyed to the witness:

"Lot known as the John Branch property, county of Placer, state of California, located at the mouth of the Truckee river, west bank, together with the buildings on said lot and all fixtures or contents therein."

Over the objection of the plaintiff, this deed was admitted in evidence. The witness testified:

"At the date of this deed I was living at Tahoe. I personally took possession of this property, and had an Italian carpenter that worked at the tavern. He and his family lived there; paid me $5 a month. I haven't any way of getting the exact record of when he went into that property, but some time during the summer of 1907. He was there five or six or eight months. I think the next winter after he went in, after he ceased to occupy it, William Gifford occupied it in the spring of 1908. Gifford occupied it as a tenant. He or his people continued there until this spring. [The trial was had on October 18, 1915.] It was April, I believe, when he was ejected. I brought a suit in ejectment or unlawful detainer. During the time I have been in possession of this property, either by myself or through my tenants, I have always claimed it as my own absolutely. There has never been any interruption of my occupation or possession of it. I have paid the taxes upon the property ever since I have had it."

Tax receipts, showing the payment of taxes by the witness for the years 1908 to 1912, both inclusive, were received in evidence. The assessment for the year 1908 was for "Lot Tahoe." For 1909, 1910, 1911, and 1912, the assessment was for "lot at mouth of Truckee river." In the last two receipts there is also included another lot owned by Mr. Bliss. He testified that during the time covered by the first three receipts the lot in question was the only property he owned at Tahoe.

It was shown by the assessment roll of Placer county that, in 1907 and 1908, the 54 acres, together with dam and water rights, were assessed to M. F. Vandall, the grantor of the plaintiff. In the years 1909, 1910, 1911, and 1912, the property was assessed to the plaintiff; reference to the dam and water rights being omitted from the assessments of 1911 and 1912. The property claimed by defendant Bliss is a portion of lot 9 of section 7, township 15 north, range 17 east, and the government plat shows that the lot contained 17.38 acres, and that it is situated in the northwest quarter of the northeast quarter of said section 7. The assessment to plaintiff and its grantor in the above-named years, so far as the property in dispute is concerned covered "the fractional N. W. ¼ of the N. E. ¼ of section 7," etc.

Section 318 of the Code of Civil Procedure reads as follows:

"No action for the recovery of real property, or for the recovery of the possession thereof,

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can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question, within five years before the commencement of the action."

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A similar statute of Minnesota was considered in Seymour v. Carli, 31 Minn. 81, 16 N. W. 495, and the court said:

"The title of the owner of a freehold estate is described by the terms 'seizin,' or 'seizin in fee'; yet in a proper legal sense the holder of the legal title is not seized until he is fully invested with the possession, actual or constructive. When there is no adverse possession, the title draws to it the possession. * * * An actual possession in hostility to the true owner works a disseizin, and, if the disseizor is suffered to remain continuously in possession for the statutory period, the remedy of the former is extinguished."

[2] The facts in this case, as above detailed, show that it was impossible that plaintiff could have been "seized or possessed of the property in question, within five years before the commencement of the action," and sustain the finding of the court below that plaintiff's cause of action is barred by the provisions of said section. Consequently it becomes unnecessary to consider the points raised by appellant in its attack upon the judgment.

The judgment is affirmed.

We concur: BUCK, Presiding Judge pro tem.; BURNETT, J.

(40 Cal. App. 647)

SPORGIS v. BUTLER. (Civ. 1944.)

(District Court of Appeal, Third District, California. April 14, 1919.)

1. APPEAL AND ERROR ⟸1011(1)—FINDINGS BY TRIAL JUDGE—CONCLUSIVENESS.

Court findings on conflicting evidence will not be reviewed, unless there is no sufficient evidence or inferences that may be drawn therefrom to sustain the findings.

2. DAMAGES ⟸185(1)—INJURIES—EVIDENCE—FINDINGS.

In an action for personal injuries, where the claimed injuries of plaintiff were of a subjective nature, and depended for proof so entirely upon plaintiff's own testimony and statements that it became specially incumbent on the trial court to thoroughly test his credibility, accuracy, and good faith as a witness, findings as to plaintiff's injuries *held* not contrary to the evidence.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by Karl Sporgis against Drury Butler. Judgment for plaintiff for less relief than demanded, and plaintiff appeals. Affirmed.

Thomas H. Christiansen, of Sacramento, for appellant.

J. W. S. Butler and B. F. Van Dyke, both of Sacramento, for respondent.

BUCK, Presiding Judge pro tem. This is an action to recover damages for personal injuries sustained by plaintiff as the result of his collision, while riding a bicycle, with an automobile driven by the defendant. The accident occurred in July of 1915, and the case was tried in December of 1916 by the court sitting without a jury. Findings and judgment were given in favor of the plaintiff in the sum of $400; but from this judgment the plaintiff has appealed, bringing up all of the testimony under the alternative method.

In its brief plaintiff contends that the findings with respect to the extent of the plaintiff's injuries are not justified by the evidence, and that the evidence without substantial conflict shows that plaintiff sustained permanent injuries which will make him a cripple for life, and that he has been and will be in the future prevented from working at his trade as a carpenter, and that consequently the judgment awarded him by the court in the sum of $400 is wholly inadequate and insignificant, and that the court "was biased and prejudiced against the appellant, and that as a result thereof he did not have a fair trial."

[1] In this case the not unusual duty was imposed upon the trial judge of making his findings from evidence of a very conflicting character, and the only power that this court has in the premises is to determine whether or not there is in the record any sufficient evidence or any reasonable inferences that may be drawn therefrom to sustain the findings; for under the law of the land the trial tribunal to which the plaintiff chose to submit his case is the sole and exclusive judge of the credibility of the witnesses and of the value and effect of their evidence.

[2] In this case the claimed injuries of the plaintiff were of a subjective nature, and depended for proof so entirely upon plaintiff's own testimony and statements that it became specially incumbent upon the trial court thoroughly to test the credibility, accuracy, and good faith of the plaintiff as a witness. The following is some of the testimony which is sufficient to justify and sustain the findings in this case:

First, in regard to the violence of the collision which plaintiff claims was the cause of his "invisible" injuries: Plaintiff himself testified that, while he was riding his bicycle on the public highway, defendant came at the rate of 30 miles per hour in his automobile directly behind him, striking the bicycle and—

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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"throwing me off the wheel and on the front part of his machine. After I was knocked off the wheel, I was on the ground between the pavement and the wheel. The left-hand wheel of the front part of the machine caught me in the middle of the back, and the machine went about 15 feet, between 10 and 15 feet, before it stopped. The automobile dragged me under the wheel on top of the pavement for a space of 10 or 15 feet. I was lying on my face toward the pavement."

On the other hand, three disinterested witnesses on behalf of the defendant testified in substance that the car—

"did not travel at all after hitting the bicycle. Possibly it moved a foot, but not more than that. The plaintiff was not dragged one foot, probably, or I would not call it that. I would say, now, he was not dragged at all."

Second, as regards the visible and tangible evidence of the effect of the collision plaintiff testifies:

"I was visibly injured up from my wrist to the middle between the shoulder and elbow—torn off the skin part of the flesh like with a scraper about three inches in width."

Immediately after the accident, appellant, at his own request, was taken to the office of his family physician, who testified as a witness on his behalf at the trial that—

"He had an abrasion on the right arm, the forearm, extending from 2 or 3 inches above the wrist up to a little above the elbow about 2 or 3 inches wide—it looked red and raw, just took off the superficial lesion of the skin, a little deeper cut."

Also:

"A small abrasion on the left hand, back of the hand and fingers as near as I can remember. There were no abrasions or bruises on the back—no skin wound at all; without an abrasion of the skin at all. Q. Has there been any change in the condition of his back from the end of say 3 months of the time of the injury? A. No. From then on the symptoms were subjective, what we call subjective symptoms to me. Nothing that demonstrates to any one else—unless there was a tenderness to the pressure. Q. By the Court: In your opinion, is the patient suffering continual pain now at the present time? Well, that, of course, is a subjective inference. I have no reason to think that he is; that he does not feel weak and feel some sensation there. I do not know if it would be an out-and-out pain. * * * A long time after the injury I got an X-ray that shows that all the vertebræ is in line, of proper position; no evidence of bones having been broken."

Plaintiff also produced at the trial as a witness on his behalf Dr. E. W. Twitchell. In his brief counsel states that Dr. Twitchell's testimony was largely founded on hypothetical questions. But Dr. Twitchell at the trial testified that he had—

"made an examination of the plaintiff in this case, which extended for an hour or more. * * * I made what I believe was a very thorough examination. * * * To be frank, I am not able to state exactly what is the matter with his back. I have examined him carefully, but I was not able to make any definite finding; that is, rather nothing which evidenced any anatomical changes—anything which I could demonstrate to anybody else. Q. You found no condition which indicated that there had been an injury to his back? A. No. If he had come to me, if a person, like anybody, and said nothing to me, and I examined him, after I got through, I would not be positive sure there was anything wrong with him. * * * I found no deformity; no anatomical changes; no swellings; no bruises; no scars. * * * No apparent injury to the muscles or nerves."

On behalf of the defendant, Dr. C. B. Jones testified that as the result of an examination of the appellant at the time of the trial:

"I found the man extremely well developed muscularly, so far as the movements are concerned of the body. Every joint seems to be an absolute normal movement. The spinal column is movable in every direction, twisting and bending. Bends backward and forward, both lateral movements. The muscularity of the spinal column is more or less sensitive; he holds it in tension considerably By directing his attention to other parts, I was able to get him to relax the muscles. They relaxed the same as a normal back. Just as he was bending forward, leaning over in the position the muscles tightened up, he could not relax, did not relax himself. In moving other parts of his body, the muscles that were held tense became relaxed giving perfect movement of the spinal cord. In manipulating the spinal column by the hands, I could find no displacement of the vertebræ, the vertebral column itself. I could get extreme bending in the lumbar region and in the cervical region—those two movements of the spinal cord. * * * I watched the man as he walked, I saw no limping or lameness of any character which sustains my conclusion of my examination. * * * I found no chronic sign. This indicates there is an absence of inflammatory condition of the spinal cord."

Dr. Jones was then asked by respondent's counsel a hypothetical question framed by the plaintiff's attorney and based upon a large number of subjective symptoms narrated by the plaintiff as a part of his testimony, such as the violent and terrific character of the collision, his suffering great pain in the small of his back, his inability to walk at all for 2 weeks and his ability for the ensuing 3 months to walk only with great difficulty and with great pain, and the continued existence of this pain and weakness in the back and his inability to bend his back either forward, backward, or sidewise without severe pain and suffering, his inability to walk except very slowly and for short distances and with great pain, etc. Assuming these conditions to exist, the doctor stated that he would—

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"expect him to be suffering from an injury to the back. Q. Taking now the basis of this hypothetical question, and add to it the further facts that after a physical examination of the back there were no physical signs of injury. No physical signs of any injury to the bones or muscles, what, then, would be your opinion as regarding the nature of this injury? A. From my examination I would term the condition as I find there is what we call traumatic spine. If he was hurt in a railroad accident, they would call it a railroad spine. It is an indefinite injury in which it is impossible to find any spot or definite lesion. The characteristics of these injuries are, the fact is there is a psychic condition as well as the injury. Of course we know that a man that is injured, we know that condition has something to do—there is a psychic condition—the mental attitude mixed with the injury. From my past experience, and from the history of such cases, and the authorities which we go by, we find that individuals of this character are cured, either by receiving a certain amount or sum for their injury, or else by not receiving a certain amount. When they find out they cannot, there is no further recourse for them, they will go back to work, either immediately or very shortly afterwards and be cured of their injuries."

Furthermore, Dr. Twitchell, plaintiff's own witness, testified:

"I regard him (plaintiff) as a man of what we call a neurotic type, that is rather characteristic of his nationality. He is from a province in Russia, a province, a country where I am in the habit of seeing that decided mental action is due to shocks of any sort, mental and physical shocks. Q. Is that condition such that, after this suit is over, he will improve? A. I should say that a suit of this kind would have a very profound impression upon an individual of his type—that is to say, genuinely affects his condition without any connivance on his part. Q. Is the condition such a condition that after this suit is over he is very liable to improve? A. That would depend likewise on the conditions, if the court disappointed him, he would be that sort of an individual who would be very much disappointed—gross disappointment, that sort of thing. Q. Doctor, so far as you are able to discover, there is nothing in his injury, physical condition, that would cause him to get worse as a result of his injury; it would be more the result of his disappointment? A. Yes; I should say so. I would not expect him to get worse because of the condition, on account of his physical condition, so much as I would on account of the other."

There is nothing in the record to justify or warrant appellant's charges that the plaintiff did not have a fair trial as a result of bias or prejudice on the part of the court, or that the record discloses any bias or prejudice. In asking questions of the witness, the court acted with a due and proper sense of the responsibility cast upon him by the duty of his office to try the case according to all the evidence available to him from the witnesses on the stand. There is no evidence to show that by any act or conduct of the judge the witnesses were coerced or attempted to be coerced into telling anything except what they believed to be the truth.

The findings attacked were therefore not contrary to the evidence, and the judgment is therefore affirmed.

We concur: BURNETT, J.; HART, J.

(40 Cal. App. 508)

MacFARLAND v. WALKER et al.
(Civ. 2714.)

(District Court of Appeal, First District, Division 2, California. April 1, 1919.)

1. APPEAL AND ERROR ⟸672 — QUESTIONS REVIEWABLE—JUDGMENT ROLL.

Where appeal is upon judgment roll alone, review is confined to facts presented by findings and admitted by pleadings.

2. DEEDS ⟸95—CONSTRUCTION.

The intent of parties to a deed should be obtained, if possible, by giving every word in deed its usual meaning.

3. DEEDS ⟸95 — CONSTRUCTION — TECHNICAL WORDS.

Under direct provisions of Civ. Code, § 1645, technical words in a deed should, unless clearly used in a different sense, be given meaning by which they would be understood by persons in profession or business to which they relate.

4. DEEDS ⟸96 — CONSTRUCTION — RECITAL.

Under direct provisions of Civ. Code, § 1068, it is only when operative words of grant are doubtful that recourse may be had to its recitals for purpose of construction.

5. DEEDS ⟸121 — CONSTRUCTION — "GRANT."

Civ. Code, § 1068, relating to construction of grants, applies to quitclaim deeds, since "grant" includes all sorts of conveyances.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Grant.]

6. DEEDS ⟸92 — CONSTRUCTION — STATUTE.

Civ. Code, § 1070, providing that, if several parts of a grant are irreconcilable, the former part prevails, must be construed with section 1068, providing when recitals in grant may be referred to, and section 1069, requiring grants to be interpreted in favor of grantee.

7. DEEDS ⟸100 — CONSTRUCTION — STATUTE.

Under direct provisions of Civ. Code, § 1066, grants are interpreted as are other contracts, and, under section 1647, may be explained by circumstances under which they were made and matter to which they relate.

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8. Mines and Minerals ⟸55(7)—Mortgages ⟸304 — Quitclaim Deed—Construction.

Where conveyance reserved mineral rights, and grantees gave a mortgage back, a subsequent deed to grantees reciting grantees' desire to have mortgage released and quitclaiming grantor's interest in premises, released not only the mortgage, but also conveyed reserved mineral rights to grantees, especially where such construction was not challenged for nearly 50 years.

9. Appeal and Error ⟸907(1)—Presumptions—Judgment Roll.

Ordinarily, where case is appealed upon a judgment roll, facts necessary to support trial court's findings will be presumed to have been presented to it.

Appeal from Superior Court, Humboldt County; George D. Murray, Judge.

Suit to quiet title by A. C. MacFarland, administrator of the will annexed of the estate of Thomas A. Scott, deceased, against Jesse Walker and others. Judgment for defendants, and plaintiff appeals. Affirmed.

J. C. MacFarland, of Sacramento, for appellant.

G. W. Hunter, L. M. Burnell, and J. S. Burnell, all of Eureka, for respondents.

BRITTAIN, J. The plaintiff appeals on the judgment roll alone after trial of a suit to quiet title to certain minerals or mineral rights, and the right to enter upon the defendants' lands, there to dig, bore, and mine for the subterranean substances. He maintains the findings do not support the judgment, because he claims all of the elements of adverse possession on the part of the defendants do not appear, and because a certain instrument set forth in the findings was, as he urges, merely a release of mortgage, and not a conveyance of the minerals and mining rights.

In 1869 the plaintiff's testator, by an attorney in fact, conveyed certain lands in Humboldt county to the predecessors in interest of the respondents by deed in terms a grant, reserving and excepting therefrom the subterranean oils and minerals and the right to enter upon the grantees' lands to dig, bore, or mine for the subterranean minerals, paying to the grantees such damages as they might sustain by reason of such entry. Upon the day the grant was made the grantees mortgaged to the grantor the land conveyed to secure the payment of a promissory note payable August 31, 1870, for $1,880, with interest at 10 per cent. During the month of August, 1870, before the note became due, the instrument in question was executed. It recites the fact of the making and recordation of the mortgage, giving the book and page of record, and describes the lands, making no reference to the reservation in the original deed. It further recites that—

"Whereas the said John Walker and Jesse Walker are desirous of having their said tract of land relieved from the operation of said mortgage; now, therefore, I, ———, in consideration of the premises and of the sum of one dollar, the receipt whereof is hereby acknowledged, remise, release, and forever quitclaim unto the said John Walker and Jesse Walker their heirs, executors, administrators, and assigns, the aforesaid premises and all the right, title and interest, both in law and equity, which I have in and to the same."

The appellant maintains that by the reservation in the original grant the grantor created two separate and distinct estates in the land, one being of the surface, or soil, and the other of the oil and similar substances below the surface, together with the right to remove them. Murray v. Allred, 100 Tenn. 100, 43 S. W. 355, 39 L. R. A. 249, 66 Am. St. Rep. 740; Kincaid v. McGowan, 88 Ky. 91, 4 S. W. 802, 13 L. R. A. 289. He argues that the clear intent of the instrument is indicated by the recital, "Whereas the said John Walker and Jesse Walker are desirous of having their said tract of land relieved from the operation of said mortgage," and that "nowhere in the instrument can be found the slightest evidence of intention to reconvey any oil lands."

The case of Barnstable Savings Bank v. Barrett, 122 Mass. 172, relied upon by the appellant, was a case where the operative words indorsed on the back of the mortgage itself were:

"Having received full payment and satisfaction of the within mortgage, I do hereby cancel and discharge the same, and release and forever quitclaim unto the within named G., his heirs and assigns, all my right, title and interest in and to the within described premises. To have and to hold," etc.

At the time the mortgagee's interest under the mortgage was the only interest he had, although he theretofore had another mortgage on a portion of the land, which he had assigned to one Flagg several months prior to the release. The mortgagee's assignment to Flagg was not seasonably recorded, and to defeat Flagg's interest it was sought to extend the instrument beyond its clear meaning. The court properly held this could not be done.

In Donlin v. Bradley, 119 Ill. 412, 10 N. E. 11, immediately after the description of the land in the deed in question was the provision, "This deed is made for no other purpose except to release a certain trust deed," describing it. The court held that the deed was limited to the purpose stated.

In Barr v. Foster, 25 Colo. 28, 52 Pac. 1101, where the quitclaim deed specifically referred to the interests of the grantors arising

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out of a certain contract, it was held that it did not release a deed of trust, of which the grantors were the beneficiaries. In each of these cases the operative words of quitclaim themselves contained a limitation upon the interest conveyed.

[1-3] The appellant maintains that, if the language of the instrument is given its full and most stringent construction, it cannot by any means refer to the oil rights. A serious argument presented by able counsel in support of the two constructions to be given the instrument demonstrates, if not its ambiguity, at least a repugnance between the recital and the operative words. Since the appeal is upon the judgment roll alone, this court is limited to a consideration of the facts presented by the findings and admitted by the pleadings. The court is confined to those fundamental rules of construction, which all lawyers find so easy to state, and which the reports of adjudicated cases show no two lawyers on opposite sides of a controversy can agree to apply in the same way. The first of these rules is to ascertain the intent of the parties by taking the instrument by the four corners, and, if possible, giving effect to every word in it in accordance with its usual meaning. In the Civil Code are codified the rules of interpretation. Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense. Civ. Code, § 1645. The operative words in this instrument, "remise, release, and forever quitclaim all my right, title and interest, both in law and in equity," whether considered as technical words of conveyancing or words understood in their ordinary and popular sense, are the most apt which could have been selected to convey to the Walkers both the equitable interest of the mortgagee and the legal interest in the minerals and mining rights. These words, standing alone and constituting the entire operative clause of the instrument in themselves, are entirely unambiguous. If they had been written without any recital having been made, there could be no question as to their legal effect. No evidence could have been introduced and no inference drawn to limit them simply to a release of the mortgage. They were not coupled in the operative clause with a limitation to the mortgage interest as were the operative clauses in the Barnstable Savings Bank case, in Donlin v. Bradley, and in Barr v. Foster, cited by the appellant.

[4-6] The appellant maintains that, notwithstanding the lack of ambiguity in the operative words of the instrument, the intent of the grantor was shown by the recitals in the preamble. If his contention were sound, no matter how broad was the language used, it would not be extended beyond the clear intent of the parties. Civ. Code, § 1648. It is only when the operative words of grant are doubtful that recourse may be had to its recitals to assist in the construction. Civ. Code, § 1068. The recitals in an instrument may be operative in the sense that they may bind either or both parties to the truth of the facts stated, or they may be examined for the purpose of resolving an ambiguity in the operative words of the grant itself, but where the words of grant are clear, the recitals cannot be resorted to for the purpose of imparting an ambiguity to the entire instrument by which clear words of grant may be limited in their effect. It may be contended that a quitclaim deed is not a grant, and that section 1068 of the Civil Code applies only to technical grants. But the word "grant" includes all sorts of conveyances, including quitclaim deeds. Faivre v. Daley, 93 Cal. 664, 29 Pac. 256. If several parts of a grant are absolutely irreconcilable, the former part prevails (Civ. Code, § 1070), but this section must be read in connection with section 1068, and with section 1069, which provides that it is to be interpreted in favor of the grantee.

[7, 8] Grants are to be interpreted as other contracts (Civ. Code, § 1066), and they may be explained by the circumstances under which they were made and the matter to which they relate (Civ. Code, § 1647). An examination of the surrounding circumstances in making the instrument in question supports the conclusion that, under the rules of construction of the language of the instrument, the operative words must be given their full significance.

The appellant maintains that the external circumstances show the instrument was intended merely as a release. An examination of all the circumstances before the court gives little support to this contention. Thomas R. Bard, as the attorney in fact of Thomas A. Scott, of Philadelphia, in 1869 was authorized to bargain and sell Scott's lands in Humboldt county, to make deeds of quitclaim, special warranty, and general warranty, to accept mortgages, to collect moneys due Scott, and to compound the same, to execute and to satisfy of record releases of mortgages, and to give acquittances and releases. When the instrument in question was executed under this power, Bard knew that he was authorized to make quitclaim deeds and to release mortgages. He also knew that on the same day the mortgage was made he reserved what the appellant maintains was a legal estate out of the mortgaged premises, consisting of rights under the surface of the lands mortgaged. He knew, therefore, that his principal had both legal and equitable interests in the lands. The instrument was made before the mortgage debt became due. It is significant that it does not recite the fact of payment of the debt. It does recite that the owners were desirous of having the

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lands relieved from the operation of the mortgage, and in consideration of that desire, and for a further consideration, Bard used the language necessary to convey both the legal and the equitable interests of his principal. He did not use the language he was expressly authorized to use in the event of the payment of the mortgage debt.

These transactions occurred nearly 50 years ago. The original grant from Scott to the Walkers was made in November, 1869. The instrument in question was made in 1870. Scott lived for 21 years after the instrument in question was executed. During that period the Walkers dealt with the property in all respects as their own. Deeds between the original grantees and from the original grantees to their successors were executed and recorded, and a few months before Scott's death successors of one of the Walkers in terms leased to one Graham a portion of the lands included within the original deed for the express purpose of drilling, digging, boring, and removing petroleum, oil, and similar substances therefrom. Scott died in 1891. Between that time and 1903 numerous other conveyances and leases of the lands and parts of them were recorded, some of them reserving in the grantors named in these latter conveyances, and others transferring to the grantees named therein, the oil and similar products with the right to extract the same. All these instruments, some 15 in number, were matters of public record more than 12 years before the plaintiff was appointed the administrator of the estate of Scott with the will annexed. His appointment was not until 23 years after the death of Scott. The appointment was made in 1914, and this suit was brought shortly thereafter. Notwithstanding the appellant's claim that during this period of half a century Scott and his estate have held an estate in the lands of which they could not be divested by nonuser, that interest in the lands was never assessed, at least before 1909, to either Scott or Scott's estate. The entire interest in the property was assessed to the holders claiming under the instrument in suit, and all taxes were paid by them. Their property was fenced and held by them openly as their own. Even though all the elements of adverse possession of such an estate as the appellant claims do not appear, for the reason that the clock would not begin running until Scott or his representatives were denied the right to exercise the privileges reserved in the original deed, in view of the notice imparted by the recordation of the instruments during a long period of years showing the adverse claims of the Walkers and their successors, coupled with the fact that at the expiration of 45 years after the instrument in suit was executed the plaintiff, as the representative of Scott's estate, deemed it necessary to bring a suit to quiet those adverse claims, the principle that equity does not look with favor upon stale claims might well be applied. Whether this principle would be conclusive or not, the dealings of the Walkers and their successors with the land after the execution of the instrument in suit and the silence on the part of Scott and the representatives of his estate in regard to the clouds upon his title, if he still retained title, would indicate that the parties to the instrument had themselves considered the operative words to mean exactly what they say.

[9] Respondent urges that, apart from any question of construction of the instrument or of adverse possession, the court made the ultimate findings of fact of ownership in the defendants and lack of ownership in the plaintiff, and that these findings fairly sustain the judgment. This rule directly applies to the present case, unless the findings of the probative facts regarding possession and the construction of the instrument in suit are at variance with the finding of ownership in the defendants. McArthur v. Goodwin, 173 Cal. 499, 160 Pac. 679. In support of the construction given to the instrument in suit by the lower court, there may have been additional facts before the lower court not presented by the judgment roll. Ordinarily the existence of whatever facts might be necessary to support the finding of ownership in such a case would be presumed to have been presented to the lower court in support of its action. Upon the facts before this court, Scott's title was divested in 1870, since which time the defendants and their predecessors in interest have been, as they still are, the owners of the lands in fee.

Judgment is affirmed.

We concur: LANGDON, P. J.; HAVEN, J.

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(40 Cal. App. 603)

CRENSHAW BROS. & SAFFOLD v. SOUTHERN PAC. CO. (Civ. 1950.)*

(District Court of Appeal, Third District, California. April 8, 1919. Rehearing Denied by Supreme Court June 5, 1919.)

1. CARRIERS ⟸150, 158(3)—LIMITATION OF LIABILITY—LOSS OR DAMAGE FROM NEGLIGENCE.

A provision in a bill of lading that amount of any loss or damage for which carrier shall be liable shall be computed on basis of value of property (being bona fide invoice price to consignee, including freight charges if prepaid) at place and time of shipment under the bill of lading, whether or not such loss or damage occurs from negligence, is not void as against sound public policy.

2. CARRIERS ⟸115—DAMAGE TO SHIPMENTS —REFRIGERATION.

Loss to fruit from imperfect refrigeration was damage for which a carrier was liable under a provision in bill of lading that the amount of "any" loss or damage for which it was liable should be computed on basis of value of property at place and time of shipment.

3. CARRIERS ⟸135—INJURIES TO SHIPMENT —MEASURE OF DAMAGES.

Under a bill of lading providing that amount of any loss or damage for which carrier was liable should be computed on basis of value of property being bona fide invoice price to consignee, including freight charges if prepaid at place and time of shipment, the extent of damages is measured by the actual loss, which is determined by the difference between the invoice price, with the freight and refrigeration charges added, and the selling price, and it is immaterial what the fruit might have sold for at point of destination.

4. COURTS ⟸97(5) — PRECEDENTS — FEDERAL QUESTIONS.

The interpretation of a uniform bill of lading issued in accordance with a schedule of freights and fares filed with the Interstate Commerce Commission, in pursuance of acts of Congress relating to interstate shipments (see U. S. Comp. St. § 8604a et seq.), and the consideration of liability of shipper thereunder, involve federal questions concerning which the decisions of the federal courts are supreme.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by Crenshaw Bros. & Saffold, a copartnership consisting of John A. Crenshaw, Ira A. Crenshaw, J. B. Saffold, and C. G. Hilderley against the Southern Pacific Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Arthur L. Levinsky, of Stockton, for appellant.

L. T. Hatfield, of Sacramento, for respondent.

BURNETT, J. The action was brought to recover damages for breach of contract in relation to the shipment of three separate and distinct consignments of grapes from three different points in California to Tampa, Fla. Briefly stated, the damage claimed was due to imperfect refrigeration, rough handling of the fruit, and unnecessary delay in transportation. The court found in favor of plaintiff, and the appeal is taken from the judgment on a bill of exceptions. Only one question is open for consideration in this court, and that is, What is the measure or standard by which the amount of compensation is to be determined? Every other question was waived by appellant in the court below, and, of course, on principle as well as authority, we must accord full significance to that waiver.

[1] The controversy revolves about this provision in the bill of lading:

"The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including freight charges, if prepaid) at the place and time of shipment under the bill of lading. * * * whether or not such loss or damage occurs from negligence."

There is no dispute that the transaction involved interstate commerce, or that appellant had filed with the Interstate Commerce Commission its schedule of rates, fares, and charges for transportation as required by the interstate commerce law. Nor is it claimed that any fraud or want of good faith characterized the execution of the contract between the parties for the shipment of the fruit. Respondents, however, do make the contention that said provision is void because against sound public policy.

A detailed consideration of the various objections to the legal operation and effectiveness of the provision is not required since the validity of such contract has been so directly and positively affirmed by the courts, including the Supreme Court of this state and the United States Supreme Court, that the question is no longer open to discussion. Of course, the circumstances and conditions of each particular case must be regarded in the interpretation of the contract, but it cannot be regarded as unlawful or inoperative.

In Kansas City S. R. Co. v. Carl, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683, a box of household goods was lost in transportation, and the shipper sued to recover its value. The main defense was that the liability was limited to the sum of $5 per hundredweight, the value agreed upon at the time and place of shipment. Many cases are reviewed in the opinion, and the court declares:

"But when a shipper delivers a package for shipment and declares a value, either upon re-

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Amendment of remittitur and correction of judgment denied 183 Pac. 208.

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quest or voluntarily, and the carrier makes a rate accordingly, the shipper is estopped, upon plain principles of justice, from recovering, in case of loss or damage, any greater amount. The same principle applies if the value be declared in the form of a contract. * * * The ground upon which such a declared or agreed value is upheld is that of estoppel."

It is not important that in the case at bar the agreement did not specify the value. It left that to be ascertained, but limited it to a particular time and place. The same principle would manifestly apply as though the parties had stated the exact value. Indeed, as we shall see hereafter, there is no controversy as to the value of the property at the time and place of shipment. Nor is there any dispute that the shipper had the option to demand, on the condition of paying a greater rate, a more favorable contract as to the liability of the carrier.

In Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co., 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948, while the main questions discussed were whether the plaintiff's exclusive remedy was against the initial carrier and whether the action was barred, the court declared:

"But the parties could not waive the terms of the contract under which the shipment was made pursuant to the federal act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariff and regulation."

In Pennsylvania R. R. Co. v. Olivit Bros., 243 U. S. 574, 37 Sup. Ct. 468, 61 L. Ed. 908, the validity of such provision was conceded by both parties, the controversy being over the questions as to the meaning of the phrase "lawful holder" in what is known as the Carmack Amendment to the Interstate Commerce Act (Act Cong. Feb. 4, 1887, c. 104, § 20, 24 Stat. 386, as amended by Act Cong. June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 595 [U. S. Comp. St. §§ 8604a, 8604aa]), whether there was any evidence of negligence on the part of the defendant, and whether plaintiff was entitled to recover the freight paid by it; the court, however, after quoting said provision from the bill of lading, said:

"Some of the bills of lading do not contain this provision, but it was agreed at the trial that the proper measure of damages was to be computed upon the basis of the value of the property at the place and time of shipment, and that such measure should be read into all of the bills of lading. As plaintiff further says, to recover the damages sustained by it based upon this value, plaintiff must receive from defendant the difference between this value and the proceeds of the sale and the freight paid. In this we concur, and therefore there was no error in including in the recovery such freight."

Gulf, Colorado & Santa Fé Ry. Co. v. Texas Packing Co., 244 U. S. 31, 37 Sup. Ct. 487, 61 L. Ed. 970, involved the shipment of poultry, the goods having been damaged by reason of the negligence of the carrier, and sold by the shipper at the point of destination. One of the vital questions considered was whether the trial court erred in giving to the jury the following instruction:

"If you find for the plaintiff you will assess the damages at the difference between the invoice price of said poultry, to wit, the sum of $22,238.56, and the value of said poultry at the time the same was delivered to plaintiff or its agents, the Western Cold Storage Company in Chicago, by the carrier, with 6 per cent. interest per annum, from January 15, 1911."

The court declared:

"We think that in taking this sum as the basis of computing damages the trial court did but enforce the stipulation in the bills of lading. * * * We think the court properly charged the jury to take the difference between this invoice price and the value of the poultry at the time the same was delivered in Chicago in arriving at the amount of damages. * * * Apart from the stipulation of these bills of lading, the ordinary measure of damages in cases of this sort is the difference between the market value of the property in the condition in which it should have arrived at the place of destination and its market value in the condition in which, by reason of the fault of the carrier, it did arrive. New York, Lake Erie & W. R. R. Co. v. Estill, 147 U. S. 616 [13 Sup. Ct. 444, 37 L. Ed. 292]. The stipulations of these bills of lading changed this rule in the requirement that the invoice price at the place of shipment should be the basis for assessing the damage."

The case of Boston, Maine Railroad v. Piper, 246 U. S. 439, 38 Sup. Ct. 354, 62 L. Ed. 820, Ann. Cas. 1918E, 469, is not opposed to the foregoing. Therein it was held that a provision exonerating the carrier from losses incurred by the shipper in consequence of the negligence of the former is illegal and not binding upon the shipper, and "is not within the principle of limiting liability to an agreed valuation which has been made the basis of a reduced freight rate."

In no decision, to which our attention has been called, has the subject received more careful and thorough consideration than in Zoller Hop Co. v. Southern Pacific Co., 72 Or. 262, 143 Pac. 931, decided by the Supreme Court of Oregon. Therein it is said:

"It is reasonable and natural that the care and risk involved in the carriage of goods should be in proportion to their value. It is proper and legitimate that, the greater the risk and responsibility, the greater should be the recom-

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pense to the one incurring them. The converse is equally true, so that consequent damages are reduced in proportion to the lesser responsibility for the goods. The risk and the rate have a logical and corresponding relation to each other, based upon the value of the property intrusted to the carrier. If it is lawful to agree in advance upon a more or less conventional value of the chattels for the purpose of securing cheaper rates in favor of the shipper, it is quite as proper to use the same value as a basis upon which to compute damage for the breach of the contract. * * * It accords with sound doctrine, therefore, that at the outset the parties may in good faith fix upon the value of the property for all contingencies likely to arise in the transaction, and this does not in any way relieve the carrier from the results of his own negligence."

In 10 Corpus Juris, 57, it is said:

"Before the enactment of the Carmack Amendment the greatest confusion existed as to whether a limitation of the carrier's liability for loss or injury to a specified value was valid in case the shipment was lost or injured by reason of the negligence of the carrier. * * * The effect of the Carmack Amendment is, of course, to make the rule uniform in all jurisdictions of the United States, so far as interstate shipments are concerned, and to render valid a limitation of the character under consideration, whether the loss or injury was due to the carrier's negligence or not."

Furthermore, it is said that even in states where such a contract is held void under statutes prohibiting carriers from limiting their common-law liability, "a contract for an interstate shipment, made in a state where such a statute is in force, is valid under the Carmack Amendment, inasmuch as the decisions of the federal courts prior to the amendment held such contracts valid."

Our own Supreme Court has also directly upheld the validity of such agreement.

In Pierce v. Southern Pacific Co., 120 Cal. 156, 52 Pac. 302, 40 L. R. A. 350, it was declared that effect must be given to the contract of the parties making the invoice price at the point of shipment the measure of damage, "and where no invoice price was actually made out and agreed upon, that expression must be understood as indicating the actual value of the trees at the point of shipment, when loaded and ready for transportation."

The question was fully considered in Donlon Bros. v. Southern Pacific Co., 151 Cal. 763, 91 Pac. 603, 11 L. R. A. (N. S.) 811, 12 Ann. Cas. 1118, involving the shipment of horses, and the court said:

"The contract is one in which the valuation of the property was agreed to for the purpose of fixing transportation charges and as measuring the responsibility of appellant. It was not a contract limiting liability. It was a contract dealing primarily with value—the value of the horses shipped. That was agreed to, and, of course, the agreed valuation must be deemed to be the actual valuation of the property—its actual valuation for all purposes of the contract."

[2] Nor do we understand how this covenant in the contract is affected in the least by the fact that there was a separate and distinct charge for the refrigeration. The charge was distinct, but the refrigeration itself was inseparably connected with the transportation of the fruit, and was an essential part of the transaction. The loss from imperfect refrigeration was damage for which the carrier was liable on that bill of lading, and the condition to which we have reference applied "to any loss or damage for which the carrier is liable." The fact that there was only one rate for the refrigeration does not derogate from the validity of the contract, since the difference in the rate for the transportation would be a sufficient consideration to uphold it.

Another important question is involved in the construction and application of this provision of the contract.

As to the first count in the complaint the court found that the grapes were sold to the best advantage for the sum of $980; that the amount of the freight charge was $496.12 and of the refrigeration was $95; that the invoice value was $783; that if the fruit had arrived in time and uninjured, it could have been sold for $1,957.50. The court concluded that the plaintiffs suffered damage to the extent of the difference between said $1,957.50 and $980, to wit, the sum of $977.50, for which judgment was allowed.

As to the second count, the court found that the fruit was sold for the sum of $1,097.75, and that if it had been received on time and in a marketable condition it would have brought the sum of $1,860. It was also found that the invoice price was $930, the freight charge $494.97, and the refrigeration charge the sum of $95. The damage allowed was therefore the sum of $762.25.

In reference to the third shipment, it was found that it was sold for $1,133.75; that if there had been no breach of the contract, it could have been sold for $2,557.50; that the invoice price was $1,255.50, the charge for transportation was $494.97, and for refrigeration was $95. The court allowed as damages the difference between the selling price and what it would have brought, to wit, the sum of $1,423.75.

[3] It is the claim of appellant that, in any event, under said provision of the bill of lading the extent of the recovery is measured by the actual loss, which is determined by the difference between the invoice price with the freight and refrigeration charge added and the selling price, and that it was entirely improper for the court to consider what the fruit might have sold for at the point of destination. Under this view, for

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the first-mentioned shipment, the account would stand as follows:

Actual cost of fruit	$ 783 00
Freight paid	591 12
	$1,374 12
Fruit brought	980 00
Loss	$ 394 12

For the second cause of action we would have:

Cost	$ 980 00
Freight paid	589 97
	$1,519 97
Fruit brought	1,097 75
Loss	$ 422 22

The third would stand as follows:

Cost	$1,255 50
Freight paid	589 97
	$1,845 47
Fruit brought	1,133 75
Loss	$ 711 72

Another view of the construction of said provision, which supports the conclusion of the lower court, suggested by respondents, is that said invoice price simply provides the maximum amount to be recovered in case of loss, but does not prevent the recovery of the difference between the selling price and what the goods could have been sold for if there had been no injury, provided such difference does not exceed said invoice price. Such seems to be the view taken by the Supreme Court of this state in the very recent case of Olcovich v. Grand Trunk Ry. Co. of Canada (Sup.) 176 Pac. 459. Therein it is said:

"While there are late cases holding that the measure of damages under such a bill of lading as that herein is the difference between the cost price at the shipping point and the selling price of the injured freight at the point of destination, * * * we prefer to follow the general view above stated."

The general view to which the court thus refers is expressed in the earlier part of the opinion as follows:

"While the exact question has never been determined in this state, in the case of a partial loss with such a contract it has been determined, in harmony with the general view, that the loss is limited by the value stated and agreed upon in the bill of lading in the case of a total loss. Pierce v. Southern Pacific Co., supra. If this limit is valid as to a total loss, there seems to be no reason why it should not also be considered as a limitation upon the damage in the case of a partial loss."

It is declared further that the authorities are not in accord as to the question, but the Supreme Court approved the view announced in 10 Corpus Juris, § 612, and 3 Sutherland on Damages, 3391.

In the Pierce Case, supra, it is to be observed that the bill of lading provided "that the actual invoice cost at point of shipment will be taken as measure of damages," language of somewhat different import from that to be construed herein. It was also held that it was error for the lower court to permit the market value of the trees at Riverside, the point of destination, to be shown, and that the injury should have been limited to what was the value in Florida, the shipping point. It was therefore in effect held that the value in Florida was not only the measure of the damages that could be recovered, but that it was the only basis upon which such damage could be computed. It may be added that obviously it would have made no difference in the result in that case whether said value was considered as the measure of the recovery or the basis upon which the damages should be computed, since there was a total loss.

In Corpus Juris, supra, the rule is stated as follows:

"The parties may, by express provisions to that effect, stipulate that in case of partial loss, the damage shall be proportioned on the basis of the sum named as the maximum limit; but where this is not done the question becomes one of construction, and very generally the view is entertained that such stipulations are to be considered as permitting recovery for the damages actually done, the amount recoverable not to exceed the amount agreed on as compensation for a total loss."

As stated in Sutherland, supra:

"Where a statute authorizes a limitation of liability by contract and a contract is made limiting liability for loss of live stock to the actual cost at point of shipment and in no event to exceed a stipulated sum per head, the measure of damages for injuries to the animals in transit due to negligence is the amount that each has depreciated in value, but in no event to exceed the actual cost at point of shipment as shown by the market value there or the stipulated value."

An examination of the cases cited by Corpus Juris and Sutherland, supra, in support of the text shows that the phraseology of the respective bills of lading is somewhat different from the language involved herein, and it lends itself more easily to the construction that the invoice price was intended to be the measure rather than the basis of the amount recoverable.

It may be said, also, of the Olcovich case, supra, that it arose prior to the adoption of the uniform bill of lading in 1908. The corresponding provision, though, in the bill of lading involved in said case was:

"The amount of any loss or damage for which the carrier becomes liable shall be computed at the value of the property at the place and time of shipment"

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—being substantially the same in that respect as the bill of lading herein. Said decision undoubtedly, therefore, favors the conclusion of the trial court in this case, since the damages awarded for each shipment are less than the amount of the invoice value and freight.

However, we cannot reconcile this view with the decision of the United States Supreme Court in the Texas case, in 244 U. S. 31, 37 Sup. Ct. 487, 61 L. Ed. 970, supra.

[4] The interpretation of the uniform bill of lading issued in accordance with the schedule of freights and fares filed with the Interstate Commerce Commission in pursuance of the act of Congress and relating to an interstate shipment, and the consideration of the liability of the shipper thereunder, involve federal questions concerning which the decisions of the federal courts are supreme. Southern Railway Co. v. Prescott, 240 U. S. 632, 36 Sup. Ct. 469, 60 L. Ed. 836; Georgia, Florida & Alabama R. R. Co. v. Blish Milling Co., 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948; A., T. & S. F. Ry. Co. v. Harold, 241 U. S. 371, 36 Sup. Ct. 665, 60 L. Ed. 1050.

In the Prescott Case it is said:

"Viewing the contract set forth in the bill of lading as still in force, the measure of liability under it must also be regarded as a federal question. As it has often been said, the statutory provisions manifest the intent of Congress that the obligation of the carrier with respect to the services within the purview of the statute shall be governed by uniform rule in the place of the divers requirements of state legislation and decisions"—citing a large number of cases.

The case of Detroit & M. Ry. Co. v. Fletcher Paper Co., 248 U. S. 30, 39 Sup. Ct. 13, 63 L. Ed. ——, involves an entirely different question.

Therein the suits were brought to recover the difference between the rates fixed by the Michigan Railroad Commission on logs carried wholly within the state and the higher rates that the defendant actually charged. The court held that the determination of the merits of the controversy depended upon the construction of the state laws, as to which the state "has the last word." It was expressly stated that the cases did not involve interstate commerce.

We see no escape from the conclusion that under the decisions of the highest court of the land the award of the trial court was too high.

To state it sententiously: The United States Supreme Court holds that under this form of contract the shipper can recover only his actual loss instead of his full compensatory damage.

It is not necessary, though, to reverse the case, since the findings of fact are complete. The judgment is modified so as to provide that:

"Plaintiffs do have and recover of and from the Southern Pacific Company, a corporation, the defendant, the sum of $1,528.06, with interest thereon at the rate of 7 per cent. per annum, as follows: On the sum of $394.12 from the 21st day of October, 1913; on the sum of $422.22 from the 23d day of October, 1913; and on the sum of $711.72 from the 14th day of November, 1913"

—and, as thus modified, the judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(40 Cal. App. 537)

MILEKOVICH v. QUINN et al. (Civ. 2709.)

(District Court of Appeal, First District, Division 2, California. April 8, 1919. Rehearing Denied by Supreme Court June 2, 1919.)

1. DIVORCE ⟸252 — HUSBAND AND WIFE ⟸272(1) — COMMUNITY PROPERTY — PROPERTY DIVISION.

Divorce dissolves the community, and, unless the parties agree to a division of the community property, it is the duty of the court, in divorce suit, to determine their respective interests.

2. DIVORCE ⟸245(2)—STIPULATION FOR DIVISION OF PROPERTY—FRAUD—SUBSEQUENT SUIT TO RECOVER SHARE OF COMMUNITY PROPERTY.

In a suit by divorced wife against her former husband for her share of community property kept from her by the fraud of the husband in making a property settlement before divorce, where the wife did not seek a new valuation for the purpose of redivision, but only the secreted one-half of the property, it was not necessary that she offer to return to the defendant property received under the settlement.

3. DIVORCE ⟸245(1) — FRAUD IN SETTLEMENT OF PROPERTY RIGHTS.

In suit by divorced wife against her former husband for her share of community property kept from her by husband's fraud in property settlement before divorce, which settlement was followed by the terms of the divorce decree, it was not necessary that the divorce decree be set aside in its entiretly, if at all.

4. JUDGMENT ⟸443(1) — SETTING ASIDE — DECEPTION OF COURT—FALSE STATEMENTS.

False statements made upon the record, sworn to in an answer, will not warrant the setting aside of the judgment because the court was deceived by them.

5. DIVORCE ⟸245(3) — SUBSEQUENT SUIT FOR RELIEF FROM DECREE — COMMUNITY PROPERTY—PROPERTY AGREEMENTS SECURED BY FRAUD—INTRINSIC FRAUD.

In a subsequent suit by plaintiff in divorce, her complaint asking to be relieved from a por-

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tion of the decree relating to community property on the ground that she was deceived by defendant's answer and cross-complaint as to the amount of community property, and thereby induced to make a property settlement stipulation, does not show intrinsic fraud, since she does not ask relief based on a judgment founded on perjured testimony, but because she was induced by false statements to enter into a contract out of court precluding her from submitting to the court questions of fact on which she now seeks adjudication.

6. FRAUD ⟸1—DEFINING FRAUD.

Equity will not attempt to define just what form of deceit is fraudulent.

7. DIVORCE ⟸245(2) — PROPERTY SETTLEMENT—COMMUNITY PROPERTY — FRAUD AND DECEIT—ADJUDICATION—RELIEF.

Although a judgment entered into upon the stipulation of the parties is as sacred and unimpeachable as any other judgment, yet, where an agreement between husband and wife in settlement of community property previous to divorce expressly provided that its provisions be incorporated in the judgment, it withdrew from judicial consideration matters so stipulated, and the court has power to grant relief to the wife where such agreement was secured by the husband's fraud or concealment of community property.

8. DIVORCE ⟸245(2) — PROPERTY STIPULATION—COMMUNITY PROPERTY—FRAUDULENT STIPULATION—EQUITABLE RELIEF.

Where a fraudulent stipulation in a divorce suit effectually withdrew issues as to community property from consideration of the court, by an express provision that findings and decree should accord therewith, equity, regarding the substance rather than the form, will relieve against the part of the decree affected by the fraud.

9. DIVORCE ⟸245(2) — COMMUNITY PROPERTY—FRAUDULENT PROPERTY STIPULATION—SUBSEQUENT SUIT—DILIGENCE—FAILURE TO CROSS-EXAMINE DEFENDANT.

Where plaintiff in divorce suit was prevented from cross-examining defendant as to the amount of community property accumulated by the fraud of defendant misrepresenting the amount thereof in the answer and cross-complaint and his securing from her by such fraud a stipulation for property settlement, plaintiff was not guilty of lack of diligence in failing to cross-examine defendant as to the amount of such property so as to bar her from subsequent suit to secure her share of the community property.

Appeal from Superior Court, City and County of San Francisco; Thos. H. Graham, Judge.

Suit by Delia Milekovich against Patrick P. Quinn and others. Judgment for plaintiff, and defendants appeal. Judgment affirmed.

John L. McNab, Timothy Healy, and Byron Coleman, all of San Francisco, for appellants.

Frank W. Sawyer, of San Francisco, for respondent.

LANGDON, P. J. Plaintiff and respondent in her suit sought to be relieved of that portion of a prior decree of divorce by which the property rights of the parties to the divorce suit are claimed by the appellants to have been finally adjudicated. The essential facts are admitted. In the interim between the divorce decree and the commencement of this action the plaintiff had remarried. When the divorce action was brought, a restraining order was made on the ex parte application of the plaintiff prohibiting the defendant in the divorce action, Patrick P. Quinn, from disposing of any portion of the community property. On the following day Quinn, upon an ex parte application, caused the restraining order to be set aside. Immediately thereafter he withdrew from his safe deposit box bonds of the par value of $45,000, and delivered them to one Brady for the purpose of secreting them from the knowledge of Mrs. Quinn, her attorneys and the court in which the divorce action was pending.

In her complaint for divorce the plaintiff made allegations concerning the community property, and, among other things, upon information and belief, that the defendant had securities of the value of $60,000, a part of the community property. In his answer the defendant denied all the substantial allegations of the complaint, and denied that he had securities of the value of $60,000, or of any sum or amount in excess of about $2,000, admitting, however, the ownership of other community property, to which further reference will be made. In the cross-complaint the defendant set up a cause of action against the plaintiff for divorce on the ground of willful desertion, and a second cause of action based upon alleged cruelty of the plaintiff. Upon receiving notice of the application for alimony during the pendency of the suit, Quinn made an affidavit expressly referring to the statements set forth in his answer and cross-complaint in regard to the community property and closing with the statement:

"In relation to said assertions about defendant's great wealth, defendant says that at the time of the great fire in San Francisco he had the home above mentioned, that the other lot of the community was unimproved, and that he had less than $3,000 in cash. Since that time he has earned the money necessary to erect the said flats amounting to $20,000 and has paid for all of the street work in connection therewith, amounting to $5,000, and to buy the Stevenson street property for $3,500, making a to-

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tal accumulation made by the defendant in that time of $32,700, which defendant submits is all that he could be expected to accumulate in that short space of time in consideration of his age and bodily condition."

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About the time the answer was filed and the affidavit served on plaintiff, negotiations were opened for the settlement of the property interests of the parties to the divorce suit. It does not appear whether negotiations were pending when the answer was filed or whether they were opened shortly after. The negotiations were carried on between the attorneys of the respective parties and extended over a period of from one to two months. During the negotiations some five or six offers of settlement of the property interests were made on behalf of Quinn, and they were successively rejected by Mrs. Quinn. On the trial of this case the rule excluding evidence of confidential communications between attorneys and clients was rigidly applied to the evidence of the attorneys of both parties. It appears, however, that no direct representation was made either by Quinn or by his attorney to Mrs. Quinn or any one in interest with her in regard to the amount of community property unless the representations made in the answer and cross-complaint and in the affidavit served upon Mrs. Quinn or her attorneys can be so construed. The only statement ascribed to the attorney for Quinn during the negotiations was, "Your client says one thing and my client says another." Whereupon the attorneys for both parties continued to deal in view of the community property known by the attorneys for the plaintiff to exist. Despite the fact that Mrs. Quinn repeatedly told her attorneys that she believed Quinn had some $60,000 worth of securities, Quinn's deposition was not taken, nor was any direct inquiry made of him, nor, so far as the record shows, of his attorneys in regard to the discrepancy between the belief of Mrs. Quinn and the statements of Quinn in his answer and cross-complaint. After rejecting many offers of settlement, the plaintiff entered into a stipulation which is attacked in the present suit. The property agreement embodied in the stipulation was made upon the assumption that under it each of the parties should receive one-half of the community property. The stipulation was for a division of all the community property. It provided that a certain lot was the property of Nellie Riley, a married daughter of the parties; that plaintiff Delia Quinn, now Delia Milekovich, should receive a lot in San Francisco, 60 by 120 feet, improved by a building containing six flats, and another lot 25 by 95 feet, together with the family dwelling house thereon and its contents, except personal belongings of the husband; that "all of the remainder of the community property of said community shall be awarded to and be the sole and separate property of the defendant Patrick P. Quinn including the following described real property," after which followed a description of a lot 75 by 95 feet, another lot 27 feet 6 inches by 85 feet, a lot in San Leandro, in Alameda county, "and also all personal property of every kind and description of said community other than the contents of said Ninth avenue dwelling house."

It is further stipulated that—

"The foregoing division of the community property is in absolute, entire, and complete satisfaction and discharge of all claims which either party to said action might assert against the other whether on account of property rights, interest in community property, or rights to maintenance, alimony, costs, and counsel fees."

In consideration of the "foregoing statements and compromise," the parties mutually released each other from all claims and demands and bound themselves to execute such conveyances as might be proper to effectuate the settlement. The stipulation closes as follows:

"It is furthermore stipulated and agreed that in case the above-entitled court shall make and enter any decree in the above-entitled action awarding a divorce to the plaintiff or to the defendant in said action that the said court shall find that all of the property hereinbefore referred to is community property of plaintiff and defendant, and shall divide the same between them in accordance with the terms of this stipulation."

The interlocutory decree, after adjudicating the divorce, adjudicated and decreed that the real property of the community belonged to and should vest in the respective parties, following the provisions of, but not referring to, the stipulation, and the decree contained the following statement:

"It is further ordered, adjudged, and decreed that the foregoing division of the community property is an absolute, entire, and complete satisfaction and discharge of all claims which either party to said action might assert against the other whether on account of property rights, interest in community property, or right to maintenance, alimony, costs, and counsel fees."

The deeds to the real property were executed in accordance with the terms of the stipulation and decree. Shortly after discovering the fraud practiced upon her by Quinn, plaintiff commenced the present action. The other parties alleged to have been custodians of a portion of the bonds or their proceeds were joined as parties to the suit. In the complaint the history of the divorce action is set forth at considerable length, and it is alleged that, in reliance upon the statements made in the answer and cross-complaint, and in the affidavit of Quinn, the

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property settlement was made; that the statements were untrue, and the settlement would not have been made but for the statements. As stated before, the essential facts are admitted either directly in the pleadings of the defendants or by statements of the defendant Quinn on the witness stand. In the complaint it is not in terms stated that the plaintiff desires to subject herself to any order which might be made in a court of equity, nor that she desires to do equity. There is no allegation nor was there any evidence of rescission or attempted rescission. The plaintiff prayed judgment "canceling, annulling, and setting aside" the agreement in the divorce action, the deeds from the plaintiff to Quinn, from the plaintiff and Quinn to Mrs. Riley, from Quinn to the plaintiff, and the interlocutory decree "so far as it affects the property"; that it be further adjudged and decreed that certain real property is the separate property of the plaintiff, and that all other property described in the complaint and "now standing in the name of the defendant Patrick P. Quinn, as well as that standing in the name of defendant Nellie E. Riley, is community property," and that Nellie E. Riley and Quinn be declared trustees of a trust in which the interest of the plaintiff should be determined; that the defendant should be required fully to account and the court decree the plaintiff to be the owner of one-half of the property in the possession or under the control of Quinn or Mrs. Riley; that the exact value of the property "wrongfully and fraudulently concealed" be determined as of the time of the settlement of the property rights in the divorce action, and the plaintiff decreed to be entitled to one-half thereof; and for general relief.

The findings and decree were very lengthy and determined that the plaintiff is entitled to $22,500, the value of one-half of the bonds and securities, with legal interest from the date of the interlocutory decree; that the recitals in the decree that the remainder of the community property should be awarded to Quinn and that the division was in absolute, entire, and complete satisfaction were made by reason of a settlement made out of court and obtained by Quinn from the plaintiff through fraud, by which the plaintiff was prevented from presenting to the court and obtaining a judicial investigation of the true facts; that the stipulation be annulled; that the plaintiff, in addition to the recovery of $22,500, be given a lien upon all of the personal and real property owned and possessed by the defendant Quinn; that Quinn and Fred J. Riley are involuntary trustees for the plaintiff of the real and personal property described in the decree as belonging to Quinn; that the plaintiff is the owner of the lot containing the six flats; that the plaintiff has no right in the property standing in the name of Mrs. Riley; that Quinn is the owner of the lots he took under the stipulation, charged with the trust for the payment of the $22,500; that the defendant is the owner of a certain lot to which the plaintiff has no right. The decree further appointed a commissioner to take possession of and sell the property, subject to the trust.

The appellant maintains that many of the findings are not supported by the evidence, and calls particular attention to the finding to the effect that, by means of the false pretenses, representations, answer, affidavit, and wrong concealment with intent to cheat and defraud the plaintiff, Quinn prevented the plaintiff from obtaining a judicial investigation and trial of the issue of property, upon which argument is made that the fraud in the present case was intrinsic in nature and not such fraud as equity will relieve against. This argument is made more fully by the appellants in another connection and will be considered with the point upon which it is most fully developed by the counsel for the appellant. Objection is made to a finding against the defendant in the matter of his alleged meritorious defense to the divorce action, and it is argued either that no such finding should have been made, or that there was no evidence to support the finding. A portion of the appellant's argument is based upon the question of whether or not relief in such a case as this can be given without setting aside the entire divorce decree. The argument upon this point presented upon behalf of the appellant will be considered in connection with that contention. Objection is made to the finding that one of the parcels of land was the separate property of the plaintiff, and it is argued that in such a case as this, under the general rule that the parties must be replaced in the respective positions they occupied at the time of the fraudulent agreement, if for any reason they cannot be so restored, equity is powerless to relieve against an admitted fraud. This also is more fully argued under other points made on behalf of the appellant.

[1] Appellant maintains that, since the property in issue in this action was community property, there was no issue upon which a finding could be made and no evidence to support a judgment quieting the plaintiff's title to the undivided one-half interest in the fee in any of the property. It is argued that, since the community property is under the absolute control of the husband, and the wife during the existence of the community has only an inchoate right to any of the property, it is beyond the power of the court in this suit to determine her interest in the property of the community. The community no longer exists. If in a divorce case the parties agree to a division of the community

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property, it is unnecessary for the court to adjudicate upon their respective interests in the former community property. If no such agreement is made, it is the duty of the court in which the divorce proceeding is pending to determine the relative interests of the spouses in their common accumulation. In this case the parties did in form agree upon substantially an equal division of the community property between them. The wife claims in this suit that in entering into the former agreement she was deluded and defrauded of her one-half interest in the $45,000 worth of securities secreted by the husband. The lower court awarded to her this one-half interest, and declared that the property of the former husband was burdened with a trust to pay her the amount of the award. If there was jurisdiction in the court to grant relief to the defrauded wife, under a well-established rule the court might make any decree within those principles of good conscience and fair dealing which are recognized as controlling the discretion of the chancellor.

[2] Under the rule of rescission, the appellant contends that, since the plaintiff did not offer to return to the defendant the property received by her under the stipulation, she has failed to bring herself within the requirement that one who seeks relief at the hands of a court of equity must first do equity. It is further argued that, since the attack is upon the divorce decree, the decree must be set aside in its entirety, if at all, and because the parties cannot be restored to their original positions, a court of equity can give the defrauded wife no relief. The fallacy of the first of these contentions is that in this suit the wife was not seeking to have any new evaluation made of the property which had been divided, for the purpose of redivision, but was seeking only one-half of the property which had been secreted. Nothing would have been gained by undoing what had been done in regard to the property divided, and the law does not require idle things to be done. The result would have been the same if she had herself deeded back the property she received, or if the court, upon the evidence submitted to it, had decreed that she owned the property she had formerly received and was entitled to $22,500 more.

"It is not an invariable rule that rescission of a contract obtained by fraud will be denied merely upon the ground that the parties cannot be placed in statu quo. * * * Parties engaged in a fraudulent attempt to obtain a neighbor's property are not the objects of the special solicitude of the courts. * * * Restoration is not exacted on account of any feeling of partiality in regard to the fraudulent party. The law cares very little what his loss may be and exacts nothing for his sake." Green v. Duvergey, 146 Cal. 379, 389, 390, 80 Pac. 234, 238.

[3-5] In regard to the second contention under this point:

"The judgment is not under review, but an issue is being tried as to whether the plaintiff is entitled to have a court of equity interpose in her behalf. The judgment is not conclusive in such a case. The question to be determined is whether the adjudication was not procured by fraud or mistake. It may be said that in such a case the legal validity of the judgment is admitted, and it is because of its validity, or apparent validity, that the plaintiff requires to be relieved from it." Eichhoff v. Eichhoff, 107 Cal. 48, 40 Pac. 25, 48 Am. St. Rep. 110.

It is not necessary, under the rule announced in Green v. Duvergey, supra, that a divorce decree be set aside either in whole or in part. The sole question is whether or not, under the facts of the present case, the court had power to grant relief to the defrauded wife. This question is the one raised by the general demurrer of the defendant, his motion at the opening of the trial to exclude all evidence in support of the allegations of the complaint, and his attack upon the judgment here. All of his other contentions merge in the determination of this contention. In reliance upon United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93, Pico v. Cohn, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159, and a long line of decisions announcing the same principle, the appellant maintains that no relief can be granted the plaintiff in this action because the admitted fraud was intrinsic and should have been uncovered in the original suit. Lengthy quotations are made in the appellants' brief from these cases. There could be no question in regard to the application of the rule if the fraud in the present case were intrinsic. The appellant forcefully argues that, because the plaintiff claims she was deceived by the statements in the answer and cross-complaint filed in the divorce suit, and in the affidavit made by Quinn, the fraud was necessarily intrinsic, and says that, "if a party may be allowed to litigate anew the matters in controversy on the ground that she relied on her adversary's pleading, then trials might be dispensed with altogether, for their functions would have ceased." This position of appellant cannot be maintained. The statement of its corollary shows its fallacy as applied to the facts here. If the statements made by Quinn had not been made in his pleading or in his affidavit filed in the suit, but had been made to the plaintiff out of court, under the contention of the learned counsel for the appellant, they might have furnished a reason for a court of equity relieving the plaintiff from the fraud practiced upon her. Can it be said that untrue statements by which the plaintiff was deceived lost anything of their effect by having been sworn to and filed in the pending divorce action? To answer this

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question in the affirmative would be to suggest a ready means for dishonest persons to accomplish fraudulent results. The rule is that false statements made upon the record will not warrant the setting aside of the judgment because the court was deceived by them. Here there is no contention made that the court was deceived, but that the respondent was deceived, and induced thereby to enter into the fraudulent agreement. The false statements were made. The lower court found upon evidence to that effect that the plaintiff relied upon the statements and entered into a contract which was made out of court. The plaintiff claimed the aid of a court of equity, not because the false statements were sworn to, but because they were false. She does not seek relief from the judgment because it was based on perjured testimony, but because she was induced by false statements to enter into a contract out of court by which she was precluded from submitting to the court the very questions which but for the contract would have been submitted to judicial investigation. In the leading case in this state, Pico v. Cohn, 91 Cal. 129, 25 Pac. 970, 13 L. R. A. 336, 25 Am. St. Rep. 159, where a judgment was rendered upon perjured evidence induced by bribery, the court, in holding that equity would not relieve from such a fraud, in its opinion asked and answered the question of what is an extrinsic or collateral fraud within the meaning of the rule.

"Among the instances given in the books are such as these: Keeping the unsuccessful party away from the court by a false promise of compromise, or purposely keeping him in ignorance of the suit, or where an attorney fraudulently pretends to represent a party and connives at his defeat, or, being regularly employed, corruptly sells out his client's interest. * * * In all such instances the unsuccessful party is really prevented, by the fraudulent contrivance of his adversary from having a trial; but, when he has a trial, he must be prepared to meet and expose perjury then and there." Pico v. Cohn, 91 Cal. 139, 25 Pac. 971, 13 L. R. A. 336, 25 Am. St. Rep. 159.

In this case, by the fraudulent contrivance of Quinn, the lower court found the plaintiff was prevented from having a trial upon the issue raised by the pleadings in regard to the amount of the community property.

[6] It has too often been stated to require the citation of authority that equity will not attempt to put a fence around fraud nor to define just what form of deceit is fraudulent. The suggestion in Pico v. Cohn of certain things which had been determined to be collateral fraud was never intended to be and was not a recital of all of the devices in which dishonest men may engage to prevent the trial of issues of fact.

[7] It is argued that because the court found, pursuant to the fraudulent contract, that the division of community property in accordance with its terms was in absolute, entire, and complete satisfaction and discharge of all claims which either party might assert to the other, there was an adjudication beyond the reach of the court of equity because, as well stated by counsel for the appellant, a judgment entered into upon a stipulation of the parties is as sacred and unimpeachable as any other judgment. It is equally true that such a judgment is no more sacred than any other judgment. Counsel say:

"If the property rights of the parties to the divorce action had been withdrawn entirely from the case, a different question might have arisen. If the decree had been silent as to property, a different question might have arisen."

They were withdrawn. The stipulation, as has been shown, expressly provided that they be incorporated in the judgment as agreed upon, and the judgment expressly incorporated them. There was no trial upon the property issues. The stipulation itself shows there was no judicial examination of the facts regarding the property issues. These matters were as effectually withdrawn from any judicial consideration as if they had been expressly withdrawn by the stipulation. If the statement of counsel be true that a different case would have been presented if the stipulation had declared what was the fact—that the court was not to adjudicate upon the property issues, but to enter a decree in accordance with the agreement of the parties—it follows that all that a dishonest party litigant need do to make his fraudulent contract effective is to go one step further in his scheme of fraud and stipulate that the court in its decree shall follow the language of the fraudulent stipulation. Such a conclusion would be intolerable. The case falls within that class where chancellors have repeated in every conceivable way that the effort on the part of the fraudulent actor more securely to bind his victim is itself one of the most convincing evidences of fraud.

[8] As was said by the Supreme Court, speaking by Mr. Justice Crockett:

"It would be a reproach to the administration of justice if such transactions were beyond the reach of a court of equity, whose peculiar province is to strip off the flimsy disguises in which fraudulent actions are so often clothed, and to regard the substance, rather than the form." Perkins v. Center, 35 Cal. 721.

From the appellant's brief it appears that after this case was argued and submitted in the court below the Court of Appeal, First Appellate District, decided the case of Vragnizan v. Savings Union, etc., Co., 31 Cal. App. 709, 161 Pac. 507, and that the respondent relies upon that case. It is sought to distinguish that case from the present one because the fraudulent stipulation in that case

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expressly withdrew from the consideration of the court the issues in regard to community property. But in this case the fraudulent stipulation just as effectually withdrew those issues from the consideration of the court, and expressly provided that the court should find and make its decree in accordance with the fraudulent recitals in the stipulation. There is no difference in principle between the two cases.

[8] The appellant argues that, under the rule by which equity denies relief in those cases where the adverse party has been guilty of negligence or lack of diligence, the plaintiff in this case was armed with the strongest weapon—that of cross-examination of the defendant—and because she failed to exercise it she should be denied relief in this suit. In the larger object of defrauding the plaintiff the very purpose and effect of the stipulation was to cause her to lay down this strong weapon of defense. By reason of the fraudulent stipulation the plaintiff was deprived alike of her privilege of cross-examination of defendant and of her right to have a judicial determination in regard to the amount of the community property. Because of the defendant's fraud, he was subjected to examination in the present case, and the court did investigate the question of the amount of community property and determined that the plaintiff was entitled to one-half of that which, in this case, the defendant admitted he had fraudulently secreted.

The judgment is affirmed.

We concur: HAVEN, J.; BRITTAIN, J.

(40 Cal. App. 407)

DREISBACH et al. v. BRADEN, Sheriff, et al. (Civ. 1909.)

(District Court of Appeal, Third District, California. March 22, 1919.)

1. SHERIFFS AND CONSTABLES ⟸137(2) — FAILURE TO DELIVER TO EXECUTION SALE PURCHASER—PLEADING.

In execution sale purchaser's action against sheriff for failure to deliver goods purchased, answer denying that sheriff "has failed and neglected, or failed or neglected, or refused, in any manner or at all, to deliver," *held* sufficient denial of failure to deliver, notwithstanding admission that actual possession was not delivered, where property was alleged to be incapable of actual delivery.

2. TRIAL ⟸404(1) — FINDINGS — CONSTRUCTION.

In execution sale purchaser's action against sheriff for failure to deliver, court *held* to have found that the property was taken possession of by the sheriff, where it found that allegations of a paragraph of the complaint were true, and where such paragraph of the complaint alleged that sheriff took possession of the property.

3. TRIAL ⟸404(1) — FINDINGS — CONSTRUCTION.

In execution sale purchaser's action against sheriff for failure to deliver property purchased, finding that property was delivered to purchaser was a sufficient finding upon the question whether the property was capable of manual delivery.

4. SHERIFFS AND CONSTABLES ⟸107—EXECUTION SALE — PROPERTY INCAPABLE OF MANUAL DELIVERY.

Where 50 tons of chrome ore were sold at execution sale, the sheriff was not required to make actual delivery to the purchaser where no request therefor was made by the purchaser at the time of delivery of the certificate of sale, under Code Civ. Proc. § 698, such ore being incapable of manual delivery within section 699.

5. SHERIFFS AND CONSTABLES ⟸107 — EXECUTION SALE—DUTY OF SHERIFF—DISPOSITION AS TO POSSESSION OF PROPERTY.

It is not the sheriff's duty to settle disputes arising after execution sales and delivery to purchaser of certificate of sale, between the purchasers and third parties, as to right of possession of the property.

6. SHERIFFS AND CONSTABLES ⟸22—EXECUTION SALE—ATTACHMENT OF GOODS.

In execution sale purchaser's action against sheriff for failure to deliver goods purchased, where the goods were situated in the shed of a third party claiming a lien thereon for transportation charges, but sheriff in attaching goods had placed deputy sheriff in charge thereof, such third party was not the custodian of the goods under the sheriff's authority.

Appeal from Superior Court, Plumas County; H. D. Burroughs, Judge.

Action by F. M. Dreisbach and E. A. Dickey, copartners doing business under the name of Zenith Chrome Mining Company, against Louis A. Braden, as sheriff of the county of Plumas, state of California, and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

C. L. Colvin, of Oakland, for appellants.

M. C. Kerr and H. B. Wolfe, both of Quincy, for respondents.

HART, J. The defendant Braden, as sheriff of Plumas county, and the National Surety Company, as the surety on his official bond, were sued by plaintiffs for the sum of $1,050, the alleged value of about 50 tons of chrome ore which they had purchased at an execution sale, and which they alleged the sheriff had not delivered to them, and for damages caused to them by his failure so to deliver said ore. Defendants had judgment, from which plaintiffs prosecute this appeal.

The first finding of the court was: That

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all the allegations in plaintiffs' complaint in paragraphs 1 to 11, inclusive, are true.

Said paragraphs of the complaint, briefly, are: That plaintiffs at all times mentioned were copartners under the name of Zenith Chrome Mining Company, and have complied with the laws of the state relative to copartnerships; that the defendant National Surety Company is a corporation organized under the laws of the state of New York, and authorized to do business in the state of California; that defendant Braden is the sheriff of Plumas county, and that he executed an official bond, with the usual covenants, with the defendant National Surety Company as surety, which was duly approved as required by law; that on or about the 22d day of July, 1916, plaintiffs brought an action in the superior court of Plumas county against one C. W. Adams for the recovery of a sum of money alleged to be due and owing to them from said Adams; that at the time of filing said complaint plaintiffs filed the usual affidavit for the issuance of an attachment, and that an attachment was issued and placed in the hands of the sheriff, which he served by attaching about 140 tons of chrome ore by taking the same into his custody and putting a keeper in charge thereof; that on the 31st day of July, 1916, the sheriff made a return on said writ in which he certified that he had levied upon and taken possession of said 140 tons of ore; that on December 13, 1916, a judgment was rendered in said action in favor of plaintiffs and against said C. W. Adams for the sum of $305 and costs; and on the same day execution was issued on said judgment, directing the sheriff to make the same out of property belonging to said Adams; that the sheriff levied upon about 90 tons of chrome ore, being a portion of the 140 tons attached, and on December 27, 1916, he sold the same after due and regular notice of such sale.

The court then found that defendant Braden, as sheriff, "did deliver the possession of all property sold under execution to said plaintiffs as required by law."

Appellants complain of this last finding, urging that it is contrary to the evidence, and also that it is insufficient as a finding upon further allegations of the complaint.

The twelfth paragraph of the complaint was that at said execution sale plaintiffs became the purchasers of the said 90 tons of chrome ore from the said sheriff; that at the time of the said purchase the property so purchased was in the possession and under the control of the sheriff; that plaintiffs, as such purchasers, paid the sheriff the full amount of the purchase price and demanded delivery of the property; that the sheriff did deliver to them about 34 tons of the property purchased by them; but failed and neglected to deliver about 50 tons thereof.

In the thirteenth paragraph it is alleged that plaintiffs were the highest bidders for the property so purchased at said sale, and that the sheriff delivered to them a certificate of sale of about 90 tons of chrome ore. Written demand upon the sheriff to deliver said property was alleged and his refusal so to do, and that he has converted 50 tons to his own use. There were allegations as to the value of the property and the amount expended by plaintiffs in pursuit thereof.

The answer of defendants contained the following affirmative allegations: That the sheriff "levied upon about 34 tons of chrome ore then upon and under the depot station of the Western Pacific Railway Company's depot at Keddie, Plumas county, Cal., then represented by plaintiffs to defendant Braden as the property of said C. W. Adams, and thereupon placed a keeper in charge thereof; that at said time and pursuant to said writ said defendant Braden levied upon * * * about 50 tons of chrome ore situated in the barn of one W. C. Lawrence at Keddie, * * * at which time, and in the presence of plaintiffs, and of their attorney, L. N. Peter, the said W. C. Lawrence claimed said ore, and claimed and asserted a lien thereon for and on account of transportation of the same from the place where mined to the place where stored, and claimed to be and was then in possession thereof."

It appears that the plaintiffs brought two actions against the sheriff, one for the value of the property sold, the other for a failure to make a return to the execution. By stipulation both cases were tried together. A motion for a new trial was made in each case, and the same bill of exceptions was used on both. The result is that there is considerable testimony in the record which does not apply to the case before us.

Preliminarily, certain points made as to the issues tendered by the answer and as to the findings should be considered and disposed of.

[1] The appellants are in error in the statement in their opening brief that the answer does not deny that the sheriff failed to deliver to the plaintiffs the ore in the Lawrence shed, and in the further statement that "all through the answer it is virtually admitted that he did not deliver the property." In paragraph 8 it is denied that "defendant Braden, as sheriff, has failed and neglected, or failed or neglected or refused, in any manner or at all, to deliver all the property set forth and described in said certificate of sale." The answer, it is true, admits that the actual possession of the property was not delivered to the plaintiffs, but declares that said property was not capable of manual delivery. The answer, it may well be admitted, is not a model pleading of the "negative" kind, but there was no demurrer thereto, and the denial referred to was sufficient to raise the issue as to the delivery of the property to the plaintiffs.

[2] It is next asserted that the court fail

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ed to find upon the question whether, at the time the property was purchased by the plaintiffs, the property so purchased was in the possession and under the control of the defendant Braden. The contention is unfounded. Paragraph 7 of the complaint alleges that at the time of the purchase of the property by the plaintiffs said property was taken into possession by said Braden and a keeper put in charge thereof by him. The court found that all of the allegations of said paragraph 7 of the complaint are true.

[3] The objection that the court failed to make a specific finding upon the question whether the property was or was not capable of manual delivery is without merit in view of the finding that the property was delivered to the plaintiffs.

There are other objections with respect to the findings which do not call for special notice.

We will now proceed to a consideration of the merits of the case.

The whole controversy here rests, in the main, upon the solution of the question whether the property sold by the sheriff to the plaintiffs was capable of manual delivery. Another point which the appellants attempt to sustain is that the sheriff, upon attaching the ore, made one Lawrence the custodian of a certain portion of the seized property, and that, upon the sale under the execution taking place, said Lawrence refused to deliver the ore to the plaintiffs. Thus it is claimed, as the complaint charges, the defendant Braden converted the ore to his own use.

The circumstances attending the seizure of the property by attachment and the subsequent sale thereof under the execution by the sheriff are these: The defendant, as sheriff at the time of the issuance of summons in the case of the plaintiffs against the said C. W. Adams, levied, under written instructions from the attorney of the plaintiffs, an attachment on about 140 tons of chrome ore, about 40 or 45 tons of which were situated at the time of the levy in a wagon shed on the premises of one W. C. Lawrence; that the sheriff, upon making said levy, placed in charge of the chrome ore so attached, as keeper, one L. P. McIntyre, a deputy sheriff under the defendant Braden; that at about the moment of time the levy was made on the ore situated in the shed of said Lawrence the latter put in an appearance, whereupon he was asked by L. N. Peter, attorney for the plaintiffs, who, with the plaintiffs, was present when the levy was made, whether he (Lawrence) had any claim on the ore in the shed, and he replied that he had, the same being due for hauling or transporting the ore from the mine; that the sheriff then said to Lawrence that he would have to attach the ore, to which statement Lawrence replied: "You can go ahead and attach it, but you cannot move it. I hold a lien against it for hauling it from the mine." As stated, McIntyre, as the defendant Braden's deputy, was placed and left in charge of the ore as the sheriff's keeper, and so remained until judgment was obtained and execution thereupon issued in the case. What occurred after the writ of execution was issued and placed in the hands of the sheriff may best be told by the testimony of that official and also that of McIntyre. The sheriff testified, in part, as follows:

"I made a sale of the ore on the platform and also that in the shed. I do not think that Mr. Lawrence was present. I do not think that it was physically possible for me to make a delivery of the ore at the time of the sale. I would have had to get a team and horse. I might have done it in time. The weight of the ore in the shed was about 40 tons. The sale took place at Keddie, near the depot. * * * Mr. Nutting was there at the time. He was there as attorney for the plaintiffs. No demand was made by him for actual delivery. I made the sale. The money was turned over. We came back to town, and I gave him a certificate of sale. Mr. Nutting was present at that time, and Mr. Dickey. At that time there was no objection made, nor any demand for actual delivery. That property is not in my possession at the present time. I have not had control nor possession of the property since the sale * * * I do not think that he (L. P. McIntyre) ever delivered it over to the purchasers, because Lawrence had a claim against it, and would not let it go. Lawrence never gave me any written claim. * * * I do not know what became of the ore in Lawrence's shed. I did not have anything to do with it after I sold it. I discharged McIntyre at the time of the sale." The sheriff further testified that, while in the first instance Lawrence claimed that he had a lien on the ore in his shed for services performed in hauling said ore from the mine, he later notified the sheriff to remove it from the shed, as he was in need of the use of the shed for other purposes and did not want the ore to be kept therein any longer. This conversation (said the sheriff) occurred a short time prior to the sale under the execution. At that time Lawrence said nothing about claiming a lien on the ore. The reason the sheriff gave for not removing the ore from Lawrence's shed was that a Mr. Nutting, who was also an attorney for the plaintiffs, advised him to do nothing in that regard "until I heard from him."

L. P. McIntyre, the deputy sheriff, who was made keeper of the attached property by the defendant sheriff, testified:

"I was put in charge of the ore. I was in charge of it from the day of the attachment until the day of the sale. That was from somewhere in the latter part of July until the first part of January or the latter part of December. I was there at the time of the sale. Mr. Dickey, Mr. Braden, and Mr. Nutting were there. There was no demand made by Mr. Dickey or Mr. Nutting on Mr. Braden that manual delivery be made of the ore in Lawrence's shed. I never heard them make any demand for any such thing. * * * I considered I was discharged from custody when the sale of the ore

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was made. I did not regard it as the proper thing to deliver the ore to the purchasers. I would not deliver that ore to any one."

It appears that the plaintiffs, neither at the time of the sale nor when the sheriff delivered to them the certificate of sale, demanded of that officer manual delivery of the ore. Indeed, it is clear from the evidence that they were perfectly satisfied with the situation after the sheriff's certificate was delivered to them until the time when Lawrence refused to permit them to take or remove the portion of the ore purchased by them which was at all times, from the date of the levying of the writ of attachment, situated in his (Lawrence's) shed.

The foregoing embraces a statement of the facts sufficient for the purposes of the decision of the point presented.

The contention of the appellants is that it was the duty of the sheriff to deliver the ore to them by manual tradition, while the respondents maintain that the property sold is of a character which rendered manual delivery thereof impossible, or, at least, impracticable, and that, therefore, the mere execution and delivery by the sheriff to the appellants of a certificate of sale was as far as that officer could go, or, in fact, that could practicably be done by him with personal property of the nature of that which was the subject of the sale.

Section 698 of the Code of Civil Procedure requires an officer making a sale of personal property under an execution, where the same is capable of manual delivery, to deliver such property to the purchaser upon the payment of the purchase money by the latter. If desired, the officer must also execute and deliver to the purchaser a certificate of sale. Where, however, personal property so sold is not capable of manual delivery, the officer making the sale is, by the terms of section 699 of the same code, required only to execute and deliver to the purchaser, upon payment of the purchase money by the latter, a certificate of sale. In either case the certificate so executed and delivered conveys all the right the debtor had in such property on the day the execution or attachment was levied.

1. It has been held that where personal property levied upon by attachment is of such a ponderable character as that its actual possession cannot be taken, and its removal for that purpose effected by the officer levying the writ without injury to such property or great expense, the taking of actual possession by the officer or its removal to effectuate such possession may be dispensed with. It has frequently been held that "with regard to heavy and unmanageable articles there seems to be no necessity for an actual handling to constitute an attachment." See cases and other authorities cited in footnote of Hollister v. Goodale, 21 Am. Dec. 680. For further illustration, it has been held, under statutes similar to our own, that a stack of grain may be levied upon by going to it and making a formal levy, and forbidding the defendant from touching it. Gallagher v. Bishop, 15 Wis. 276. Again, a similar levy upon hewn stones (Hemmenway v. Wheeler, 14 Pick. [Mass.] 408, 25 Am. Dec. 411; Polley v. Iron Works, 4 Allen [Mass.] 329), on iron ore (Mills v. Camp, 14 Conn. 219, 36 Am. Dec. 488), and on mill logs (Bicknell v. Trickey, 34 Me. 273), has been upheld as sufficient.

In the case at bar the validity of the seizure by attachment is not challenged. Nor is it questioned that the sheriff, upon levying the writ of attachment, took legal possession of the ore and continued in such possession to the time of the sale of the property under the writ of execution. Indeed, the appellants themselves insist throughout their whole argument that the sheriff took and had such possession. But, as has been observed, they say that, upon the sale being made to them under the writ of execution, it was the legal duty of the sheriff to have made an actual physical delivery of the ore into their possession.

[4] We believe the property so sold to them was of a character that manual delivery thereof could not conveniently and without great expense be made by the sheriff. That officer could not nor was it expected of him to attempt so impracticable, and, indeed, so preposterous, an act as to deliver the ore to the plaintiffs piece by piece. The most he could have done would have been to have loaded the ore on a wagon or truck, and by such means have hauled, or caused it to be hauled, and so delivered, to some place or point designated by the plaintiffs. He was not asked by the plaintiffs to do this, nor do we think he was required to do it; for, as stated, it would obviously have involved great expense to do so, thus adding to the costs, and so creating an additional burden which ultimately would fall on the shoulders of the debtor. Having made the sale to the plaintiffs and delivered to them the certificate of sale, the latter thereby acquired all the right the debtor had in the ore. They knew where the ore was situated and it was up to them to take possession of it. As to the claim that Lawrence made to a lien on the ore in his shed, it is to be remarked that the plaintiffs were at all times, from the time the writ of attachment was levied on the ore, aware of said claim. With such knowledge they accepted the certificate of sale without then making a demand on the sheriff for a manual delivery to them of the ore, and only made such demand after Lawrence had refused to deliver to them the ore that was in his shed at the time of the levy.

[5] Obviously, it was not incumbent on the sheriff as a legal duty to settle any disputes which might, after the sale and the de-

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livery by him to the plaintiffs of the certificate of sale, arise between plaintiffs and third parties as to the right to the possession of the property. But however this all may be, it is, as above declared, clear to our minds that the property is of that character and of such bulk in quantity that it was not capable of manual delivery, and that the sheriff, in the sale thereof under the execution sale, did all that the statute required of him by making symbolical delivery thereof to the plaintiffs. Indeed, we can conceive of no case where section 699 of the Code of Civil Procedure would be more applicable than it is to the facts of this case.

[6] 2. The proposition that Lawrence was the custodian of the ore situated in his shed as the appointee and agent of the sheriff is not supported either by the evidence or the findings. McIntyre, the deputy sheriff, was by the sheriff placed in charge of all the ore seized by the latter under the writ of attachment, and remained in the capacity of keeper of the property until it was sold to satisfy the judgment against Adams. It is true that the ore attached in the shed of Lawrence was allowed to remain there, but it was at all times in the legal custody of the sheriff through his keeper. There is not a word of testimony that Lawrence acted or was ever authorized to act as custodian of the ore for the sheriff.

The case of Aigeltinger v. Whelan, 133 Cal. 110, 65 Pac. 125, cited by appellants, in its facts bears no resemblance to this case. There the sheriff levied an attachment upon certain personal property, and placed the same in a warehouse in charge of a keeper. Nearly two years later judgment was given in favor of the defendants and against the plaintiff in the action in which the writ of attachment was issued. Thereupon one of the defendants demanded of the sheriff that he return the property taken by him under the attachment, but the sheriff answered that he did not have the property, but that he had stored it in a warehouse, and that the warehouseman had sold it for storage. The sheriff made no claim of lien on the property for any costs, charges, or keeper's fees. All these facts were proved at the trial, and it was held by the Supreme Court, in sustaining the judgment of the court below against the sheriff, that the latter, being charged with the duty of safely keeping the seized property and restoring the same to the defendant on his recovering judgment (Code Civ. Proc. §§ 540, 553), violated the duty so enjoined upon him by allowing the property to be sold or so disposed of. Thus it will readily be perceived that that case has no pertinent application to the facts of the instant case.

Our conclusion is that the plaintiffs have failed to make out a case against the sheriff, and the judgment is accordingly affirmed.

We concur: BUCK, Presiding Judge pro tem.; BURNETT, J.

(54 Utah, 360)

EMELLE v. SALT LAKE CITY.
(No. 3288.)

(Supreme Court of Utah. April 21, 1919.)

1. APPEAL AND ERROR ⟸907(2) — EXCEPTIONS—REVIEW—RECORD.

Where the bill of exceptions did not contain the evidence and the parties on appeal relied upon a stipulation that there was evidence tending to prove the allegations of the complaint, and evidence tending to prove the allegations of the answer, every intendment must be presumed in favor of the judgment; and, if it be contended that there was no evidence to support an instruction, etc., such contention cannot be considered if the matter be within the issues.

2. MUNICIPAL CORPORATIONS ⟸822(2)—STREETS — OBSTRUCTIONS — INJURY TO BICYCLIST—INSTRUCTIONS.

In an action for injuries received by a bicyclist, who fell when her machine struck an obstruction in the street, an instruction that the city was not an insurer of the safety of its streets, and was required to use nothing more than reasonable care to keep the same in a safe condition, *held* not open to objection.[1]

3. MUNICIPAL CORPORATIONS ⟸764(2)—STREETS—DUTY OF CORPORATION.

A municipality is not bound in the care and construction of its streets to make special provision for bicycles.

4. APPEAL AND ERROR ⟸1170(9)—HARMLESS ERROR—INSTRUCTION.

An instruction, in an action by a bicyclist against a city, that a gutter was not a part of the street prepared for travel, if error, must be disregarded under Comp. Laws 1917, §§ 6622, 6968, where the cyclist averred that she was riding on the asphalt part of pavement at time of accident.

5. APPEAL AND ERROR ⟸701(1)—REVIEW—INSTRUCTIONS.

Where the record on appeal by a bicyclist, injured while riding on a city street, did not contain the evidence or the substance thereof, error cannot be predicated on an instruction that the gutter was not part of the street.

6. TRIAL ⟸260(1)—INSTRUCTIONS—REFUSAL.

The refusal of a requested instruction covered by those given is not error.

7. TRIAL ⟸260(8)—INSTRUCTIONS—REFUSAL.

In an action by a bicyclist injured when her machine struck an obstruction in a street,

[1] Citing Bills v. Salt Lake City, 37 Utah, 507, 109 Pac. 745; Morris v. Salt Lake City, 35 Utah, 487, 101 Pac. 373; Scott v. Provo City, 14 Utah, 31, 45 Pac. 1005.

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refusal of requested instruction that, where the city had opened whole street and an obstruction existed therein to its knowledge, it was duty of city to place lights or warning signals thereon at night, or to put up barriers, *held* proper, in view of an instruction as to duty of city which was given.

8. TRIAL ⟸248—INSTRUCTION.

In an action by a bicyclist injured while riding at night on a street, a requested instruction, which contained a correct abstract statement of the law as to the duty of travelers to apprehend danger, *held* properly refused.

9. MUNICIPAL CORPORATIONS ⟸822(5)—INSTRUCTIONS—REFUSAL.

In an action by a bicyclist who was hurt when her machine struck an obstruction in the street, the refusal of an instruction, stating the rule promulgated by a city ordinance that bicyclists and slow-moving vehicles should keep close to the right-hand curb, *held* not error, in view of the pleadings and evidence.

Appeal from District Court, Salt Lake County; Wm. H. Bramel, Judge.

Action by Marguerite Emelle against Salt Lake City. From a judgment for defendant, plaintiff appeals. Affirmed.

Geo. G. Armstrong and W. E. Rydalch, both of Salt Lake City, for appellant.

Wm. H. Folland, City Atty., and H. H. Smith and W. W. Little, Asst. City Attys., all of Salt Lake City, for respondent.

THURMAN, J. Plaintiff brought this action to recover damages for an injury received by her while riding a bicycle on one of the streets of defendant city. The injury occurred on the night of June 8, 1917, on what is known as State street, and as the complaint of the plaintiff and answer of defendant are of especial importance for reasons that will hereafter appear, we deem it necessary to set them out with more than ordinary fullness.

The complaint, in substance, alleges that State street, at the point in controversy, at all times mentioned, was open and improved to its full width by the defendant, and by defendant was paved, curbed, and guttered; that on the night in question and for a long time prior thereto defendant carelessly and negligently mantained and permitted to remain upon said paved, curbed, and guttered part of said street a certain wooden automobile approach at the point where the injury occurred, which approach extended from and beyond the curbed, guttered, and paved part of said street; that said approach was made of 2x6 stringers, with planks 2x6 and 2x8 and 9 feet in length running crosswise of said stringers; that the same was weather-beaten and of a gray color, and when in place it extended from the top of the curb over the gutter and onto the paved part of the street in a sloping or wedge shape; that it was so constructed that it became loose and moved out onto the paved part of said street, which defendant knew, or ought to have known; that the existence of said automobile approach was known to the defendant and its agents, or in the exercise of ordinary care should have been known to them, as it had been maintained at said point for a long time, at least one year, before the injury complained of. Upon information and belief plaintiff alleges that the existence of the approach at said point and the condition above referred to was known to the supervisor of streets of defendant city for many months before the accident, and that he carelessly and negligently consented to and carelessly and negligently authorized the maintenance of said approach for several months prior to the time of the accident; that on the date of the injury, at about 9:30 p. m., plaintiff was riding on said street, on the east side thereof, on her bicycle, on her way from the southern part of said city to her residence; that while out in the street and upon the asphalt pavement she suddenly, without fault on her part, ran against the said automobile approach, which was then, owing to the negligence and carelessness of defendant, lying on said street, with only one corner of said approach upon the curb; that there were no street lights at or near said place, and no warning lights or barriers at or near said obstruction to warn plaintiff of the condition; that it was the duty of the defendant to exercise reasonable care to maintain its improved streets in a reasonably safe condition and to guard against injury to persons and property by removing or making reasonably safe any obstructions or dangerous objects in the street, and that it was the duty of said defendant to exercise reasonable diligence to discover and remove such obstruction as existed at the said time and place, and to make said street reasonably safe for travel of all kinds at all hours; that notwithstanding its duty as aforesaid defendant negligently and carelessly permitted said obstruction to be placed and maintained upon said street, and left without light or barriers to warn plaintiff and others, as above stated; that plaintiff, without fault on her part, ran against said obstruction, as before stated, with great force and violence, whereby she was thrown from her bicycle upon the pavement and upon said obstruction, causing her the injury complained of. Plaintiff then alleges that she filed with the city commissioners of Salt Lake City her written claim against said city, signed by her and properly verified, describing the cause and circumstances of her injury; that at all times mentioned there were in force certain ordinances of said city

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which will be referred to hereafter as occasion may require.

Defendant, answering, admitted its corporate capacity, and that the street at the place in controversy was open and improved to its full width, and that the same was paved, curbed, and guttered by and under the authority of the city. It denies the remaining allegations of the complaint, except that it admits that plaintiff presented to the board of commissioners of defendant city a claim in writing, setting forth certain particulars of an accident alleged to have occurred to plaintiff, and that the said commissioners rejected and disallowed said claim. Further answering, defendant denied each and every allegation of the complaint except as specifically admitted, qualified, or denied, and as a separate defense further answered as follows:

"That at the time of the alleged injury to the plaintiff, and at and near the place of the alleged accident, State street was well lighted by street arc lights, which were then burning and giving light sufficient to light up objects in and upon the paved streets and all parts thereof; that at the time of said alleged accident and injury said street was free from any objects or traffic which would interfere with the vision of the plaintiff as she proceeded northward on the east side of said street, and that the view of plaintiff in the direction in which she was going was unobstructed, and that by the exercise of ordinary care and prudence the plaintiff could have seen the said automobile bridge or driveway in time to have avoided the same; that at the time of the alleged accident and injury plaintiff was riding her bicycle upon and along said street without a light; that if the plaintiff met with an accident as alleged in said complaint, or suffered any injuries at the time and place in the manner alleged, and sustained damages thereby, as alleged, the said accident and the said injuries and the said damages were caused in whole or in part, or were contributed to by the negligence and want of care on the part of the said plaintiff in failing to use ordinary care and prudence in riding her bicycle upon said street, in failing to use ordinary care and prudence in avoiding a condition which she could have discovered and avoided in the exercise of ordinary care and prudence, and by the failure of the plaintiff to carry a light upon her bicycle, and in riding the same at such time and place without a light, and not by any negligence or default or want of care on the part of the defendant."

A trial of the case to a jury resulted in a verdict for the defendant, no cause of action. From the judgment entered thereon plaintiff appeals.

Exceptions were taken to certain instructions to the jury, and refusals to instruct as requested by plaintiff. The rulings of the court in regard to these matters are assigned as error, and relied on to reverse the judgment.

The bill of exceptions does not contain the evidence submitted to the jury, but it does contain the following statement relating thereto:

"During the trial of said case plaintiff offered, and there was received, evidence tending to prove all the allegations in plaintiff's complaint, and defendant offered, and there was received, evidence tending to prove all the allegations of defendant's answer, and in contradiction of the testimony offered by the plaintiff. At the conclusion of the evidence, there was evidence before the jury tending to show negligence of the defendant as alleged, and evidence tending to show negligence of the plaintiff as alleged, and there was also evidence tending to show that the defendant was not negligent, and that the plaintiff was guilty of contributory negligence that proximately contributed to her injury, and also that the plaintiff was not guilty of contributory negligence that proximately contributed to her injury, and different inferences of fact might have been drawn from said evidence, both with respect to the negligence of the defendant and as to the contributory negligence of the plaintiff."

[1] We remark in the beginning that where the evidence or the substance of it does not appear in the bill of exceptions, but the parties rely solely upon a stipulation such as that above quoted, exceptions which otherwise might be available to appellant are rendered unavailable because of certain fundamental rules of practice with which every practicing lawyer is more or less familiar. Every intendment must be presumed in favor of the judgment. If it be contended that a certain instruction was wrong because there was no evidence upon which to base it, such contention cannot be considered, if the matter is within the issues, because it is stipulated that there was evidence to support every issue presented. If it be contended that the court misdirected the jury as to matter of law, such contention cannot be considered if upon any theory of the case within the issues made the instruction could have been right or for any reason nonprejudicial. We call attention to these matters at this stage of our remarks for the reason that after a careful examination of the exceptions relied on we are of the opinion that many of them must be summarily disposed of because of the impossibility of considering them for the reasons above stated. What we have stated with respect to instructions complained of applies with equal force to instructions requested and refused, where the same or analogous conditions exist. Other difficulties in the way of considering certain exceptions on their merits without having the evidence before us will be referred to later in connection with the subjects to which they relate.

[2] Appellant assigns as error certain language in the court's instruction No. 9. We have italicized the language to which exception was taken:

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"The city is not an insurer of the safety of its streets. It is required to use nothing more than reasonable care to keep its streets in a reasonably safe condition, by night as well as by day, for persons traveling thereon and exercising reasonable care and prudence in so traveling. A pedestrian or bicyclist or other traveler in traveling upon a public street in the city has the right to assume that the city has performed its duty in regard to making the streets reasonably safe, but this does not excuse such traveler from exercising reasonable care in his own behalf. *The city is not bound to make any special provisions for bicyclists, and no liability is to attach to it because no part of the street was specially adapted to bicycle travel. Nor is any liability to be charged against the city in this case because the street was not of sufficient width."*

The objection to the first part of the instruction is that it carries the idea that the city is only required to use the same degree of care that is imposed upon the traveler who uses the street, whereas, as appellant contends, a greater degree of care is required of the city. The case of Bills v. Salt Lake City, 37 Utah, 507, 109 Pac. 745, is relied on in support of this contention. The injury in that case was caused by the plaintiff being thrown from his bicycle by reason of an excavation which it was alleged the city negligently permitted to be and remain in the street. The trial court instructed the jury that a person riding a bicycle upon the street, as a matter of ordinary caution and prudence, *should observe the path or way being traveled, with a view to detect, and avoid, if possible, any obstruction that would make it unsafe for a bicycle rider.* The language italicized was especially excepted to by plaintiff, and this court held that the exception was well taken. The opinion cites the case of Wilson v. Atlanta, 63 Ga. 294, and quotes therefrom the following language:

"The duty of maintaining a street in a fit condition for safe use, though limited to ordinary diligence in those on whom that duty is cast, involves a very different measure of vigilance in foreseeing danger from that which a passenger is bound to exercise."

The opinion in the Bills Case then proceeds:

"It is accordingly held that the degree of vigilance to discover and remedy defects in streets is greater on the part of servants of the city than is imposed on the traveler to discover and avoid them. Yet it is held, and such, no doubt, is the law, that the traveler must avoid defects that are obvious and apparent, and, if he fails in this duty, he may be guilty of contributory negligence."

In construing the opinion of a court we should never lose sight of the particular facts to which the opinion relates. No matter how general and comprehensive may be the language used to express the thought, the facts of the particular case must be borne in mind. In the Bills Case the injury was caused by an excavation in the street, a defect which might not be observed by a traveler on the street even in the exercise of ordinary care. As defects of this kind are usually caused by the city itself in making improvements, or permitted by the city to be made by others for temporary purposes, we see no reason why a higher degree of vigilance might not be required of the city to safeguard and protect the public against danger resulting therefrom than is required of a traveler on the street to observe and avoid such dangers. While, therefore, we are of the opinion that the doctrine announced in the Bills Case is right as applied to the facts of that particular case, we see no reason for holding that the doctrine there enunciated should be applied to the facts in the instant case. Here the thing that caused the injury was not a defect in the street such as an excavation or something below the surface and difficult to see until perhaps too late to avoid it, but it was an obstruction superimposed upon the surface—something just as observable to the traveler in the exercise of ordinary care as it would be to the superintendent of streets or other servants of the city. Besides, it is claimed the obstruction was not in its usual place, but was protruding into the paved portion of the street, which, if true, must have been a temporary condition only, and was not caused by the city itself or knowingly permitted. It will be noted also that the language complained of does not declare that the degree of care required of defendant to keep its streets in safe condition and that required of plaintiff to avoid the danger are equal and coextensive; and yet appellant argues the question just the same as if such had been the meaning of the language used. The court in the Bills Case laid down what it saw fit to announce as the true test. At page 515 of 37 Utah, at page 747 of 109 Pac., it says:

"The true test for the court to follow is that it is the duty of the city to exercise ordinary vigilance and care to detect defects in its streets and to exercise ordinary care and reasonable diligence to remove them, and to exercise the same care to maintain its streets to the extent that they have been opened for travel in a reasonably safe condition for ordinary use and travel."

Measured by this test, the language complained of was not error. See, also, cases cited by respondent. Morris v. Salt Lake City, 35 Utah, 487, 101 Pac. 373; Scott v. Provo City, 14 Utah, 31, 45 Pac. 1005. Respondent also cites the following authorities to the point that the city is not an insurer of the safety of its streets: Dillon, Mun. Corp. (5th Ed.) § 1019; Shearman & Redfield, Negligence (5th Ed.) § 367; Elliott,

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Roads and Streets (3d Ed.) § 793. We apprehend, however, that this doctrine is not seriously questioned. We know of no authority to the contrary.

[3] Appellant also complains of the language used by the court in the latter part of the same instruction, to the effect that the city was not bound to make special provision for bicycles. In view of the fact that appellant's counsel when preparing their brief had the Bills Case before them, it is a little surprising that they overlooked that part of the opinion which decided a question exactly similar in principle, and decided it against the contention they now make. There was no error in the instruction complained of.

[4, 5] Appellant also complains of certain language in the court's instruction No. 10. The entire instruction, with the part complained of italicized, reads as follows:

"It is admitted herein that said State street was at all times involved in this action a street of Salt Lake City, and at the place in question was paved, curbed, and guttered and opened and improved to its full width.

"It is and was the duty of the city to use reasonable care to keep said street at said place over its whole width, including those parts upon which some travel might reasonably be expected to take place, in a reasonably safe condition for public travel of all kinds, including travel by bicycle, as well as travel by other methods, in ordinary use. *But here let it be understood that the gutter or depression in the street immediately next to the curbing is not a part of the street prepared for travel, nor is it a part of the street upon or along which much travel is expected to take place. The gutter was made primarily for drainage purposes, and not for travel. The portion of the street prepared and primarily intended for travel includes the asphalt pavement from gutter to gutter.* Notwithstanding these facts, if you find from a preponderance of the evidence that the gutter was so constructed, and that its position and nature was such that travel by bicycle would take place thereon practically as well as on the asphalt, you cannot find the plaintiff guilty of contributory negligence, or guilty of lack of proper care, solely because she rode very close to or even in said gutter, if you find that at the time of the accident she was riding in said gutter."

It is not within the power of the court, under the stipulation heretofore quoted, to determine on its merits the question presented by this exception. For aught we know the uncontradicted evidence may have disclosed the facts upon which the court based its instruction. It may have been conclusively proven or even conceded that primarily travel on the street was limited to the asphalt pavement from gutter to gutter, just as the court instructed the jury, or the evidence may have disclosed that the sides of the gutter were perpendicular and not sloping, or that the slope or contour of the gutter was such as to render travel therein impracticable, if not impossible. If such were the case, the language complained of was not error. But, aside from this view of the question, appellant's contention was, and she stated her cause of action upon that theory, that when the accident occurred she was riding on the asphalt pavement, and not in the gutter. It is therefore impossible to conceive how plaintiff could have been prejudiced by the language in question. Harmless errors must be disregarded. Comp. Laws Utah 1917, §§ 6662, 6968, and cases cited in the notes.

The latter part of the instruction, however, was certainly as favorable to plaintiff as she had any right to expect, and strongly tended to render harmless the part complained of, even if it was error.

[6, 7] The exceptions already considered by us present by far the most serious questions before us on this appeal as regards the instructions given by the court. Exceptions were taken to numerous other instructions, but the objections made are too technical and hypercritical for serious consideration. We do not feel justified in devoting time and space in according to them a special review. We do not intend by this to criticize appellant or her able counsel for bringing these questions before us for determination. Counsel in a case are ordinarily justified in taking slim chances and in relying upon what seem to them possible grounds for reversing or upholding a judgment, but it is nevertheless the duty of the court in such cases to discriminate between such questions as are entitled to receive extended consideration and those which should be summarily disposed of.

The remaining assignments of error relate to the refusal of certain requests. Exception is taken to the refusal of the court to instruct the jury as follows:

"You are instructed that the defendant city is required to use ordinary care to keep in a reasonably safe condition for passage and travel such parts of its streets as have been improved and open for travel, by night as well as by day, and if the city opens and undertakes to put the whole width of the street in condition for travel, as State street was at the point at which plaintiff alleges she was injured as set forth in her complaint in this action, and invites the public to use the whole width, then it is the duty of the city to exercise ordinary care so as to maintain the whole width of such street in a reasonably safe condition for travel thereon."

Again we are confronted with the utter impossibility of considering the question on its merits, if it has any merits, for the reason that it is not alleged in the complaint or admitted in the answer that the whole of State street was improved or open *for travel*, nor have we any means of knowing whether there was any evidence in the case

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that would properly admit of such an instruction. Besides this, the subject-matter of the instruction requested, as far as it was material or proper under the issues made, was fully covered by instruction No. 8 and the first part of instruction No. 10 as given by the court. This exception should not prevail.

Exception is also taken to the refusal of the court to instruct the jury as follows:

"You are instructed that where the whole street is opened by the defendant city, and an obstruction exists therein to the knowledge of said city, which knowledge may be either actual or constructive, as explained in other instructions given to you by the court in this case, then the city is required, and it is the duty of the city, at night to place lights or warning signals, or to put up barriers, or to use some other reasonable method to point out the location of such obstruction in the traveled part of such street, so as to keep one from driving or riding over said obstruction."

The substance of this request was covered by the following instruction given by the court:

"You are instructed that it was the duty of Salt Lake City to keep State street at the place where plaintiff alleges that she was injured in a reasonably safe condition for travel by all kinds of vehicles, including bicycles, and in case of a defective condition in or dangerous obstruction on said street, it was its duty to exercise ordinary care and diligence, as in these instructions is more fully explained, to apprise the plaintiff and the public of such defect or dangerous condition by placing barriers or signals, or by some other efficient means to point out the danger."

There was no error in refusing this request.

[8] Complaint is also made that the court erred in refusing plaintiff's request No. 4, offered in the following language:

"You are instructed that the plaintiff while using State street on the night of June 8, 1917, was not by law required to apprehend danger, and was not required to be vigilant to discover any dangerous obstruction therein, if you find that one existed, but she could ride thereon in the nighttime relying upon the assumption that Salt Lake City, whose duty it was to keep said part of State street in a reasonably safe condition for travel, had performed that duty, and that she was exposed to no danger from its neglect, if you find there was neglect. You are further instructed that the foregoing does not mean that she was not required to look for and avoid defects in the street that were obvious, and that ought to have been detected, and hence avoided by her, by the use of ordinary care, but such use of ordinary care is limited by the law as hereinbefore stated to you."

The above request was evidently taken from a quotation used by this court in its opinion in the Bills Case, supra, 37 Utah, at page 514, 109 Pac. 745, as the language is almost identical. As an abstract proposition of law it is probably unimpeachable, but it does not follow as a matter of course, because one can find an abstract proposition of law correctly expressed in certain language, that, therefore the same language may be properly used in instructing a jury. While it may be perfectly proper for an authority on criminal law to declare that "the flight of a prisoner raises a presumption of guilt," it would be fatal error, under our system, to so charge the jury. An authority on roads and streets, or the duty of municipal corporations in respect thereto, might with propriety declare, as an abstract principle, that the failure of a city to erect barriers or place signals at a given point to warn travelers of a dangerous condition in the street is negligence for which, in case of injury caused thereby, the city would be liable, and yet an instruction to a jury, in a concrete case, using the same language, might and probably would be prejudicial error. Other illustrations will readily occur to the reader. We are of the opinion that when the court charged the jury, as it did in instruction No. 9, to the effect that a pedestrian or bicyclist or other traveler, in traveling upon a public street in the city, has the right to assume that the city has performed its duty in regard to making the street reasonably safe, it went as far in that direction as it was necessary to go in order to safeguard the rights of plaintiff.

Appellant's requests Nos. 5 and 6 are presented substantially in the language used by this court in the Bills Case, supra. The evident purpose was to apply the law of that case to the facts in the present case, notwithstanding the facts are essentially different, as heretofore pointed out. Besides this, the requests are subject to the criticism made to the request we have just considered. In following literally the language used by the court in stating an abstract principle of law and attempting to apply it to the concrete facts of a case by way of an instruction the jury is apt to be misled. The language used by a court in stating an abstract principle is not the impartial form of language that should be used in instructing a jury. The request was properly denied.

[9] Finally, appellant complains that the court erred in refusing to instruct in relation to certain ordinances of the city relating to traffic and travel on the streets, one of which, in part, reads as follows:

"Every person driving a slow moving or heavily loaded vehicle and riders of bicycles shall keep close to the right-hand curb, allowing more swiftly moving vehicles to pass on the left."

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This ordinance was pleaded by plaintiff and set forth in her complaint. In the same complaint she alleged that the accident occurred while she was riding on the asphalt pavement. It is difficult to see under these circumstances how the ordinance was of such special importance as to require it to be given as a separate instruction. It is not alleged in the complaint that there was any travel or traffic on the street at or near where the injury occurred at the time of the accident. It does not appear that appellant was compelled to ride close to the curb in order to permit other vehicles to pass on the left. If such had been the case, and because of such traffic and travel she had been compelled to ride as closely as possible to the curb, a case would be presented in which it might have become the duty of the court to instruct in respect to the ordinance. But no such case was presented. In fact, as before stated, the appellant's contention was that she was riding on the asphalt pavement when the injury occurred. The request, if given, would have been misleading. It was therefore properly refused.

We have now considered at some length the principal points upon which appellant relies to reverse the judgment. Those not specially considered are unimportant. Some of the language used by the court in one or more of the instructions given might, with propriety, have been omitted, and thereby have afforded appellant less pretext for complaint. But the language referred to was not prejudicial error justifying a reversal of the judgment.

The verdict of the jury was sustained by the evidence. The jury had the right to find, and no doubt did find, that the street was well lighted at the point where the injury occurred; that there was no obstruction to the view of plaintiff; that the obstruction in her path was plainly visible; that there was no traffic or travel on the street at or near the point of the injury rendering it necessary for her to run against the obstruction which caused the injury.

Respondent has filed a most elaborate and comprehensive brief. Hundreds of authorities have been cited, most of which are in point, and many of them exceedingly illuminating. We have not deemed it necessary to refer to them to any considerable extent in the body of these remarks. Practically every question presented on this appeal is determinable on elementary principles. The reporter, however, in reporting the case will note the authorities relied on by each of the parties.

The judgment of the trial court is affirmed at appellant's costs.

CORFMAN, C. J., and FRICK, WEBER, and GIDEON, JJ., concur.

(54 Utah, 406)

PUBLIC UTILITIES COMMISSION OF UTAH v. GARVILOCH. (No. 3350.)

(Supreme Court of Utah. April 29, 1919.)

1. CARRIERS ⟸5—"PUBLIC UTILITY"—WHAT ARE—SUPERVISION.

In view of Comp. Laws 1917, § 4782, subds. 6, 13, 14, and 28, as well as section 4798, defendant, who operated an automobile for hire, carrying passengers over no designated route, and allowing them to select the designation, *held* to be operating a "public utility" within section 4818, and so falls within the jurisdiction of the Public Utilities Commission.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Public Utility.]

2. CARRIERS ⟸5—PUBLIC UTILITIES ACT—OPERATION OF AUTOMOBILE FOR HIRE.

That defendant obtained a license from the secretary of state to operate an automobile, and was also granted a license by a town to carry passengers for hire, does not afford him any protection, where he operated utility contrary to the provisions of Public Utilities Act; and so, where defendant unlawfully interfered with a licensed automobile stage line, he is liable.

3. CARRIERS ⟸10 — PUBLIC UTILITIES ACT —OPERATION OF AUTOMOBILE.

The granting of a certificate of convenience and necessity by the Public Utilities Commission to the operator of an automobile stage line not only confers authority to operate the stage line, but, in view of Comp. Laws 1917, § 4840, relating to actions for damages by persons who may be injured by the acts or omissions of any public utility, such certificate affords protection to the holder against any one interfering with the right conferred, which is in the nature of a limited franchise.

4. CARRIERS ⟸11—PUBLIC UTILITIES ACT—INTERFERENCE—WHAT CONSTITUTES.

Though defendant in the operation of his automobile for hire was operating a public utility, yet, as his business was practically that of a taxicab driver, and he had no established route, he will not be enjoined from carrying passengers to destinations at points served by an automobile stage line, having a certificate from the Public Utilities Commission.

Appeal from District Court, Salt Lake County.

Action by the Public Utilities Commission of Utah against Mike Garviloch. From a judgment for defendant, plaintiff appeals. Affirmed.

Dan B. Shields, Atty. Gen., and O. C. Dalby, Jas. H. Wolfe, and H. Van Dam, Jr., Asst. Attys. Gen., for appellant.

Willard Hanson and B. L. Liberman, both of Salt Lake City, for respondent.

FRICK, J. The Public Utilities Commission of Utah, hereinafter called commission, commenced this action in the district court of Salt Lake county to enjoin the defendant

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from operating a certain "automobile stage line." The commission, in its complaint, in substance alleged that on April 2, 1918, one Eugene Chandler made application to the commission for a "certificate of convenience and necessity," as required by the Utilities Act of this state, to operate "a stage line between Bingham Canyon and Highland Boy mine, and between Bingham Canyon and Copperfield in Salt Lake county"; that thereafter a public hearing was duly had on said application, and that said commission duly granted the said Chandler a certificate of convenience and necessity to "operate an automobile stage line for the transportation of passengers" between the places before stated, and that no other person or persons have been granted a certificate of convenience and necessity to operate a stage line or to carry passengers between said places; that "this defendant, Mike Garviloch, disregarding the order so made by the Utilities Commission, has undertaken to operate and is now engaged in the operation of an automobile stage line and to carry passengers for hire over said routes as established by the said order of the Utilities Commission, to wit, between Bingham Canyon and Highland Boy mine and between Bingham Canyon and Copperfield, without having received from the said commission a certificate of convenience and necessity, or without authorization from such commission so to do, and in violation of the terms of chapter 47, Laws Utah 1917, commonly known as the Utilities Act;" that defendant, after being repeatedly requested to refrain from operating said stage line, refuses to do so, and continues to operate the same; that the commission has no speedy or adequate remedy at law, and therefore prays that the defendant be enjoined from operating said stage line, etc.

The defendant appeared and filed a general demurrer to the complaint. The demurrer was overruled, and the defendant filed his answer to the complaint, in which he admitted the capacity of the commission, etc., and in effect denied all other allegations of the complaint. As an affirmative defense he averred:

"And further answering said complaint as a defense thereto, this defendant says that he is the owner of a certain automobile, which car has been duly licensed by the state of Utah as a commercial car; that the town of Bingham Canyon is a duly incorporated municipality of the state of Utah, and on the 12th day of July, A. D. 1918, said town of Bingham Canyon, through its proper officers, duly issued to this defendant a certain license, which license was then and there required by said town of Bingham Canyon for all persons operating an automobile for hire in and around said town, and the said license was duly issued to this defendant by virtue of the ordinance aforesaid, and duly authorized this defendant to operate an automobile for hire from the said 1st day of July, A. D. 1918, to the 31st day of December, A. D. 1918; and that at the expiration of said license there was duly issued to this defendant another license from the 1st day of January, A. D. 1919, to the 31st day of March, A. D. 1919, authorizing and permitting this defendant to operate a certain automobile for hire;" that he has operated and continues to operate said automobile for hire by virtue of the licenses aforesaid; "that in and around said town of Bingham Canyon are numerous mines and also a number of towns, and that occasionally he has been employed for hire by diverse and sundry persons to make trips to cities and towns, including trips to Salt Lake City, Garfield, Lark, Midvale, Riverton, Revere Switch, Phœnix, Highland Boy mine, Frisco mine, Copperfield, United States mine, the Boston Consolidated mine, and various and sundry trips around the town of Bingham Canyon and to other places as might be desired by persons desiring to employ defendant to carry them as passengers in said automobile aforesaid;" that he has made no trips between the points mentioned in the complaint "upon any schedule, or attempted to run between said points, except an ocasional run not in competition with any person or corporation operating between said points, * * * but has made a few occasional trips between said points when hired to do so by persons who requested the services of this defendant."

A hearing before the district court upon an agreed statement of facts resulted in a judgment dismissing the action, from which the commission appeals and insists that the district court erred in refusing to enjoin defendant and in dismissing the action.

The defendant contended in the district court, and now contends, that the provisions of the Utilities Act do not cover the acts complained of, and do not affect him in the conduct of the business which he is carrying on as described in his answer and in the stipulation of facts upon which the judgment is based.

The facts stipulated are very voluminous, and, in view of the issues presented by the pleadings, they are, in many respects, redundant and wholly immaterial. After finding that the commission had duly issued to Eugene Chandler a certificate of convenience and necessity to operate an automobile stage line over the route in question and that he is operating the same in accordance with and pursuant to the direction of the commission, the only material facts under the issues are contained in 6 out of the 34 paragraphs contained in the stipulation. While the facts stated in the 6 paragraphs, in our judgment, could still be further condensed, yet, in view of the contentions of the parties, we have deemed it but fair to state the facts stipulated in the language of the parties. They are as follows:

"(22) That he [defendant] has since the 1st day of October aforesaid, and up and until he was restrained by order of this court, to wit, the 11th day of January, A. D. 1919, carried passengers as follows: That he has carried passengers for hire in said automobile from

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Phœnix and also from Highland Boy mine over said highways to the said Denver and Rio Grande Depot in Bingham; that he has likewise carried passengers in said automobile from the said depot to different points in the said town of Bingham, and likewise to the said town of Copperfield and to the said town of Phœnix and to the said Highland Boy mine.

"(23) That he has also carried passengers for hire in said automobile during the said time hereinbefore referred to, over the said highways from the said towns of Phœnix, Bingham, Copperfield, and from the said Highland Boy mine to Salt Lake City, Midvale, Murray, Garfield, and Lark, and to such other places as he might be hired to carry passengers by those wishing to be carried by the defendant, and as he, defendant, might elect to accept said persons as passengers; and that he has likewise carried passengers to and from various points in and around Bingham, such as the United States mine, which is on said highway in the main canyon, and is beyond the town of Copperfield; and to and from the Boston Consolidated mine and other places in said Carr Fork canyon which are beyond said Highland Boy mine.

"(24) That he has at times during the period set forth herein, to wit, from October A. D. 1918, until January 11, 1919, by permission of the officers of Bingham, and by virtue of said license issued by said town, maintained a place in Bingham near where said Carr Fork branches off from the said main canyon aforesaid, and near the place where the said Eugene Chandler has his stand or place where he maintains his automobiles as aforesaid, and at the said point this defendant during said time received persons whom he carried for hire in said automobile over said highway to the town of Phœnix and to said Highland Boy mine, and also at said place in Bingham he has received persons that he has carried for hire in said automobile over said highway to the town of Copperfield; and that he has likewise during the said period received persons as passengers in the said town of Phœnix, and at Highland Boy mine and in the said town of Copperfield, which he has carried as passengers for hire in said automobile over said highway aforesaid, and discharged the said persons as such passengers at the place in Bingham where he maintains said stand as aforesaid.

"(25) That he has, during said period, and up to the time when he was restrained by order of said court, made from 5 to 15 trips per week between the said place or stand in Bingham where he maintained his car as aforesaid and the said town of Copperfield, Phœnix, and the said Highland Boy mine aforesaid.

"(26) That all of said persons so carried, as set forth in paragraphs numbered 24 and 25, were carried at the request of the passengers, and upon no regular schedule or schedules, nor upon any regular rate of fare; that is to say, that whenever persons, desiring to become passengers between said points as aforesaid, requested this defendant to transport them in said automobile and this defendant agreed to accept said persons as passengers, then this defendant charged such sum from such persons as he, defendant, thought the trips might be worth under varying conditions.

"(27) That if said trips were made in stormy or inclement weather the charges would be more than if made in fair weather. That if one person desired to be conveyed in said automobile as aforesaid, this defendant would charge the said person at least $1, and possibly as much as $2, to transport him to any of the said places, to wit, from the said place in Bingham to Copperfield, Phœnix, or Highland Boy mine, and that if a number of persons applied at the same time, he, this defendant, might make said persons a rate less than a dollar, according to the number desiring to be hauled as passengers as aforesaid."

[1] Defendant relies upon Comp. Laws Utah 1917, § 4818, which, so far as material here, provides:

"No * * * automobile corporation, * * * shall henceforth establish or begin the construction or operation of a * * * line, route, plant, or system, without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction. * * *"

Defendant insists that the provisions of the foregoing section apply only to those who intend to construct "a line, route, plant, or system," etc. The district court held against the defendant's contention. In passing on the question the district court filed a written opinion, of which we adopt the following and make it a part of this opinion, namely:

"It is contended by defendant that the omission to say 'operation or construction' at the close of the clause above indicates, if taken in connection with the balance of the section, which relates in terms largely to 'construction,' that the section applies only to the 'construction' of automobile lines, and not to their 'operation,' and that the word 'operation,' where used, is superfluous to the substantial meaning of the section as a whole. It is, of course, elementary in statutory construction that a word may be disregarded or eliminated, if its presence makes the clause in which it occurs unintelligible. Lewis' Sutherland on Statutory Construction (2d Ed.) vol. 2, § 384. It is also true, however, that words may be supplied if necessary to give effect to the intention of the Legislature, if that intention be ascertained with reasonable certainty. Section 382 of the author just quoted. Reading the statute as a whole, and particularly reading section 4818 with section 4782, subdivision 13, defining 'automobile corporation,' and bearing in mind that as a matter of common knowledge automobile carriers 'operate' without 'construction,' the court concludes that the insertion of 'or operation,' at the end of the clause above quoted from section 4818, would more correctly give effect to the legislative intent than the elimination of the words 'or operation' after the first word 'construction' in the same section. It seems to be the plain purpose of the statute as a whole to regulate all public utilities, including 'automobile corporations' (as therein defined), both as to 'construction' and 'operation.' To strike the phrase 'or operation,' just referred to, would markedly restrict the power of the commission respecting utilities in general. (And it is not to be inferred that all other utilities are to be controlled by the

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commission, both with respect to 'operation' and 'construction,' but that 'automobile corporations' are to be controlled merely with respect to 'construction,' an activity in which 'automobile corporations' almost never indulge. Such an interpretation of the statute would be unreasonable.)"

There are, however, other provisions of the Utilities Act which make it clearer still that the defendant's automobile is within the jurisdiction of the commission. Comp. Laws Utah 1917, § 4782, subds. 6, 13, 14, and 28, which are a part of the original Utilities Act, read as follows:

"6. The term 'transportation of persons,' when used in this title, includes every service in connection with or incidental to the safety, comfort, or convenience of the person transported and the receipt, carriage, and delivery of such person and his baggage."

"13. The term 'automobile corporation,' when used in this title, includes every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, engaged in, or transacting the business of, transporting passengers or freight, merchandise or other property for compensation, by means of automobiles or motor stages on public streets, roads or highways along established routes within this state.

"14. The term 'common carrier,' when used in this title, includes * * * automobile corporation; * * * and every corporation or person, their lessees, trustees, receivers, or trustees appointed by any court whatsoever engaged in the transportation of persons or property for public service, over regular routes between points within this state."

"28. The term 'public utility,' when used in this title, includes every * * * automobile corporation * * * where the service is performed for or the commodity delivered to the public or any portion thereof. The term 'public or any portion thereof,' as herein used, means the public generally, or any limited portion of the public, including a person, private corporation, municipality, or other political subdivision of the state, to which the service is performed or to which the commodity is delivered, and whenever any * * * automobile corporation * * * performs a service or delivers a commodity to the public or any portion thereof for which any compensation or payment whatsoever is received, such * * * automobile corporation * * * is hereby declared to be a public utility subject to the jurisdiction and regulation of the commission and the provisions of this title. * * * Any corporation or person not being engaged in business exclusively as a 'public utility,' as hereinbefore defined, shall be governed by the provisions of this title in respect only of the 'public utility' or 'public utilities' owned, controlled, operated, or managed by it or by him, and not in any respect of any other business or pursuit."

Section 4798 provides:

"The commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in this state, as defined in this title, and to supervise all of the business of every such public utility in this state, and to do all things, whether herein specifically designated, or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction."

After considering all of the foregoing provisions together, as we must, there remains little, if any, room for controversy respecting the jurisdiction of the commission over all public utilities or what, within the purview of the act, constitutes a public utility.

Under the stipulated facts, therefore, the defendant and Eugene Chandler are each engaged in operating a public utility.

[2, 3] Defendant contends, however, that the act applies and the jurisdiction of the commission extends only to such utilities as are operated on public streets, roads, or highways along established routes, as provided in the act. He insists that the license he obtained from the secretary of state under the general law and the one issued to him by the town of Bingham Canyon give him ample authority to operate his automobile for hire over public streets and highways as it is stipulated he is doing. He insists that he is not operating his automobile on or along an established route, nor over a regular route as contemplated by the act. We remark that neither the license issued by the secretary of state nor the one obtained from the town of Bingham Canyon gives the defendant the right to operate a public utility nor affords him any protection if he is operating such utility contrary to the provisions of the Utilities Act. See Puget Sound T., L. & P. Co. v. Grassmeyer (Wash.) 173 Pac. 504, L. R. A. 1918F, 469. The commission has the exclusive jurisdiction over and power to regulate all public utilities defined in the act. Whenever any person or corporation desires to operate a public utility within this state over a public street or highway, and over what is designated as an established route, he or it, before doing so, is required to obtain from the commission what in the act is called a certificate of convenience and necessity. Such a certificate is in the nature of a limited franchise, and authorizes the grantee in the certificate to operate a utility over the designated routes and likewise protects him against interference by others unless authorized by the commission. In City of Memphis v. State ex rel. Ryals, 133 Tenn. 83, 179 S. W. 631, L. R. A. 1916B, 1151, Ann. Cas. 1917C, 1056, P. U. R. 1916A, 825, in speaking of the power to regulate public utilities on public roads or highways, the court, in the course of the opinion, said:

"It is too clear for extended discussion that it was competent for the Legislature, under the police power, to regulate the use of streets and public places by jitney operators, who, as common carriers, have no vested right to use the same without complying with a requirement as to obtaining a permit or license. *The right to*

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make such use is a franchise to be withheld or granted as the Legislature may see fit." (Italics ours.)

As bearing upon the proposition just stated, see, also, State v. Mayo, 106 Me. 62, 75 Atl. 295, 26 L. R. A. (N. S.) 502, 20 Ann. Cas. 512; Commonwealth v. Kingsbury, 199 Mass. 542, 85 N. E. 848, L. R. A. 1915E, 264, 127 Am. St. Rep. 513; Petition of Gray, P. U. R. 1916A, 33. The granting of a certificate of convenience and necessity by the commission to Chandler, therefore, was in the nature of a limited franchise which authorized him to operate his automobile stage line over the route designated in the certificate for the time and under the conditions therein specified. The certificate, therefore, not only confers authority to operate the stage line, but it necessarily also affords him protection against any one who unlawfully interferes with the right thereby conferred. If such is not the legal effect of the certificate, then the operation of utilities may easily become detrimental rather than beneficial to the public and thus result in a farce. To obviate such a result is, in our judgment, clearly contemplated by the act itself. Comp. Laws Utah 1917, § 4840, provides for actions for damages by all persons who may be injured in any respect by the acts or omissions of any public utility. This necessarily includes damages for the unlawful interference by one public utility with the rights and franchises of another public utility. That proposition is clearly illustrated in Puget Sound, etc., Co. v. Grassmeyer, supra.

In addition to the foregoing, however, ample power is also conferred on the commission to bring actions in the courts to enforce its orders and to punish violations of the Utilities Act.

There is, therefore, no doubt concerning the jurisdiction of the commission over the defendant and over the business he is conducting, nor concerning the question that, if he is unlawfully interfering with the rights granted to Eugene Chandler under the certificate of convenience and necessity issued by the commission, the court, upon the application of the commission, if such interference be established, not only has the power to prevent such interference by injunctive relief, but, in such case, it would be its duty to do so. The question therefore, is whether, under the issues presented by the pleadings, and in view of the stipulated facts, the defendant has unlawfully interfered or is so interfering with Chandler's rights under the certificate of convenience and necessity issued to him.

[4] It will be observed that all that is complained of in the complaint is that the defendant is operating a stage line, that is, a public utility, over an established route without having obtained permission to do so from the commission as required by the Utilities Act. The defendant denied the charge, and in his answer set forth in detail the nature or character of the business he is conducting, which he contends is not interfering with any established route, etc. He, however, also insists that in view that he is not operating his automobile over a route established by himself, and is not operating his car according to a fixed schedule and for a fixed charge for the service rendered, therefore his business is not subject to regulation by the commission. The contention, in our judgment, is not tenable to the full extent claimed by defendant.

The test, where the commission has jurisdiction over a particular utility, is not whether the party complained of, as here, is operating an automobile or stage line for hire over a route upon a schedule or at a fixed rate of fare for the services rendered, but the test is whether he is in fact operating a public utility over a material portion or the whole of an established route over which another has theretofore obtained from the commission a certificate of convenience and necessity to operate a public utility. Much was said in the argument about what constitutes an established route within the purview of the act and how and by whom such a route may be established. To our minds that question is not difficult of solution. In this case the route, within the purview of the act, was manifestly established over the public highway between the points stated in the complaint and designated in the certificate of convenience and necessity issued to Chandler. No doubt the defendant is not operating his automobile over a route which was established upon his application as was the Chandler route, but that is not controlling. What he is charged with is that he is operating a public utility over a route established by the commission upon the application or petition of Chandler, and over which route Chandler has been granted a certificate of convenience and necessity to operate a public utility for the benefit of himself and the public. If, therefore, the defendant is operating his automobile over Chandler's route, or over a substantial part of it, in opposition to or in competition with Chandler, then, in our judgment, the defendant is doing so in violation of the Utilities Act. If he solicits passengers at or near the Chandler route from among those who but for his solicitations would use the utility operated by Chandler, and transports them over the route designated in the certificate issued to Chandler, then he is doing so in violation of Chandler's rights, granted to him by the certificate. If, however, as contended by his counsel, defendant is not soliciting passengers, as before stated, and is only transporting those who specially apply to him

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for transportation from points which have no connection with the points on the route operated by Chandler, or if he is hired by one or more persons to carry him or them from a point outside of Chandler's route to a point on Chandler's route for a price agreed upon between such persons and the defendant for the services rendered, and the persons hiring his automobile may direct when and where it shall go, then he is not violating the provisions of the Utilities Act. In other words, if the defendant is merely carrying on a so-called hack or taxicab business upon request from those who may desire to be carried in a special conveyance which is under their direction and control for the time for which it is hired and at a price agreed upon for the services, then he is not operating on or over an established route within the purview of the act, and is not subject to regulation as though he were operating such a route. The proposition just stated is well illustrated in the case of Terminal Taxicab Co. v. District of Columbia, 241 U. S. 252, 36 Sup. Ct. 583, 60 L. Ed. 984, Ann. Cas. 1916D, 765, in which case, in the course of the opinion, it is said:

"It may be assumed that a person taking a taxicab at the station [railroad station] would control the whole vehicle both as to contents, direction, and time of use, although not, so far as indicated, in such a sense as to make the driver of the machine his servant according to familiar distinctions."

It is accordingly held in that case that a vehicle which is hired as just stated does not come within the rule applicable to those vehicles which are operated over regular or established routes. To the same effect, see, also, In re Ryder, P. U. R. 1916B, 1067. If, therefore, the defendant interferes with the established route by soliciting patronage, as hereinbefore illustrated, he may, nevertheless, be prohibited from so interfering. Such, it seems to us, is manifestly the purpose of the act. If such is not the case, regulation will accomplish nothing, and the public interests will not thereby be subserved. Whenever a route is established, the person or corporation to whom a certificate is granted must operate the vehicle used at the times, in the manner, and for the prices designated in the certificate. The utility must be operated in good and in bad weather, and, if so specified, both day and night. If, therefore, any one who owns an automobile may compete with the one who has obtained a certificate by soliciting passengers who wish to pass over the established route, then he may do that only in fair weather and at such hours or times when the travel is greatest, and may thus make it impossible for the one having the certificate to successfully carry on the business because of lack of patronage and insufficient remuneration for conducting the business. Public convenience may thus not only be greatly affected, but might be entirely destroyed instead of being subserved. If the public is not properly served by the one having obtained a certificate over an established route, any one in interest may complain, and the commission has full power to compel obedience to any orders it may make with respect to the matter. Moreover, if the person operating the route fails to give adequate service, any person may apply to the commission for a certificate to operate a utility over the same route upon such terms and conditions as may seem just and proper to the commission under all the circumstances. While in this case we are not as well satisfied as we might be that the defendant is not, to some extent at least, interfering with Chandler's business, yet, in view of the stipulated facts upon which the district court based its judgment, we cannot say that the interference is unlawful, or is such as to authorize this court to reverse the judgment or order what judgment should be entered different from the one that has been entered.

We have arrived at the foregoing conclusion with less reluctance for two reasons: (1) Because the principal purpose of bringing this action was to obtain a construction of the Utilities Act for the purpose of determining the respective rights of the commission and the holder of a certificate of convenience and necessity; and (2) for the reason that if Chandler's business is in fact unlawfully interfered with by the defendant, as stated by the Attorney General at the hearing, Chandler may, as before stated, institute an action on his own behalf, and recover such damages as he may prove, or he may obtain such other relief as may be just and equitable in the premises. He, not being a party to this action, is not bound by the stipulation of facts in this case, and hence may allege and prove the facts regarding defendant's operation of his automobile as they in fact exist, if indeed they materially differ from the agreed statement in this case.

For the reasons stated, the judgment is affirmed. Costs to the defendant.

CORFMAN, C. J., and WEBER, GIDEON, and THURMAN, JJ., concur.

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(25 N. M. 245)

STATE v. KAYSER. (No. 2106.)

(Supreme Court of New Mexico. May 8, 1919.)

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(Syllabus by the Court.)

1. CONTEMPT ⟸60(3) — AFFIANT'S PERSONAL KNOWLEDGE OF FACTS — EVIDENCE—JURISDICTION.

Where the accusation in a contempt proceeding is in positive terms and there is nothing in the record to show that the affiant did not have personal knowledge of the facts set forth in the accusation, the fact that the affiant did not testify as a witness in the case, and that the evidence did not affirmatively show knowledge on his part of such facts, will not divest the court of jurisdiction.

2. CONTEMPT ⟸60(1) — VERIFICATION—PRESUMPTION — AFFIANT'S KNOWLEDGE OF FACTS STATED.

Where an information in a contempt proceeding is verified by the oath of a private person, it will be presumed, in the absence of a showing to the contrary, that he has actual knowledge of the facts stated therein.

3. CONTEMPT ⟸33—BRIBERY OR INTIMIDATION—INTERFERENCE WITH WITNESS—POWER OF COURT.

The trial court has the power to punish as for contempt and bribery intimidation, or unlawful interference with a witness in a case on trial before such court, until the trial of such case has been concluded, and it is no longer possible for such witness to affect the result of the trial by changing his testimony or giving further testimony in the case.

4. CONTEMPT ⟸2 — "CONSTRUCTIVE CONTEMPT."

A constructive contempt is an act done, not in the presence of the court, but at a distance, which tends to belittle, to degrade, or to obstruct, interrupt, prevent, or embarrass the administration of justice.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Constructive Contempt.]

5. CONTEMPT ⟸13—INTIMIDATION OF WITNESS.

It is contempt of court for a person, by intimidation or other unlawful means, to attempt to procure such witness to testify in a case contrary to evidence previously given by such witness. It is not the fact, or the truth of a given fact, which such a party desires a witness to testify to, but the unlawful and unwarranted interference with the witness and the course of justice, which brings punishment upon the head of the offender.

6. CONTEMPT ⟸2—INTENTION OF PARTY.

The determination as to whether a contempt has been committed does not depend upon the intention of the party, but upon the act which he has done.

7. CONTEMPT ⟸13 — INTERFERENCE WITH WITNESS.

Courts are for the purpose of and it is their fundamental province to administer justice between parties according to the facts established in a given case, and to receive from such witnesses their own conception of the facts of any case, without let or hindrance from any person. It is the interference with the witnesses and the attempt to influence them as to their testimony that constitutes the offense.

8. CONTEMPT ⟸30—DUE ADMINISTRATION OF JUSTICE.

Trial courts are charged with the duty and necessity of guarding their proceedings against everything which interferes, or tends to interfere, with the due and orderly administration of justice.

9. CONTEMPT ⟸28(1)—EXCUSE—DISCLAIMER.

Disclaimer of intentional disrespect or design to embarrass the due administration of justice is, as a rule, no excuse, especially where the facts constituting the contempt are admitted, or where a contempt is clearly apparent from the circumstances surrounding the commission of the act.

Appeal from District Court, Torrance County; E. L. Medler, Judge.

Affidavit or information by the State of New Mexico against Augustin Kayser for contempt of court. Demurrer to affidavit or information overruled, and motion to discharge the rule overruled, and defendant found guilty and sentenced to jail, and from the judgment and sentence, he appeals. Affirmed.

The appellant and respondent was cited to appear before the district judge of Torrance county, N. M., upon the 9th day of March, 1917, to answer an affidavit or information charging him with alleged contempt of court.

The affidavit of George A. Blake, upon which the rule was issued, alleges in substance that Blake was and is the plaintiff in a certain cause pending in the district court of Torrance county against V. S. Cavin, George W. Prichard, and others; that said cause came on for trial at the November, 1916, term of the court, and that upon that trial one Victorio Ballejos was a witness, and that he testified upon either the 22d or 23d day of November; that during the night after Victorio Ballejos had testified, the appellant and respondent went to the room where Ballejos was sleeping and attempted to persuade and prevail upon him to change his evidence from that given by said Ballejos upon the trial telling Ballejos in substance:

"That if he did not change his testimony previously given and corroborate the testimony of two other witnesses, who had testified upon the trial of said cause, one George W. Prichard, who was one of the defendants in said cause, was going to have him, the said Victorio Ballejos, indicted or punished for perjury or false swearing in the giving of his evidence or testimony upon the trial of said cause. That said

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Kayser intimidated and threatened said witness by telling him that unless he changed his evidence he would be punished as above stated, and said Augustin Kayser thereafter informed said George W. Prichard and his counsel that he, the said Victorio Ballejos, had admitted that he had sworn falsely in the giving of his testimony upon the witness stand and wanted to change his testimony previously given, and affiant believes, and therefore charges, that the said Augustin Kayser willfully tampered and attempted by threats to procure said Victorio Ballejos to retract and change his testimony. That the evidence of said Victorio Ballejos was material to the issues involved in said cause."

To this affidavit and information a demurrer was interposed objecting to the jurisdiction of the court and the sufficiency of the information on the ground that it did not charge a contempt. This demurrer was overruled, with exceptions taken, whereupon the respondent answered, admitting that Ballejos was a witness as stated in the affidavit, and further admitting that he had gone to the room where Ballejos was sleeping and had had a conversation with him, said admission being in the following language:

"(2) He also admits that upon the night of said day, and after the said Victorio Ballejos had testified and fully completed his said testimony, this respondent went to the house where the said Victorio Ballejos was sleeping, but denies that it was about the hour of midnight, and, on the contrary, alleges and states the fact to be that it was about the hour of 10:30 p. m., and further admits that on arriving at the house of said Victorio Ballejos he had a conversation with the said Ballejos about and concerning his testimony so given upon the witness stand during the afternoon of the same date, and admits that in said conversation he told the said Ballejos of a certain conversation he had overheard between one George W. Prichard and E. R. Wright, the attorney of said George W. Prichard in said cause No. 613."

Respondent and appellant denied all of the other allegations of the affidavit, and particularly denied that he at any time threatened or intimidated the said Ballejos, as charged in the affidavit, and specifically denied that he had tampered with any witness or attempted to procure the said Ballejos to retract or change his testimony by threats or otherwise.

Upon the issues so joined, evidence was introduced. At the conclusion of the evidence for the state, a motion to discharge the rule was made upon various grounds, which was overruled, with exception taken. After respondent and his witnesses had testified, the motion to discharge the rule was renewed; it being again overruled with exception taken.

The court finding that the acts complained of, under the proofs, constituted a contempt, the respondent was sentenced to 60 days in jail. From this judgment and sentence appeal was taken to this court. The evidence in the case will be discussed in the opinion.

E. R. Wright and J. J. Kenney, both of Santa Fé, for appellant.

C. A. Hatch and H. S. Bowman, Asst. Attys. Gen., for the State.

ROBERTS, J. (after stating the facts as above). [1] The first proposition relied upon by appellant for a reversal here is that there was no sufficient information or affidavit of any person having knowledge of the facts. In a majority of the jurisdictions "the affidavit filed as the basis of a proceeding to punish for a contempt, not committed in the presence of the court, must state positive knowledge. If made upon information and belief, it is insufficient." See note to the case of State v. Newton, 16 N. D. 151, 112 N. W. 52, 14 Ann. Cas. 1035. Appellant does not contend that the information in the present case shows, upon its face, that it was made upon information and belief, and indeed no such contention would be justifiable. The affidavit charges the offense in positive terms.

Appellant argues that the evidence in the case shows that Blake, the affiant, could have no personal knowledge of the matters contained in the information. Blake, the affiant, did not testify as a witness in the case, and there is nothing apparent from the testimony of other witnesses which indicates that Blake had personal knowledge. Likewise, there is nothing in the record to show that he might not have had personal knowledge of the matters alleged in the information. In view of the fact that Blake was not a witness, did not testify, and the record discloses no affirmative evidence of his lack of knowledge, the charge that Blake had no actual knowledge of the facts set forth in his affidavit is not borne out by the record. Where the accusation in a contempt proceeding is in positive terms, and there is nothing in the record to show that the affiant did not have personal knowledge of the facts set forth in the accusation, the fact that the affiant did not testify as a witness in the case, and that the evidence did not affirmatively show knowledge on his part of such facts, will not divest the court of jurisdiction. It was not necessary in this case to determine the question as to whether or not an affidavit in such a proceeding, based upon information and belief, would be sufficient to confer jurisdiction upon the court. No such affidavit was filed in this case. As stated the affidavit was in positive terms.

[2] The sole question here presented is whether or not it must affirmatively appear from the evidence that the affiant had di-

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rect and positive knowledge of the facts alleged and set forth in the petition. In the case of State v. Lund, 51 Kan. 1, 32 Pac. 657, it was held that, where an information is verified by the oath of a private person, it will be presumed, in the absence of a showing to the contrary, that he has actual knowledge of the facts stated therein. This we believe to be the correct rule. For this reason the court properly overruled the demurrer to the evidence based on this ground.

[3] The next proposition urged is that the affidavit wholly fails to set forth or charge any act constituting contempt of the court. This assignment is divided into four subheads, which will be considered in the order set forth in appellant's brief. The first is:

"It affirmatively appears that at the time of the transactions and occurrences mentioned in the affidavit, the party, Victorio Ballejos, was not a witness before the court in which the contempt is charged to have been committed."

In support of this proposition counsel allege that the witness Ballejos was in fact no longer a witness before the court, for the reason that he had concluded his testimony and had been told, "That is all." They state that the process had been obeyed, the witness' testimony had been concluded, and the spell of the process was no longer over the witness. The facts were that Ballejos had testified in the case, had been excused, but had not been discharged from attendance upon the court. The evidence in the case had not been concluded at the time of the transaction charged in the accusation. He was subject to recall at any time. We think the trial court has the power to punish as for contempt any bribery, intimidation, or unlawful interference with a witness in a case on trial before such court until the trial of such case has been concluded and it is no longer possible for such witness to affect the result of the trial by changing his testimony or giving further testimony in the case. Some courts even go to the extent of holding that the witness is still before the court, so that tampering, or bribery, or assault upon such witness constitutes contempt of the court, even though the evidence in the case had been concluded and the case has gone to the jury for its decision (Brannon v. Commonwealth, 162 Ky. 350, 172 S. W. 703, L. R. A. 1915D, 569), and this possibly is the correct rule; but in this case we are not required to go to that extent.

[4] "A constructive contempt is an act done, not in the presence of the court, but at a distance, which tends to belittle, to degrade, or to obstruct, interrupt, prevent, or embarrass the administration of justice." 13 C. J. 5.

[5] Certainly the act charged against appellant tended to obstruct, interrupt, prevent, or embarrass the administration of justice. It was possible for the witness to be recalled in the case. In fact, appellant asked him to take the stand and change his former testimony, and held out to him, for the purpose of inducing him to so do, the fact that the party injured by his former testimony intended to prosecute him for perjury if he did not change his testimony. Therefore there is no justification in appellant's contention in this regard.

It is next urged that there is no allegation in the accusation that the appellant did or endeavored to do anything to prevail on Ballejos to swear falsely or to do anything that would make the transaction a contempt. The allegations of the accusation are that appellant attempted to persuade and prevail upon said Victorio Ballejos "to change his evidence," to "change his testimony previously given and corroborate the testimony of two other witnesses." The accusation says that, "unless he changed his testimony," or "unless he changed his evidence, he might be indicted or punished for perjury or false swearing." Also that appellant "willfully tampered and attempted, by threats, to procure said Victorio Ballejos to retract and change his testimony."

Appellant contends that the accusation nowhere alleged that appellant attempted to procure Victorio Ballejos to swear falsely, to perjure himself, or to give false testimony; and he contends that an attempt to get a man to tell the truth is not contempt of court. He contends that the adjudicated cases all hold that it is contempt of court to use threatening language to a witness about to be examined, or to use either persuasive or threatening language to a witness for the purpose of making him testify falsely, or not to testify, or to attempt to intimidate witnesses, knowing they have been instructed by the court not to talk about the case; and cases of this import will be found cited in notes to section 48, p. 38, 13 C. J. It must be conceded that the cases cited go only to the extent of holding that it is contempt of court to attempt, by threats or bribery, to induce a witness to testify falsely. The question which appellant urges upon the court has, so far as our research has extended, never been decided, and counsel on either side have cited no case directly in point, but, on principle, we do not believe that appellant's contention is sound. The purpose of a trial is to arrive at the truth of the contested issue, and this question can only be ascertained by the testimony of witnesses, and this testimony, if it is to be believed and carry conviction, must be given by the witness without fear or favor. In other words, the witness must recite the facts as he understands and remembers them, and the testimony which he is to give to the court and jury must not be put into

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his mouth by others. The ascertainment of truth requires that the witness must tell his own story, in his own words, under the sanctity of his oath, without persuasion, intimidation, or bribery. Here the witness had told his story, and presumptively he told the truth. Appellant informed him that, unless he changed his testimony to correspond with that given by two other witnesses who apparently had testified to a different state of facts, one of the parties to the case, who had apparently been prejudiced by his testimony, would prosecute him for perjury.

Appellant's intention in talking to his friend, Ballejos, may not have been inspired by bad motives, and it may be that he did not want his friend, Ballejos, to testify to anything that was false, but courts of justice cannot tolerate or permit any interference with witnesses by parties or others; and, in order to secure the impartial administration of justice, they must see to it that there is no interference with the witnesses in the case. If appellant's position is sound, then in every case where a witness is bribed or intimidated and the party offering the bribe, or attempting to intimidate the witnesses, brought before the court upon a charge of contempt, the inquiry would necessarily go beyond the question as to whether or not the bribe was offered or the intimidation attempted, and the court would be required to determine whether or not the offending party had attempted to influence the witness to testify to a fact which was not true. Certainly this contention is unsound, and the only inquiry required in such a case is whether or not the party, by threats or bribery, or other unlawful means, attempted to induce the witness to testify to a certain state of facts. It is not the fact, or the truth of a given fact, which such a party desires a witness to testify to, but the unlawful and unwarranted interference with the witness and the course of justice which brings punishment upon the head of the offender. Hence there is no merit in this contention.

[6] It is next argued that the affidavit fails to charge that appellant willfully, knowingly, and with intent did or committed any act which was sufficient to constitute a contempt. It is unnecessary for the accusation to charge the intent in a contempt proceeding. The affidavit is sufficient if the facts therein stated constitute a contempt. If they do, then the intent becomes immaterial. It is the acts done by the contemner and the acts alone that are looked to in a determination of the offense. In the case of Dodge v. State, 140 Ind. 284, 39 N. E. 745, the court said:

"In determining whether or not a contempt has been committed, it does not depend upon the intention of the offending party, but upon the act he has done."

"Disclaimer of intentional disrespect or design to embarrass the due administration of justice is no excuse, especially where the facts constituting the contempt are admitted, or where a contempt is clearly apparent from the circumstances surrounding the commission of the act." 13 C. J. 45.

Here a contempt was clearly apparent from the circumstances surrounding the commission of the act.

The next assignments in counsel's brief are as follows: (a) No offense is charged; (b) there is no contempt proven; (c) there was no tampering with any witness; (d) it affirmatively appears from the evidence that none of the matters complained of amount to a contempt. These points will all be discussed together as they practically involve the same question.

The offense charged in the affidavit and the facts as proved on the trial are practically the same. In substance, the offense charged and the evidence show the following facts: A certain trial was pending wherein the man, Victorio Ballejos, had given certain testimony. The evening after the giving of such testimony the appellant, Augustin Kayser, was present when a certain conversation was had between one of the defendants in the case pending, Col. Prichard, and his attorney, in which Prichard said that he was going to institute a prosecution for perjury against Victorio Ballejos and have him indicted on account of the testimony the said Ballejos had given that day. It further appears that the appellant, some few hours later, in company with two other men, went to the room where the said Ballejos was sleeping, and appellant related the conversation to Ballejos, and told him that if he did not change his testimony that Col. Prichard was going to have him indicted for perjury. It further appears from the evidence that Kayser and Ballejos were lodge brothers, and were neighbors and friends. The explanation of this conduct is that Kayser was simply acting as a friend of Ballejos, and was endeavoring to protect him, Ballejos, and induce him to tell the truth. It also appears that two other witnesses on the trial of the main case had testified differently from Ballejos, and Kayser endeavored to have Ballejos corroborate the testimony given by these witnesses. The question is, Is this sufficient to constitute a contempt of court?

[7, 8] Counsel state that the offense of contempt of court is something that tends to belittle, degrade, embarrass, or disgrace the court, or impedes the due administration of justice. We think this statement as a general rule is correct, and that any acts or conduct that does belittle, degrade, embarrass, or disgrace the court or impedes the due administration of justice is a contempt of court. They say the actions of the defendant in this case were to further rather than impede the administration of jus-

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tice. Supposing this is correct; suppose the only intention of the defendant was to assist the court in the administration of justice, would it be any less contempt? We think not. The general rule is that courts are for the purpose of and it is their fundamental province to administer justice between parties according to the facts established in a given case, and to receive from witnesses their own conception of the facts in any case, without let or hindrance from any person. If a person attempts to influence a witness by means of persuasion, bribery, or otherwise, his acts are none the less contempt because he means well. It is the interference with the witness and the attempt to influence him, as to the testimony he will or will not give, that constitutes the offense. Anything that hinders or influences a witness invades the province of the court to receive unbiased, unprejudiced, and uninfluenced evidence, and constitutes to that extent an obstruction of justice. The general rule in this regard is stated in 8 R. C. L. § 346, where it is said:

"The great objection of their [courts] existence is the ascertainment of truth in its relations to the transactions of men, and this can only be done fairly and impartially when all persons having knowledge of the transaction inquired of are brought or allowed to come before them for examination without let or hindrance from any one."

The above quotation, which appears under the general subject of obstructing justice, we think clearly states the rule applicable to the present case. There is no dispute but that he went to the man, Ballejos, and attempted to influence his testimony. This is admitted throughout the entire trial, and stands forth plain and uncontradicted. It alone is sufficient to justify the conviction of the appellant and authorize the court in fixing the punishment it did, regardless of the intention of the appellant.

Counsel insist that there were no threats or other overt acts shown, no bribery, etc., but this contention is without merit. When Kayser went to the witness and told him that a prosecution for perjury would result unless he changed his testimony to corroborate the testimony of two other witnesses who had testified differently, he clearly threatened the witness. No greater inducement could be hung over a witness' head than the threat of indictment for perjury, even though it was made under the guise of friendship. Such a guise only makes it the worse, and is calculated to have more effect. In the case of Murphy v. Wright, 167 Iowa, 75, 148 N. W. 985, the court said:

"The trial courts are charged with the duty and necessity of guarding their proceedings against everything which interferes, or tends to interfere, with the due and orderly administration of justice."

Clearly there is no merit in any of the contentions referred to.

[9] It is next argued that appellant had completely purged himself of any contempt by his disclaimer or any intent to contempt the court or show any want of due regard for its authority, and that such disclaimer on the part of appellant was sufficient to purge him of any offense that existed. This could only avail the appellant in the matter of punishment, not as a defense. The general rule is:

"Disclaimer of intentional disrespect or design to embarrass the due administration of justice is as a rule no excuse, especially where the facts constituting the contempt are admitted or where a contempt is clearly apparent from the circumstances surrounding the commission of the act." 9 Cyc. 25.

In the case of United States v. Shipp, 203 U. S. 563, 27 Sup. Ct. 165, 8 Ann. Cas. 265, the court said:

"If the presence and the acts should be proved, there would be little room for the disavowal of the intent."

Here the facts constituting the contempt were practically admitted, and the contempt was clearly apparent from the circumstances surrounding the commission of the act.

In the case of Atlantic Powder Co. v. Dittmar Powder Mfg. Co. (C. C.) 9 Fed. 316, the court said:

"Any question of animus can bear only on the extent of punishment."

This case was cited and approved by the territorial court in the case of In re Clancy, 7 N. M. 580, 37 Pac. 1108.

In the matter of the contempt proceedings against Marron and Wood, 22 N. M. 632, 167 Pac. 9, L. R. A. 1918B, 217, this court said:

"In the first place it is to be observed that both respondents disclaim any intent to violate the order of suspension. This disclaimer is entitled to consideration by the court, and under many circumstances might so mitigate the offense as to require no more punishment than a reprimand. They both allege that they took counsel as to their rights under the order, and were advised that their course of conduct was proper. This fact reflects upon the degree of punishment required, but has no effect in relieving respondents of the contempt itself."

See, also, case note to the case of Carson v. Ennis, L. R. A. 1917E, 650.

We think these authorities sufficiently show that, where a contempt is clearly apparent from the circumstances surrounding the commission of the act, the question of disclaimer affects only the punishment, and not the guilt or innocence of the party. It is a matter to be decided by the court after hearing all the evidence, and when it has once been determined by the trial court, who has the advantage of having the witness

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before him, of hearing his testimony by word of mouth, this court will not disturb the findings of the trial court in that regard.

Lastly, it is argued by appellant that the court erred in refusing to admit evidence proving or tending to prove that the subject of the testimony of Victorio Ballejos, and the fact that it was upon its face incorrect and even perjured testimony, was a matter of general talk, conversation, and discussion at Estancia at the time of the transactions upon which the alleged constructive contempt is based. We fail to appreciate the argument advanced by appellant to sustain the admissibility of this evidence, or to understand how such evidence would tend to excuse or exculpate the interference by appellant with the witness, or his attempt to persuade him to change his testimony. Much that has been heretofore stated in this opinion is equally applicable to this point, and need not be here repeated. It is sufficient to say that the court properly rejected the proffered evidence.

Finding no error in the record, the judgment will be affirmed; and it is so ordered.

PARKER, C. J., and RAYNOLDS, J., concur.

(25 N. M. 267)

CRAWFORD v. LONGUEMARE et al.
(No. 2159.)

(Supreme Court of New Mexico. Jan. 25, 1919. Rehearing Denied June 7, 1919.)

(Syllabus by the Court.)

1. INJUNCTION ⟸172—TEMPORARY INJUNCTION—DISSOLUTION—VERIFIED ANSWER.

Where a preliminary or temporary injunction has been granted ex parte upon a verified petition, it should be dissolved upon the filing of a verified answer by the respondents, which fully and fairly meets all the equities in the petition.

2. INJUNCTION ⟸36(2)—RIGHT TO TITLE AND POSSESSION—JUDICIAL DETERMINATION.

The validity of the title and possession alleged by the respondents to be in them should be judicially determined at law, before its assertion, or the assertion of rights under it, should be enjoined.

(Additional Syllabus by Editorial Staff.)

3. INJUNCTION ⟸46—REPEATED TRESPASSES—ADEQUATE REMEDY AT LAW.

In cases of trespasses, where it is necessary to quiet a rightful admitted or established possession, equity may interpose to prevent a multiplicity of suits, although there may be a remedy at law; but equity will not grant an injunction against one person merely because he is guilty of repeated trespasses, where the legal remedy affords an adequate and complete redress in damages.

4. INJUNCTION ⟸46—TRESPASS—MULTIPLICITY OF SUITS—JURISDICTION.

To justify the interference of a court of equity in cases of trespass, in order to avoid a multiplicity of suits, there must be several persons controverting the some right, and each standing upon his own claim.

Appeal from District Court, Doña Ana County; Medler, Judge.

Action for injunction by L. M. Crawford, trustee, against Charles A. Longuemare and others. Temporary injunction issued ex parte, and from its dissolution, on defendants' motion, plaintiff appeals. Affirmed.

This suit is brought by the plaintiff to restrain alleged trespasses upon the real estate claimed by the plaintiff. The complaint alleges plaintiff is a resident of the state of Kansas and sues as trustee for the Amusement Syndicate Company; that he is the owner and in possession of the real estate described in the complaint; that the defendants have combined and confederated together, without the knowledge and consent of the plaintiff, and entered upon said land, cutting down the trees, converting the same into wood, and removing the same, and alleging that defendants have removed from said land about 500 cords of such wood; that defendants intended to clear the land and take possession thereof from the plaintiff, and to continue the alleged acts. The plaintiff prayed that a temporary writ of injunction be issued by the court, restraining the defendants, their agents, servants, and employés, from in any manner entering upon the said land, and from cutting the trees, timber, and wood, and that upon the final hearing the said injunction be made perpetual and an accounting be had; also that the plaintiff have judgment against the defendants in the sum of $5,000.

A temporary injunction was issued ex parte upon the verified petition. The defendants filed an amended answer, denying the allegations of the complaint, setting up title and possession in themselves. Upon the coming in of the answer, the defendants also interposed a motion to dissolve the temporary injunction upon various grounds, which motion for dissolution was granted, and from the action of the court in dissolving such injunction plaintiff appealed to this court.

Jones, Jones, Hardie & Grambling, of El Paso, Tex., and Frank Herron, of Las Cruces, for appellant.

McKenzie & Loose, of El Paso, Tex., and Young & Young, of Las Cruces, for appellees.

RAYNOLDS, J. (after stating the facts as above). [1, 2] Plaintiff has assigned many errors, but it is not necessary to pass upon all of them, as we believe that, under the

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state of the pleadings, the fact that title to the property, for which the injunction was sought to prevent trespass, was in dispute and was not clearly established in the party seeking the injunctive relief, is determinative of all the questions involved. Where a preliminary or temporary injunction has been granted ex parte upon a verified petition, it should be dissolved upon the filing of a verified answer by the respondents, which fully and fairly meets all the equities in the petition. The validity of the title and possession alleged by the respondents to be in them should be judicially determined at law before its assertion, or the assertion of rights under it, should be enjoined. The authorities are uniform upon this proposition, and it is only necessary to quote from a few standard text-books and well-considered cases:

"To warrant the relief in this class of cases the party aggrieved must show a satisfactory title to the locus in quo, and if the title be denied or in doubt the injunction will generally be refused against a defendant in possession, until the title is established at law." High on Injunctions (4th Ed.) § 698, p. 663.

"And where the title to the premises is in dispute, both parties claiming title thereto, it is held that an interlocutory injunction should be dissolved upon answer disclosing defendants' claim of title and showing that they are acting in good faith, believing themselves to be the owners of the premises." Id. § 698, p. 666.

"When, however, there is a substantial dispute between the parties, and they have not submitted it to be tried by the equity proceeding, the equity court will generally require the plaintiff to establish his right at law before granting an injunction." 6 Pom. Eq. Jur. § 549, p. 946.

"The preliminary injunction issued in the present case, upon the filing of the complaint, was properly dissolved. The answer sets up paramount title in the defendants, and the validity of that title should be judicially determined, before its assertion be enjoined." Curtis v. Sutter, 15 Cal. 260.

"The general rule, as has often been stated, is that, in order to give the court of equity jurisdiction to enjoin torts to property, two conditions must concur: First, the complainant's title must be admitted, or be established by a legal adjudication; and, second, the threatened injury must be of such a nature as will cause irreparable damage, not susceptible of complete pecuniary compensation. * * * It seems to be clearly settled that, whenever the complainant's title is disputed, a court of equity will not interfere by injunction, or make perpetual an injunction already granted, on the ground of a multiplicity of suits, until he has procured his title to be established by a successful trial at law. The ground upon which this action is based is because as a general thing courts of equity do not try disputed legal titles to land. 1 Pom. Eq. Jur. § 252; Poyer v. Des Plaines, 123 Ill. 111 [13 N. E. 819, 5 Am. St. Rep. 494]; Carlisle v. Cooper, 21 N. J. Eq. 576; Irwin v. Davidson, 38 N. C. 311; Caro v. Pensacola City Co., 19 Fla. 766." Carney v. Hadley, 32 Fla. 344, 14 South. 4, 22 L. R. A. 233, 37 Am. St. Rep. 101.

"The power to grant injunctions to prevent injustice has always been regarded as peculiar and extraordinary. It is not controlled by ordinary and technical rules, but the application for its exercise is addressed to the conscience and sound discretion of the court. Ordinarily, it will not be exercised when the right of the complainant is doubtful, and has not been settled at law; and, even when it has been so settled, an injunction will not be granted when the remedy at law is adequate." Bassett v. Salisbury Mfg. Co., 47 N. H. 437.

"Where a motion to dissolve an injunction is made upon bill and answer alone, the general rule is to dissolve the injunction, if the answer denies all the equities of the bill." 2 Sutherland, Code Pleading Practice, § 2990, p. 1876.

We do not mean to lay it down as a proposition of law, to which there is no exception, that in order to obtain a writ of injunction to protect the land claimed to be owned by the petitioner, he must as a prerequisite in all instances allege and prove that he has the title to and is in possession of the land in question. There may be instances where the equitable remedy will be used in aid of the legal; for example, to enjoin trespass and waste, pending the determination of the title in a suit in ejectment, or, again, where it is alleged that the respondents are insolvent and cannot respond in damages for the injury they are committing, or are about to commit, upon such property. As is well said in Cowles v. Shaw, 2 Iowa, 496, quoted in Carney v. Hadley, 32 Fla. 344, at page 350, 14 South. 4, at page 6, 22 L. R. A. 223, at page 238, 37 Am. St. Rep. 101:

"We do not say that there may not be cases where the legal remedy would be incomplete, and in which an injunction might properly issue. For instance, as above suggested, the defendants might be entirely insolvent, the trespass might grow into a nuisance or waste, numberless suits might have to be brought, in order to make the remedy complete, the trespass might be by a party occupying a fiduciary relation, or the injury of such a character that the loss would be irreparable, and not be compensated in dollars and cents; and in any such or similar cases an injunction might be proper."

This case, however, presents no such features. The petition, on the other hand, alleges the injuries already done to amount to the sum of $500, and alleges that, if continued, they will amount to more than the sum of $5,000, and asks for an accounting of the injury done. It is true petitioner does state that his injuries are irreparable, but in the same pleading estimates them in money, which is a contradiction of terms. He fails to allege that the respondents are insolvent and cannot respond in damages, or to show that his legal remedies are inadequate. Plaintiff alleges that he will be involved in a multiplicity of suits unless an injunction is granted. The record, however,

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shows that the trespasses complained of were made under the direction of one person, his servants and agents, and not by several persons controverting the same right and each standing on his own claim or pretension.

[3, 4] The right to equitable relief on this ground is well expressed in the case of Carney v. Hadley, 32 Fla. 344, 14 South. 4, 22 L. R. A. 233, 37 Am. St. Rep. 101, above cited, in the following language:

"In cases of repeated trespasses, where it is necessary to quiet a rightful admitted or established possession, chancery has often interposed to prevent a multiplicity of suits, although there may be a remedy at law, and this is a well-recognized head of chancery jurisdiction when a proper case is presented. The court will not, however, grant an injunction against one person merely because he is guilty of repeated trespasses where the legal remedy affords an adequate and complete redress in damages. The rule, as stated by many decisions, is that, to justify the interference of a court of equity in cases of trespass in order to avoid a multiplicity of suits, there must be several persons controverting the same right, and each standing upon his own claim or pretension. Jerome v. Ross, supra [7 Johns. Ch. 315, 11 Am. Dec. 484]; Hatcher v. Hampton, 7 Ga. 49; Nicodemus v. Nicodemus, 41 Md. 529; Thorn v. Sweeney, 12 Nev. 251; John A. Roebling Sons' Co. v. First National Bank of Richmond, 30 Fed. [D. C.] 744; High, Inj. § 700."

Under all the circumstances of the case, and when, as here, the petition is met by respondents' verified answer, denying title and possession in the petitioner and alleging them to be in the respondents, and where, as here, said verified answer fully and fairly denies all equities of the petition, we see no reason for departing from the general rule dissolving the injunction upon the answer disclosing defendants' claim of title, and showing that they are acting in good faith, believing themselves to be the owners of the land in question.

As we find no error in the action of the lower court in dissolving the temporary injunction and dismissing the complaint, the decision is therefore affirmed; and it is so ordered.

PARKER, C. J., and ROBERTS, J., concur.

(72 Okl. 321)

CLARK et al. v. CAWDELL. (No. 10067.)

(Supreme Court of Oklahoma. May 13, 1919.)

(Syllabus by the Court.)

APPEAL AND ERROR ⊂⊃800—NEW TRIAL ⊂⊃116(2)—TIME FOR MOTION FOR NEW TRIAL—EXCUSE—REVIEW.

Sections 5035 and 5036, Rev. Laws 1910, requiring a motion for new trial to be filed within three days after the verdict or decision is rendered, and to be made in writing, are mandatory; and, in the absence of a showing that the party filing said motion has been unavoidably prevented from doing so within the time fixed by statute, this court will not consider errors occurring at the trial.

Error from District Court, Grady County; Will Linn, Judge.

Action to quiet title by Ethel D. Cawdell against C. B. Clark and others. Judgment for plaintiff, motion for new trial overruled, and defendants bring error. Affirmed.

McClure & Castell, of Sulphur, for plaintiffs in error.

Bond, Melton & Melton, of Chickasha, for defendant in error.

OWEN, C. J. This action was brought by Ethel D. Cawdell against plaintiffs in error to quiet title in certain described premises in Grady county. Judgment was entered in her favor on the 11th day of January, 1918. Counsel for plaintiffs in error at that time suggested the record might show a motion for new trial filed as of that date and overruled, exceptions allowed, and an extension of time given in which to prepare and serve case-made. This entry was made, but in truth and in fact no motion for new trial was filed until the 26th day of March, 1918. The grounds assigned for new trial are on account of errors alleged to have occurred during the trial.

The motion not having been filed within three days, as required by the statute (section 5035, R. L. 1910) the judgment of the lower court must be affirmed on authority of Ronne v. Hirsh, 178 Pac. 88, and Ewert v. Wills, 178 Pac. 87.

All the Justices concur, except SHARP and HARRISON, JJ., not participating.

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WILLIAMS v. HEWITT. (No. 9476.)

(Supreme Court of Oklahoma. Jan. 28, 1919. Rehearing Denied May 27, 1919.)

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(Syllabus by the Court.)

1. INDIANS ⟸10—CONTROL OF ESTATES—SPECIAL LEGISLATION.

The estates of members of the Osage Tribe of Indians are governed by special legislation, and the provisions of general legislation do not apply.

2. GUARDIAN AND WARD ⟸9½—GUARDIAN OF MINOR ALLOTTEES—POWER OF COUNTY COURT TO APPOINT.

The office of a proviso in an act is to conditionally suspend the operation of an antecedent clause, and does not create an affirmative condition, nor defeat the operation of one already in existence.

(Additional Syllabus by Editorial Staff.)

3. INDIANS ⟸10—MINOR ALLOTTEES—JURISDICTION OF COUNTY COURT—"INCOMPETENCY."

Under Act Cong. April 18, 1912, § 3, amendatory of Allotment Act Cong. June 28, 1906 of Osage Tribe of Indians, conferring jurisdiction on county courts over estates of allottee minor orphan Indians, and of the property of deceased, insane, or other incompetent allottees, such incompetency to be determined by state laws, minority is not "incompetency," but merely a disability.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Incompetency.]

Commissioners' Opinion. Division No. 3. Error from District Court, Osage County.

Proceeding by Rosa Hewitt Williams against George W. Hewitt for the appointment of a guardian of certain minors. Proceeding dismissed, and petitioner brings error. Affirmed.

H. C. Hargis, of Pawhuska, for plaintiff in error.

Grinstead & Scott, of Pawhuska, for defendant in error.

SPRINGER, C. The parties will be referred to as petitioner and respondent. This case is in this court on petition in error from a judgment of dismissal by the district court of Osage county. The petitioner, a member of the Osage Tribe of Indians, filed a petition in the county court of Osage county, praying for the appointment of a guardian for the estates of Valorie and Loretta Hewitt, minors, aged 11 and 9 years, respectively. These minors are members of the Osage Tribe of Indians,, and their estates consist only of lands, funds, and mineral interests allotted to them by reason of their tribal relations, under the act of Congress of June 28, 1906, commonly known and referred to as the Osage Allotment Act.

The petitioner is the mother of the minors, for whose property the appointment of a guardian is sought in these proceedings, and likewise she is the mother of Maritus Hewitt, a daughter 7 years of age, and William G. Hewitt, a son 5 years of age; the two last-named children not being members of the Osage Tribe of Indians, having been born since the close of the tribal rolls, and therefore having no estates, Indian or otherwise. The respondent is the father of all these children and is a nonmember of the Osage Tribe of Indians.

On the 9th day of March, 1917, the district court of Osage county granted a divorce to the respondent, and also awarded the care and custody of all of the children of the parties to this proceeding, to him, together with all of the rights and interests of said children of every kind and nature whatsoever. The property interests of said children were awarded to the father for their care, control, and education.

Prior to the act of Congress of June 28, 1906 (34 Stat. 539, c. 3572), the Osage Tribe of Indians was the owner of what was known as the Osage Reservation, now Osage county, Okl., and a trust fund something in excess of $8,000,000, which was the proceeds of the sale of tribal lands in Kansas, and which fund was held in the treasury of the United States; the government paying interest thereon at the rate of 5 per cent. per annum, which was paid quarterly and prorated to the individual members of the tribe. In addition to the interest payment, the Osage Tribe of Indians received rentals from their lands for grazing and agricultural purposes. Their lands were held in common; the government collecting the rentals and paying the same to individual members at the same time and in the same manner the interest payments were made.

Prior to the Allotment Act these people received large sums as royalties accrued from oil and gas and mining operations, and these royalties were collected and distributed by the department, as were the payments of their rentals and interest on their trust fund. These in a great measure constituted all the tribal incomes prior to the allotment. During all the time the government acted as guardian of these people in the collection and payment of money due the tribe, the funds belonging to the minor members were paid to the parents. Paragraphs 1 and 2 of section 4 of the Allotment Act read:

(1) "That all the funds of the Osage Tribe of Indians, and all the moneys now due or that may hereafter be found to be due to the said Osage Tribe of Indians, and all moneys that may be received from the sale of their lands in

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Kansas under existing laws, and all moneys found to be due to said Osage Tribe of Indians on claims against the United States, after all proper expenses are paid, shall be segregated as soon after January first, nineteen hundred and seven, as is practicable and placed to the credit of the individual members of the said Osage Tribe on a basis of a pro rata division among the members of said tribe, as shown by the authorized roll of membership as herein provided for, or to their heirs as hereinafter provided, said credit to draw interest as now authorized by law; and the interest that may accrue thereon shall be paid quarterly to the members entitled thereto, except in the case of minors, in which case the interest shall be paid quarterly to the parents until said minor arrives at the age of twenty-one years: Provided, that if the Commissioner of Indian Affairs becomes satisfied that the said interest of any minor is being misused or squandered he may withhold the payment of such interest: And provided further, that said interest of minors whose parents are deceased shall be paid to their legal guardians, as above provided."

(2) "That the royalty received from oil, gas, coal, and other mineral leases upon the lands for which selection and division are herein provided, and all moneys received from the sale of town lots, together with the buildings thereon, and all moneys received from the sale of the three reservations of one hundred and sixty acres each heretofore reserved for dwelling purposes, and all moneys received from grazing lands, shall be placed in the Treasury of the United States to the credit of the members of the Osage Tribe of Indians as other moneys of said tribe are to be deposited under the provisions of this act, and the same shall be distributed to the individual members of said Osage Tribe according to the roll provided for herein, in the manner and at the same time that payments are made of interest on other moneys held in trust for the Osages by the United States, except as herein provided."

And section 7 of said act provides:

"That the lands herein provided for are set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or to their heirs, as herein provided; and said members, or their heirs, shall have the right to use and to lease said lands for farming, grazing, or any other purpose not otherwise specifically provided for herein, and said members shall have full control of the same, including the proceeds thereof: Provided, that parents of minor members of the tribe shall have the control and use of said minors' lands, together with the proceeds of the same, until said minors arrive at their majority. * * *"

[1] There is nothing in the Allotment Act which confers jurisdiction upon the county court of Osage county, or any other court, to appoint a guardian for the management and control of lands, funds or property belonging to members of the Osage Tribe of Indians. All of the affairs of members of the Osage Tribe of Indians are governed by special legislation, and the provisions of the general laws do not apply. Lynn v. Brown, 38 Okl. 209, 132 Pac. 810.

The Allotment Act specifically provides:

"And the interest that may accrue thereon * * * shall be paid quarterly to the parents until said minors arrive at the age of twenty-one years: Provided, that if the Commissioner of Indian Affairs becomes satisfied that said interest of any minor is being misused or squandered he may withhold the payment of such interest."

It is plain, from the provisions of this Act, that it was the intention of Congress to confer upon the Commissioner of Indian Affairs supervisory control of payments, to be made to parents, of the minors' interest; and it is equally plain that it was the intention of Congress to grant unto the parents the right to control and use the minors' lands, together with the proceeds of the same until the minors arrived at their majority. This condition continued until the act of Congress of April 18, 1912 (37 Stat. 86, c. 83), which act is supplementary and amendatory of the Allotment Act, section 3 of which provides:

"That the property of deceased and of orphan, minor, insane, or other incompetent allottees of the Osage Tribe, such incompetency being determined by the laws of the state of Oklahoma, which are hereby extended for such purpose to the allottees of said tribe, shall, in probate matters, be subject to the jurisdiction of the county courts of the state of Oklahoma, but a copy of all papers filed in the county court shall be served on the superintendent of the Osage Agency at the time of filing, and said superintendent is authorized, whenever the interests of the allottee require, to appear in the county court for the protection of the interests of the allottee. The superintendent of the Osage Agency or the Secretary of the Interior, whenever he deems the same necessary, may investigate the conduct of executors, administrators, and guardians or other persons having in charge the estate of any deceased allottee or of minors or persons incompetent under the laws of Oklahoma, and whenever he shall be of opinion that the estate is in any manner being dissipated or wasted or is being permitted to deteriorate in value by reason of the negligence, carelessness, or incompetency of the guardian or other person in charge of the estate, the superintendent of the Osage Agency or the Secretary of the Interior or his representative shall have power, and it shall be his duty, to report said matter to the county court and take the necessary steps to have such case fully investigated, and also to prosecute any remedy, either civil or criminal, as the exigencies of the case and the preservation and protection of the interests of the allottee or his estate may require, the costs and expenses of the civil proceedings to be a charge upon the estate of the allottee or upon the executor, administrator, guardian, or other person in charge of the estate of the allottee and his surety, as the county court shall determine. Every bond of the executor, administrator, guardian, or other person in charge of the estate of any Osage allottee shall be subject to the provisions of this section and shall contain therein a reference here-

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to: Provided, that no guardian shall be appointed for a minor whose parents are living, unless the estate of said minor is being wasted or misused by such parents. * * *"

[3] By this act it was intended to confer jurisdiction on the county court of Osage county over the estates of allottee minor Indians, where such allottee is a minor orphan, and the property of deceased, insane, or other incompetent allottee of the Osage Tribe of Indians. Minority is not incompetency within the meaning of the act, but merely a disability. The precise question presented by this record is this:

"Does the act of Congress of April 18, 1912, confer upon the county court of Osage county jurisdiction to appoint a guardian for the estate of an Osage minor Indian where both parents are living?"

The petitioner in this case relies upon the "proviso" contained in the last act referred to:

"Provided, that no guardian shall be appointed for a member whose parents are living, unless the estate of said minor is being wasted or misused by said parents."

It is observed, by reading the act, that nothing is contained in the body thereof which confers jurisdiction upon the county court to appoint a guardian in such cases, except as contained in the proviso. In the case of Joplin Supply Co. v. C. C. Smith, 182 Mo. App. 212, 167 S. W. 649, it is said:

"The purpose of a proviso in a statute is not to create new rights or make new laws or take away old ones already existing or repeal a part of an existing substantive law; but merely to restrict the preceding portion of the statute of which it forms a part."

In the case of In re Application of Henry M. Day et al. for Admission to the Bar, 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519, it is said:

"It is not the legitimate office of a proviso to enlarge the enactment to which it is appended."

In the case of State v. Young, 74 Or. 399, 145 Pac. 647, it is said:

"The office of a 'proviso' is to limit or restrain the preceding enactments, and it cannot be held to enlarge such enactments."

In the body of the opinion in the case of State v. Collins, 94 Wash. 310, 162 Pac. 556, it is said:

"A constitutional or statutory provision is a restraint or limitation upon, and not an addition to, that which precedes it."

In the case of Trimmer, Treasurer of Garvin County, v. State ex rel. Rennie, 43 Okl. 152, 141 Pac. 784, it is said:

"The proviso of a statute is a clause which generally contains a condition that a certain thing shall, or shall not, be done in order that something in another clause shall take effect. It implies a condition and defeats the operation of the antecedent clause conditionally."

To the same effect is the holding by this court in the case of Board of County Commissioners of Noble County v. Whitney (No. 9355) 175 Pac. 112 (not officially reported).

[2] The office of a "proviso" in an act does not create a new right, nor does it destroy existing rights at the time of its adoption, and there being nothing in the act of April, 1912, which provides for the appointment of a guardian of the property of Osage minor Indians where the parents are living, except that which is contained in the "proviso," the Allotment Act which confers upon the parents the control and use of the minors' lands, together with the proceeds of the same, until said minors arrive at their majority, and which authorizes the interest payments to be made to the parents, but which contains a supervisory control over the same by the Commissioner of Indian Affairs, applies.

Having reached this conclusion, we must hold that there was no error by the trial court in dismissing the petition, and accordingly its ruling thereon is in all respects affirmed.

PER CURIAM. Adopted in whole.

(75 Okl. 59)

HART-PARR CO. v. DUNCAN. (No. 8655.)

(Supreme Court of Oklahoma. April 15, 1919. Rehearing Denied June 10, 1919.)

(Syllabus by the Court.)

1. SALES ⟸124—BUYER'S RIGHT TO RESCISSION—CONDITIONS PRECEDENT.

Where a traction engine is purchased under contract warranting the engine to do certain work, and the contract contains the further provision that, if inside of six days from the date of its first use it shall fail to fill the warranty, * * * notice shall be given the seller of the defects and a reasonable time given the seller to remedy the defects, and the further provision that "the use of such engine after the expiration of six days shall be conclusive evidence of the acceptance of same by the purchaser," *held*, that such a provision does not constitute a condition precedent to the purchaser's right to a rescission where the holding and use of such engine after the six days has been at the instance and request of the seller and for the benefit of the seller.

2. SALES ⟸287(6)—RESCISSION BY BUYER—TENDER.

(a) Requested instructions examined, and *held* to not state the law applicable to the issues involved.

(b) Where a failure by a purchaser to make tender within the time provided for in a con-

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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tract is the result of the request of the seller, and where such delay is due to the fault of the seller and due to no fault of the purchaser, it is not error for the court to refuse to submit to the jury the question whether tender has been made within a reasonable time.

3. SALES ⟹279—WARRANTY—ISSUES.

(a) Instructions of the court examined, and *held* to substantially state the law applicable to the facts and issues in the case.

(b) Where a contract of purchase of an oil traction engine contains warranty that "the engine will develop certain horse power," and also a warranty that "the oil-cooling device will keep the cylinders sufficiently cooled for the successful operation of the engine," and it appears from the evidence that the failure of the engine to do satisfactory work is due wholly to the defects in the cooling device, it is immaterial in such case whether the engine develops the horse power it is warranted to develop, and in such case it is not error for the court to refuse to submit the question of fact to the jury whether the engine will develop the horse power it was warranted to develop.

4. SALES ⟹130(4) — WARRANTY—BREACH—DAMAGES.

Where an engine is purchased under warranty that it will do certain work, and, relying upon such warranty, the purchaser executes his promissory notes in payment thereof, and such warranty is breached by the seller, and the purchaser seeks a rescission of the contract because of the breach, he will not be denied the right also to recover the actual damages he has sustained by reason of the breach.

5. SALES ⟹62—CONTRACT—DIVISIBILITY.

Where in a single contract an oil tractor engine and gang plows, each represented to be perfectly suited to the other, are purchased together from the same company at the same time and for the specific purpose of plowing, in such case the fact that the engine is supplied by the selling company from its house in one state and the plows from its house in another state, and the fact that they are ordered on separate order blanks and separate notes given for each, do not render the contract divisible, in the absence of other evidence that it was the intention of the parties that it should be divisible.

Appeal from District Court, Tillman County; Chas. B. Wilson, Jr., Judge.

Action by the Hart-Parr Company against Joseph T. Duncan, with counterclaim by defendant for affirmative relief. Verdict and judgment denying plaintiff's demand and allowing affirmative relief, and from the judgment and an order overruling its motion for a new trial, plaintiff brings error. Affirmed.

Mounts & Davis, of Frederick, and Chester I. Long and Austin M. Cowan, both of Wichita, Kan., for plaintiff in error.

Wilson & Roe, of Frederick, for defendant in error.

HARRISON, J. The governing facts in this case are that in June, 1914, plaintiff in error, the Hart-Parr Company, a corporation of Charles City, Iowa, sold to defendant in error, Jos. T. Duncan, a certain 40 horse power oil tractor engine and two six-furrow disc plows, taking in payment Duncan's five promissory notes, aggregating $2,785, secured by mortgage on the engine and plows.

The engine was warranted to do good work, but would not do so, and could not be made to do so. Duncan notified the Hart-Parr Company of such fact, and refused to pay the notes because of the worthlessness of the engine, whereupon the Hart-Parr Company brought suit on the notes. Duncan answered, denying liability on the notes because of breach of warranty by the company, and also asked for affirmative relief in damages alleged to have been caused by the company in selling him a defective engine.

The company replied to Duncan's answer, and the case was tried upon the issues thus formed, resulting in a verdict and judgment releasing Duncan from liability on the notes and giving him damages in the sum of $294.68, the amount paid by him for freight on the engine.

From such judgment and order overruling motion for new trial the Hart-Parr Company appeals upon 15 specific assignments of errors, including the assignment that the court erred in overruling motion for new trial, which motion itself contained 14 grounds for a new trial.

The entire assignment of errors, however, is presented and argued in the plaintiff in error's brief under the following topics:

(1) The question of tender.

(2) A refusal to give requested instructions.

(3) Errors in the instructions given by the court.

(4) The defendant not entitled to rescind.

(5) Errors in the verdict and judgment in releasing defendant from liability on the notes given for the plows.

Under the first proposition it is contended by plaintiff in error that the defendant had not complied with the provision of the contract as to tender of the engine, and was therefore not entitled to a rescission of the contract. The contract in question consisted of a printed order furnished by the company which Duncan had signed and sent in to the company for the shipment of the engine and plows, which order was made subject to the warranties contained therein.

Among the provisions of warranty was the provision that the engine would develop certain horse power; also the provision that the oil-cooling device would keep the cylinders sufficiently cooled for the successful operation of the engine; and the further provision that:

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"If inside of six days from the date of its first use it shall fail to fill the warranty with respect to the development of power, notice shall be given the Hart-Parr Company at their office at Charles City, Iowa, by registered letter or telegram, stating particularly wherein it fails to fill the warranty, and reasonable time given said company to send a competent person to remedy the defects, if any there be; the purchasers rendering necessary and friendly assistance. If the engine cannot be made to develop the guaranteed power, it shall be returned by the purchasers free of charge to the shipping point where received, and the payments made will be refunded, and no further claim is to be made on the company.

"If the purchasers fail to make the engine do satisfactory work through improper management, inefficient operators, or neglect to observe the printed or written directions of the manufacturers, then the purchasers are to keep the engine, also to pay all necessary expenses incurred by any man sent at their request to put the engine in condition for successful operation.

"It is further mutually understood and agreed that the use of said engine after the expiration of the six days named in the above warranty shall be conclusive evidence of the acceptance of the same, and full satisfaction to the undersigned, who agrees thereafter to make no other claim on the Hart-Parr Company. * * *"

[1] The company contends that the defendant, by keeping the engine more than six days after he had received it and by not returning it at the end of six days, had not complied with the conditions precedent to his right to rescission and was not in position to ask for a rescission.

A number of cases are cited in support of this contention, among which are several Oklahoma cases as well as cases from other states in support of the general rule:

"Where a contract of sale is coupled with an express warranty which stipulates the course to be pursued by the purchaser in the event the warranty fails, such stipulation must be followed by the purchaser in order to enforce the warranty."

But the above rule is not applicable to the facts in this case. The testimony discloses that this engine was brought to Duncan's place about the 18th day of June and put to work by one of the Hart-Parr Company's experts, but failed to do good work from the very beginning; that the first expert remained with the engine from about June 18th until about June 27th, the engine from the beginning and at all times failing to give satisfaction. After the first expert left, Duncan called up the company and informed them that the engine was not working satisfactorily, and was requested by the company to try to get along with it until they could get a man; that they had no available man at that time, but would send one as soon as possible. The man came in about a week, and other men came later; and they continued to try to make the engine run until about the 26th of September, having spent more than two months in a vain endeavor to make it work, and all this delay at the instance and request of the company.

The company's expert set up the engine on the 18th of June, and continued from then until the 27th day of June trying to make it run, but he could not make it do satisfactory work, and, when the company was informed of this fact, it requested Duncan to get along with it until another expert could be sent. Thus the failure to return the engine according to the stipulation relied upon by the company was brought about at the instance and request of the company and for the benefit of the company. In fact, it appears from this testimony that all the delay in failing to return the engine and ask for a rescission of the contract was at the request of the company and for the benefit of the company. The company continued to send experts to try to make the engine do satisfactory work for a period of over two months, which delay was of no benefit whatever to Duncan. In fact, as the testimony shows, Duncan was materially damaged by reason of the delay. The company was getting all the benefit of the delay in the hope of ultimately making this engine do the work instead of having to take it back or replace it with another engine.

Under these circumstances there is no rule of law, at least none recognized by this court, that would deny Duncan the benefit of the provision of warranty and force him to take a worthless engine and pay $2,785 for it.

[2] It is contended also that no sufficient tender was made by Duncan. This contention is not supported by the evidence. Even if a formal tender was material, such contention is not sustained by the evidence.

Plaintiff in error lays great stress upon the fact that the engine at the time suit was brought was upon Duncan's premises and in his possession, and that the provision in the contract was that the engine should be returned to the railroad station at Hollister. But the testimony is that from the beginning the company had knowledge that the engine was defective, and that from the 18th of June to the 26th day of September this defective engine had been kept by Duncan to Duncan's material detriment, in order to give the company opportunity to make the engine work, if it could be made to do so, and that at the end of this time Duncan, having become thoroughly satisfied that the engine was absolutely worthless, and could not possibly be made to do satisfactory work, refused to grant any further delay, and notified the company that the engine was there; that it was out in his field; that he was ready at any time to deliver it at Hollister, and would do so upon the surrender by the company of

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his notes. This the company refused to do. Under these circumstances Duncan was not required to return the engine at the station at which it had been received, knowing that the company would not receive it and had failed and refused to return his notes. See Young v. Blackert, 51 Okl. 285, 151 Pac. 1057; Barber Medicine Co. v. Bradley, 48 Okl. 82, 150 Pac. 127; Rawlings v. Ufer, 161 Pac. 183, not yet officially reported; also J. I. Case Threshing Mach. Co. v. Huber, 160 Mich. 92, 125 N. W. 66, 32 L. R. A. (N. S.) 212.

Second Proposition. Under this proposition plaintiff in error contends that the court erred in refusing to give requested instructions 1, 2, 3, and 4 requested by the company. Under the evidence in this case the requested instructions were properly refused by the court for the reason that they did not state the law applicable to the facts in the case. The requested instructions referred to are drawn upon the theory that the failure of Duncan to return the engine after having used it six days, as stipulated in the order, was due to Duncan's fault, when as a matter of fact it appears from the record that Duncan's failure to return it at the end of six days' use and the prolonged delay in asking to be released from his notes was due to the fault of the company.

It is also contended that the court erred in refusing to submit to the jury the question whether or not tender had been made within a reasonable time. This contention likewise is based upon the theory that the delay in making tender within the time prescribed in the contract was due to the fault of Duncan, which failure, as we have heretofore observed, cannot be sustained under the record.

[3] Third Proposition. Under the third proposition it is contended that the court erred in its instructions to the jury. The argument in this regard is based partly upon two theories: One, that Duncan had failed to act promptly after the discovery of the defects or fraud, and that the failure to so act was due to his own fault; and the other, that the court had eliminated from the case the question of "whether the engine would develop the horse power provided for in the warranty," and submitted to the jury only one question, "as to whether the cooling device had fulfilled the conditions of the warranty." As has already been observed, the question as to whether Duncan acted within a reasonable time was not a material question in the case. Under the circumstances, and under the undisputed facts in the case, it was immaterial whether the engine developed the horse power it was warranted to develop or not, so long as the cooling device was so defective as to render the entire engine worthless. If the cooling device had done the part it was warranted to do, then the engine might have developed the horse power it was warranted to develop, but, inasmuch as the cooling device was so defective that the engine became overheated and the cylinder warped and rendered useless and worthless, it was immaterial, so far as this case is concerned, whether it would have developed the horse power or not, and hence no error to eliminate the question of "horse power" and submit to the jury the question alone "as to whether the cooling device had fulfilled the warranty." We think the instruction complained of was a substantially correct statement of the law applicable to the issues involved.

Fourth Proposition. Under this proposition it is argued, citing a number of authorities in support of such contention, that Duncan, having elected to sue for a breach of warranty, could not thereafter ask for rescission of the contract, and the court erred in submitting the case to the jury on the question of rescission. As to whether this contention should be sustained if plaintiff in error's premise was correct we do not feel called upon to decide, but the issues of fact presented by the pleadings were that the company brought this suit upon the notes and asked for judgment for the face value thereof with interest.

[4] The defendant answered, admitting the execution of the notes, but alleging that they were given in consideration of the machine and engine involved here; that the engine was worthless, and therefore the notes were given for no consideration. These facts, if true, would have entitled the defendant to a rescission of the contract. In addition to these facts the defendant also alleged that, by reason of the worthlessness of the engine and by reason of the fact that a worthless engine had been sold to him, he had been damaged to the extent of the freight he had paid on the engine, which was $294, and that he had been otherwise damaged in his endeavor to make the engine work, in different amounts that he had paid out, which sums would not have been necessary to pay out if the engine had worked satisfactorily, together with other items of damage which he alleged he sustained by reason of the fact that the company had sold him an engine that was of no use to him. There is no inconsistency in these causes of action. If the company had sold Duncan an engine warranted to do good work, and, relying upon such warranty, Duncan had executed his promissory notes, aggregating $2,785, and the engine should prove worthless, prove to be of no value whatever to Duncan, and fail wholly to perform the work it was purchased to do, the work it was warranted to do, then upon proof of such facts Duncan would be entitled to release from liability on the notes, and in addition to that, if he had been actually damaged by reason of fraud perpetrated by the company in selling

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him a worthless engine, then upon proof of such damage he would be entitled to recover therefor. There is no inconsistency in the two causes of action. Phillips et al. v. Mitchell et al., 172 Pac. 85.

Fifth Proposition. Under this proposition it is argued that the court erred in overruling the motion of plaintiff for judgment in its favor upon the two notes for the plows which were purchased with the engine.

[5] This contention is based upon the assumption that the purchase of the plows constituted a separate contract, and despite the fact that the plows and engine were purchased under separate and distinct contract, the failure of the engine to come up to the warranty did not relieve the defendant from liability on the notes given for the plows, which had been purchased under separate contract.

Plaintiff in error in its brief says:

"The mere fact that the two contracts of purchase were made at the same time and may have been part of the same transaction does not prevent the contracts from being divisible. A separate price was set out for each, separate notes were given for each article, and separate orders were made for each. Even though the purchase was covered by one contract, yet, where separate prices are given, the contract is divisible, and a rescission of part of the divisible contract does not entitle the defendant to rescission as to the other"—citing cases in support of this contention.

But the facts in the case do not support this theory. It appears from the record that Duncan wrote to the Hart-Parr Company at Charles City, Iowa, telling them, in substance, that he would be in the market for an engine and requesting full information as to the kind of an engine suitable to his needs and all particulars in regard to what the company had called their "free trial offer." In reply to his request Duncan received the following letter from the company at Charles City, Iowa, which appears as Exhibit A in the record, to wit:

"Mr. Joe. T. Duncan, Route 1, Hollister, Okl.—Dear Sir: Your favor just at hand, requesting full particulars about our free trial offer, and telling us that you are operating a half section of land, and that you expect to do some road grading as well as the farm work, with your tractor.

"The free trial offer plan that has been recently put into force by our company makes it possible for paying one dollar down on the outfit, and also leaves it up to you to decide whether or not you can afford to continue doing your work with horses, and do expensive farming, or whether you want to do cheaper farming, the Hart-Parr way.

"We are building our tractors in several sizes, but for the half section farm we recommend our 27 BHP tractor, and a set of our four bottom self and half lift plows.

"However, your conditions may be unusual, and there may be some reasons why this tractor wouldn't be the best one for your work, so we are asking you to fill out the inclosed coupon, and mail it promptly to our office at Wichita, Kansas, which office has charge of all our business in your section. They are familiar with your farming conditions there and are in position to advise with you fully and completely as to which one of our rigs you ought to have on your farm.

"They will take the matter up with you at once, and quote you our prices and terms, and explain to you fully all about this free trial offer plan, the plan that makes it easy for you to try out a Hart-Parr oil tractor to your own satisfaction on your own farm and find out whether or not it would do the business for you. We are,

"Yours very truly, Sales Department,
"Hart-Parr Co., by D. C. Hull."

It is observed that the above letter plainly and definitely tells Duncan that the Wichita office has charge of all the Hart-Parr business in Duncan's section of the country, and that the Wichita office would advise him as to what was best suited to his needs, and, following these instructions from the company, Duncan wrote the Wichita office, the office which the company said had charge of all its business in Duncan's section. And, pursuant to Duncan's letter to the Wichita office, a Mr. Thompson was sent by the Wichita office to advise what he needed and to sell him what he needed.

Under these circumstances Mr. Thompson came to Duncan not merely as an agent with limited authority, but as the authorized representative of the Wichita house, which had charge of all the company's business in Duncan's section of the country. Hence any representations made by Thompson were representations made by the company. Thompson was the man chosen by the company and sent by the company to tell Duncan just what he needed. The company spoke through Thompson to Duncan, and the company is bound by the representations which Thompson made for the company to Duncan. Hence the company told Duncan, through Thompson, that the engine in question was the kind of engine he needed, the kind that would serve his purpose, and that the plows in question were the kind of plows he needed for his particular purpose. Duncan needed the engine for the plows and needed the plows for the engine. He had a certain work to be done; he had no use for either without the other, and no use for either unless both would work satisfactorily. Thompson led him to believe that they were just what he needed, and upon Thompson's representations he bought the plows and engine with which to do his plowing. It was all one contract, all one purchase. The fact that the plow was ordered on one blank and the engine on another, and that separate notes were given for each, did not render it a separable or

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divisible contract, or make it two distinct contracts.

The plows which were suited to this engine were priced at a certain figure, and the engine, that was suited to the plows was priced at a certain figure, and Duncan upon a certain date purchased them, all for a specified price. The plows were kept in stock at the Wichita office and the engine kept in stock at the Charles City, Iowa, office; hence the necessity of two separate order blanks to complete the one purchase, which in our opinion, in absence of other evidence that the parties intended it to be divisible, constituted one indivisible purchase contract.

The court therefore did not err in refusing to direct judgment for the company on the notes given for the plows.

When the entire case is summed up, it amounts to this, that Duncan had a half section of land that he wanted to have plowed; he needed the engine and plows to do it with; he had no use for either without both. Thompson was sent as the representative of the company to tell Duncan what he needed and to sell it to him. Relying on what Thompson said as to what he needed, Duncan entered into a purchase contract for the implements or instruments which combined do his plowing. The company sold him what they warranted to be just such an implement or combination of implements as would do the work he wanted done, and took his notes aggregating $2,785 in payment. The combination was worthless to Duncan, and the company knew it to be worthless; yet it asked the court for judgment for the full amount of the notes with interest. Duncan asked the court for release from liability on the notes and for damages caused by the fraud.

The issues involved were submitted to the jury by the court, the jury returned a verdict in favor of the defendant, and upon such verdict the court rendered judgment.

We find no substantial error in the record. The judgment is affirmed.

(72 Okl. 320)

SHARPE et al. v. STATE. (No. 8379.)

(Supreme Court of Oklahoma. May 13, 1919.)

(Syllabus by the Court.)

INTOXICATING LIQUORS ⊂=246—SEIZURE AND FORFEITURE — STATUTE—"APPURTENANCE."

An automobile seized July 21, 1915, in the unlawful conveyance of intoxicating liquor, in the presence of an officer having power to serve criminal process, was not subject to seizure by such official and forfeiture to the state, under the provision of section 3617, Rev. Laws 1910, and is not an "appurtenance" within the meaning of that section (following One Cadillac Automobile v. State, 172 Pac. 62).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Appurtenance.]

Appeal from County Court, Ottawa County; Vern E. Thompson, Judge.

Proceeding by the State of Oklahoma to forfeit one Buick automobile and 96 one-half pints of whisky, with intervention and claim by Nelle Sharpe and Floyd Gaither and by the Hood Implement Company. From a judgment forfeiting the automobile to State and from the overruling of a motion for a new trial, Nelle Sharpe and Floyd Gaither bring error. Reversed and remanded, with direction to restore the automobile to the interveners.

Nesbitt & Axley, of Miami, for appellants.
S. P. Freeling, Atty. Gen., for the State.

McNEILL, J. On the 21st day of July, 1915, E. C. Branson, constable of Ottawa county, arrested Nelle Sharpe and Floyd Gaither without a warrant in Ottawa county for unlawfully conveying intoxicating liquors, and seized the liquors and the automobile in which the same was being conveyed. He made a return to the county court, setting forth the description of the liquor and the automobile, whereupon said court issued a warrant commanding him to hold said property and set the hearing on the same for the 5th day of August, 1915.

The said Nelle Sharpe and Floyd Gaither filed a plea of intervention claiming to be the owner of said automobile. The Hood Implement Company filed a plea of intervention claiming possession of said automobile by reason of a chattel mortgage thereon. The case was tried upon an agreed statement of facts. The court rendered judgment forfeiting said automobile to the state. The motion for a new trial was overruled, and the case is brought here for reversal.

This case is controlled by former decisions of this court in the case of One Cadillac Automobile v. State, 172 Pac. 62, wherein the court stated:

"An automobile used January 3, 1917, in the unlawful conveyance of intoxicating liquor in the presence of an officer having power to serve criminal process was not subject to seizure by such official and forfeiture to the state under the provisions of section 3617, Rev. Laws 1910, and is not an 'appurtenance,' within the meaning of that section, which provided: 'When a violation of any provision of this chapter [chapter 39, Intoxicating Liquors] shall occur in the presence of any sheriff, constable, marshal, or other officers having power to serve criminal process, it shall be the duty of such officer, without warrant, to arrest the offender and seize

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the liquor, bars, furniture, fixtures, vessels, and appurtenances thereunto belonging so unlawfully used.'"

This doctrine has been followed by this court in the case of State v. One Ford Automobile (not officially reported) 174 Pac. 489; Cox et al. v. State (not officially reported) 173 Pac. 445; One Hudson Super-Six Automobile v. State (not officially reported) 173 Pac. 1137.

The seizure in this instance having been made prior to the taking effect of the act approved March 24, 1917, it is held by the former opinions of this court that there is no authority under section 3617, Revised Laws 1910, to justify the seizure and confiscation of an automobile, although it had been used in an unlawful conveyance of intoxicating liquor.

It is therefore ordered that the case be reversed and remanded with instructions to restore the automobile to the interveners.

SHARP, PITCHFORD, HARRISON, RAINEY, and JOHNSON, JJ., concur.

AMERICAN INV. CO. v. BREWER et al.
(No. 8778.)

(Supreme Court of Oklahoma. Dec. 24, 1918. Rehearing Denied May 27, 1919.)

(Syllabus by the Court.)

1. GUARDIAN AND WARD ⟸98—SALE BY GUARDIAN—PAYMENTS—SECURITY.

Where property of a minor is sold by a guardian partly on time and partly on deferred payments, the deferred payments must be secured by a first lien on the land together with such other security as the court may deem sufficient.

2. GUARDIAN AND WARD ⟸105(1)—GUARDIAN'S SALE—AVOIDANCE—FRAUD.

A guardian's sale of land can be avoided by pleading and proving fraud in making the sale or the court may give such other relief as may be authorized by equitable principles.

3. EVIDENCE ⟸65—GUARDIAN AND WARD ⟸108—GUARDIAN'S SALE—NOTICE TO PURCHASER.

In case land of a minor is sold by the guardian, the purchaser and all others afterwards dealing with the land are charged with notice of the probate proceedings through which the sale is made, also of the law involved, and must take notice that, in case there are deferred payments, the same must be secured by a first lien on the land sold.

4. INFANTS ⟸74, 77—GUARDIAN AD LITEM—LITIGATION—PARTIES.

A guardian ad litem of a minor is the arm of the court extended to protect the minor who is incapacitated to look after his own interests, and when, in order to guard the minor's rights, it becomes necessary, the court should direct the guardian ad litem to make all persons parties to the litigation whose presence is necessary to give the court jurisdiction to grant proper and adequate relief to the minor.

Commissioners' Opinion, Division No. 1.

Error from District Court, Stephens County; Cham Jones, Judge.

Foreclosure action by the American Investment Company against B. L. Brewer, David H. Spain, a minor, and others, with cross-petition by T. B. Reeder, guardian ad litem of David H. Spain, minor. Judgment for the minor on the cross-petition, and plaintiff brings error. Remanded, with directions.

H. E. Oakes, of Oklahoma City, for plaintiff in error.

T. B. Reeder, guardian ad litem, of Duncan, for defendants in error.

STEWART, C. David H. Spain is a minor Indian owning certain lands situated in Stephens county; Thomas H. Spain being his guardian. On application for order of the county court the guardian sold the land of the minor to B. L. Brewer, $2,000 being the consideration, $1,100 of which was to be cash, the remainder to be secured by mortgage against the land. The guardian made his report to the court, and the sale was approved, and guardian's deed executed. The evidence shows that B. L. Brewer was without funds, and that, by arrangement with the guardian before he paid the cash consideration, the guardian's deed was executed and the land was mortgaged by Brewer to the American Investment Company to secure a loan of $1,100, and what is known as a commission mortgage was executed as a part of the same transaction to C. E. Cartt to secure two notes of $165 each, said commission mortgage being second to the mortgage made to the American Investment Company; that afterwards C. E. Cartt transferred the commission mortgage to the American Investment Company. The $1,100 was paid to the guardian, and a third mortgage given to secure the minor for the remainder of the purchase price. It does not appear that the court made investigation of the facts at the time of approving the sale and transfer, but granted relief upon the representations of the guardian in the return of the sale which showed the payment of the cash consideration and proper security for the unpaid part. On failure to pay the notes secured by the commission mortgage when due, the American Investment Company brought foreclosure action on the commission mortgage, alleging in the petition that the first mortgage for $1,100 had been transferred by the com-

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pany and was not at the time owned by the plaintiff; a foreclosure of the commission mortgage only being asked. T. B. Reeder was appointed guardian ad litem for the minor, and appeared and filed answer and cross-petition setting up necessary facts showing collusion and fraud between the guardian of the minor, the American Investment Company and B. L. Brewer, the purchaser of the land, and asking that all mortgages against the land be canceled and all cloud be removed from the minor's title to the same, also praying in the alternative that the mortgage made for the purpose of securing the unpaid purchase price coming to the minor be declared superior to all mortgages and liens against the land, and that the same be foreclosed. Upon a trial being had, the court ordered that the title and possession of the premises be settled and quieted in the minor as against any and all claims or demands of the plaintiff and other defendants who had been made parties and those claiming under them; that the guardian's deed, the commission mortgage, and all other deeds or documents be canceled and removed as clouds upon the title of the minor; that the American Investment Company and those claiming by, through, or under it, and the defendants, and each of them, and those claiming through, by, or under them, or either of them, be perpetually enjoined from claiming any right, title, interest, or estate in and to the land adverse to the minor, from which judgment the plaintiff duly appeals to this court, and as grounds for reversal urges the following propositions:

"First. The judgment is void for the reason that said court had no jurisdiction of the particular matter which the judgment professed to decide.

"Second. The fact that the prayer to the answer of said defendant prayed that plaintiff's mortgages and certain deeds through which it claims be canceled as clouds upon his title did not warrant the court in canceling the same.

"Third. The validity of the guardianship sale cannot be attacked in this proceeding."

[2] Under the first proposition the plaintiff in error urges that the court had no jurisdiction to render the particular judgment for the reason that the same was entirely outside the issues in the case; in other words, that the pleadings were not sufficient to authorize the court to render the particular judgment. Our attention is called to Standard Savings & Loan Association v. Anthony Wholesale Grocery Company, 162 Pac. 451, L. R. A. 1917D, 1029; Jefferson v. Gallagher, 56 Okl. 405, 150 Pac. 1071; Sharp v. Sharp, 166 Pac. 175, L. R. A. 1917F, 562; Rogers, Treasurer, et al. v. Duncan, 156 Pac. 678; Rogers v. Bass & Harbour Furniture Co., 47 Okl. 786, 150 Pac. 706; Anglea v. McMaster et al., 17 Okl. 501, 87 Pac. 660; Choi v. Turk et al., 55 Okl. 499, 154 Pac. 1000; 23 Cyc. 683.

The second proposition is necessarily embraced in the first, being argumentative and merely meant to suggest that, as the issues joined did not authorize the particular judgment, the prayer could not cure the failure to make necessary allegations. There is no doubt about the soundness of the authorities presented nor of the abstract proposition of law urged by plaintiff in error, but, on an examination of the pleadings in the case, we find that the facts showing the fraud have been sufficiently pleaded, and that the allegations have been sustained by the proof. The relief sought being equitable, it was therefore the duty of the court, under the pleadings and the proof, to render such judgment as would adequately protect the injured minor, at the same time doing equity between the parties. As to the third proposition, that the validity of the guardianship sale cannot be attacked in this proceeding, we desire to say that the rule of law which the plaintiff in error seeks to invoke does not apply to a proceeding to set aside a sale or cancel instruments affecting the title of land on the ground of fraud, and that upon a proper showing such relief may be had whether the fraud is in connection with a guardian's sale approved by the court or otherwise. The thing necessary to be determined is whether or not there was fraud in the sale, and, if fraud was perpetrated, the fact that it has the appearance of judicial sanction does not affect the right of the defrauded person to equitable relief.

[1] The American Investment Company and all other persons dealing with the land in question were charged with notice of the probate proceedings which showed that the minor's land was sold partly for cash and partly on time and are also presumed to know and are charged with notice of the law as to guardianship sales. The statute which applies is section 6567, R. L. 1910, which reads:

"All sales of real estate of wards must be for cash, or for part cash and part deferred payments, not to exceed three years, bearing date from date of sale, as, in the discretion of the county judge, is most beneficial to the ward. Guardians making sales must demand and receive from the purchaser a bond and mortgage on the real estate sold, with such additional security as the judge deems necessary and sufficient to secure the faithful payment of the deferred payments and the interest thereon."

As we construe such statute, it is necessary that a cash payment be made and that the balance be secured by a first mortgage on the land with such additional security as the county judge may deem sufficient. While the statute does not in its terms require a first mortgage on the land, it would be unreasonable to hold that the Legislature had any other intent. It would also be violative of the terms of the statute requiring part cash that the minor should furnish the se-

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curity out of the identical property sold for the purpose of procuring the money for the cash payment. This would not be a cash payment, but would amount in effect to permitting the guardian to make a first mortgage on the land and then sell the equity without any cash payment, merely securing the remaining purchase price by a mortgage alone upon the equity sold. The courts will not uphold such circumvention in dealing with the property of minors. In addition to being charged with notice of the probate proceedings and of the law, the American Investment Company had actual knowledge of the arrangements between Brewer and the guardian, as is shown by a letter in the record admitted to have been written by them sent to their agents, Womack & Brown, at Duncan, Okl., at the time of closing the loan and prior to the recording of a mortgage given to secure the minor, which letter in part reads:

"We are paying this loan out upon the promise of your Mr. Womack that he will procure an acknowledged statement from Thomas H. Spain, the guardian, waiving all rights for the balance of the purchase money in favor of this company, and that if Mr. Spain takes a mortgage for any part of the purchase money, said mortgage will recite that same is inferior to $1100.00 mortgage to the American Investment Company dated March 28th, 1913, recorded in Book ——, page ——, and to a second mortgage to C. E. Cartt for $330.00, same date, recorded in Book ——, page ——.

"We know that your Mr. Womack understands exactly what is necessary and we want you to send us an exact copy of the language that you use in the third mortgage that we may place with our files and know that we are protected and will have the matter always before us for ready reference."

[3, 4] We are of the opinion that the court was authorized to grant the relief which is provided for in the judgment, and that, under the state of pleadings and with the parties at that time before the court, no more adequate relief could have been afforded. But the record in this case discloses to us that the minor did not obtain all of the relief to which he was entitled, due to the fact that the assignee of the first mortgage was not made a party to the proceeding. Ordinarily this court would let the matter rest where it is, in view of the fact that the party interested did not file the proper pleadings or take proper steps toward making other parties; but a different course should be pursued where the interests of a minor are involved. The guardian ad litem is the arm of the court extended to protect the minor, who, because of his minority, is incapacitated to act for himself and is unable to protect his own interests. Minors and incompetent persons are the especial objects of attention of the courts and it is the duty of the court, whenever the necessity appears to advise the guardian ad litem as to what steps to take and what pleadings to file. It is clear that the assignee of the first mortgage should have been made a party to the proceedings below in order that the minor could have all the relief to which the facts entitled him. Under the state of the record it is clear that the assignee was charged with notice of the probate proceedings showing the return of the sale and of the law involved, but a judgment could not be rendered affecting his rights without having him before the court as a party. The assignee, under the law, was not an innocent purchaser for value. We think that the facts would warrant the cancellation of the guardian's deed and also all transfers of the land or incumbrances against the same, since the guardian's sale, but, under the rule that he who seeks equity must do equity, it would be the duty of the minor to restore everything of value which he has received before the cancellation of the first mortgage should be awarded. The guardian was paid $1,100 as the proceeds of the loan made by the American Investment Company; the presumption being that the minor received the benefit thereof. There is no evidence before us to show whether or not the guardian had squandered this money. We assume that, if such is the case, there is a sufficient bond to protect the minor, and, as it does not appear that the price received for the land was inadequate, we are also of the opinion that, if for the minor's best interest, the court would be authorized to declare the mortgage given to secure the balance of the purchase price of the land superior to all other outstanding liens against the land not existing at the time of the sale, and that such mortgage so declared be a first lien, that the same be foreclosed, and the proceeds first applied to the payment of such mortgage indebtedness, costs, and taxes. This being an equity case, the court has authority to modify the judgment so as to do justice between the parties or to remand the case to the trial court for such purpose. Not having the assignee before us, we are unable to modify the judgment; therefore we have decided to remand the case to the trial court for further proceedings, where all necessary parties can be brought before the court.

It is ordered that the cause be remanded to the trial court, with directions to set aside the original judgment and require the guardian ad litem to make the assignee of the indebtedness secured by the first mortgage a party to the proceedings, and that the trial court hear and determine the issues in accordance with the views herein expressed, allowing or ordering such amendments to the pleadings as the court in its discretion may find proper.

PER CURIAM. Adopted in whole.

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(75 Okl. 22)

CASTLE v. REEBURGH et al (No. 9138.)

(Supreme Court of Oklahoma. Feb. 18, 1919. Rehearing Denied May 27, 1919.)

(Syllabus by the Court.)

1. WATERS AND WATER COURSES ⟸178(2)—OBSTRUCTION — DAMAGE TO CROPS — MEASURE.

In an action for damages for injury to growing crops, caused by damming up a water course, causing the same to overflow upon the land of another, where the evidence discloses that part of the crops were planted and ruined by reason of the overflow, and that thereafter the land was replanted, and the crops cultivated and harvested, the measure of damages plaintiff will be entitled to recover will be the difference between the reasonable market value of the crops which, as shown by the evidence, would have been raised on such land, had not said overflow occurred, and the market value of any crops actually raised thereon.

(a) If no crops were planted, or, if planted, failed to come up, by reason of the overflow, then the plaintiff's recovery will be the reasonable rental value of the land for such year or years.

2. WATERS AND WATER COURSES ⟸119(1)—SURFACE WATERS — DIVERSION — RIGHTS OF PROPRIETORS.

The common law governing the diversion of surface water, as adopted and applied in this state, has been modified and restricted to this extent, namely: That each proprietor may divert the same, to cast it back or pass it along to the next proprietor, provided he can do so without injury to such adjoining proprietor. Under this rule of law, no one is permitted to sacrifice his neighbor's property in order to protect his own.

3. WATERS AND WATER COURSES ⟸179(5)—OVERFLOW — INJURY TO CROPS — INSTRUCTION.

In an action for damages for injury to growing crops, caused by the damming up of a water course, where the answer is a general denial, and there was some evidence that another branch had overflowed on this land, but no evidence as to the condition of the crops, or the damage done to the crops by said overflow, or what time of year said overflow occurred, under the pleadings and the character of evidence offered, it was not error to refuse an instruction, requested by the defendant, to the effect that the defendant would not be liable for any damage caused by the overflow of any other branch which contributed to said damage.

Error from District Court, Greer County; W. C. Crow, Judge.

Action by S. P. Reeburgh and another against William E. Castle. Verdict and judgment for plaintiffs, and defendant brings error. Affirmed.

S. B. Garrett and Wilkins B. Garrett, both of Mangum, for plaintiff in error.

H. D. Henry, of Mangum, for defendants in error.

McNEILL, J. This was an action commenced in the district court of Greer county by S. P. Reeburgh and William Rimmer against William E. Castle; the petition alleging that the said William E. Castle had built and constructed a certain ditch and embankment across his land, which was without authority of law, and was unnecessary and without regard to the land of the plaintiff, thereby filling up and stopping the natural water course of said Spring Branch stream, which passed across the surrounding country, adjacent to said land, thereby damming up said water course and causing the water to flow down and across, and spread over and across, 35 acres of land belonging to plaintiff, and there stand and flood the lands of plaintiff; that during the years 1912, 1913, and 1914, William Rimmer was farming the land of Reeburgh, and giving a share of the crop as rent; that the damming up of said water damaged the crops for the years of 1912, 1913, and 1914. Both plaintiffs join in and bring said suit for damages caused said crops. To this petition the defendant filed a general denial. The case was submitted to a jury, and the jury returned a verdict in favor of the plaintiffs. Defendant below appeals from said judgment to this court.

[1] Plaintiff in error alleges 24 separate and distinct assignments of error, but only a few are presented and argued in the brief, and we will content ourselves with passing on only those that are argued. Assignments Nos. 15 and 17 present the question whether the court properly instructed the jury as to the measure of damages. Instruction No. 4, given by the court, was as follows, to wit:

"You are further instructed that, in the event you find from a preponderance of the evidence that plaintiffs should recover, then you should assess the amount of their recovery as follows, to wit: Where crops are growing on the land, if same were injured or destroyed by overflows caused by the ditch of the defendant, the plaintiffs would be entitled to recover the reasonable market value of the crops, as has been shown by the evidence would have been raised on said lands had said overflow not occurred; less the market value of any crop actually raised thereon; if no crop was planted, or, if planted, failed to come up, and you find from a preponderance of the evidence that such failure was caused by the alleged wrongful action on the part of the defendant, then plaintiffs should recover the reasonable rental value of said land for such year or years."

The evidence tended to show that certain crops were damaged and ruined in the spring by reason of the overflow, and were either drowned out or failed to come up, and the

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plaintiff thereafter replanted said land; that by reason of the crops being late the yield was not as great as it would have been, had not the overflow killed or injured the first planting. Then there was some evidence that some crops were overflowed, but were not killed, and were cultivated and harvested, but the yield was small, owing to the damage caused by the overflow. Then there was evidence that certain land could not be cultivated, by reason of this overflow, and no crop was raised. This was the evidence as to the character of the damage. This instruction is in exact accord with the holding of this court in other cases. In the case of Missouri, O. & G. Ry. Co. v. Brown, 41 Okl. 70, 136 Pac. 1117, 50 L. R. A. (N. S.) 1124, the court said as follows:

"In arriving at the value of a growing crop, it is proper to show by evidence the probable yield under proper cultivation, and the value of such probable yield when matured, gathered, prepared, and ready for sale; also the probable cost of proper cultivation necessary to mature the crop, as well as the cost of its gathering, preparation, and transportation to market. The difference between such probable value in the market and the cost of finishing the cultivation, and gathering, preparing, and transportation to market, will ordinarily represent the value at the time of loss with as much certainty as any other method."

To the same effect is the case of De Arman v. Oglesby et al., 49 Okl. 118, 152 Pac. 356. We see no error in this instruction, and hold that the measure of damages was properly submitted to the jury.

The next assignments of error argued by plaintiffs in error are assignments Nos. 18, 19, and 20, wherein it is alleged that the court erred in refusing to give instructions Nos. 2, 3, and 4, requested by plaintiff in error. The court's instructions Nos. 2 and 3 were as follows:

"(2) You are further instructed that if you find from a preponderance of the evidence in this case that the defendant, Castle, by constructing a ditch along the section line, diverted waters which ordinarily flowed in another direction, and if you further find from a preponderance of the evidence that the construction of said ditch had the effect of diverting waters which had theretofore flowed along the course of Spring Branch, if you find that Spring Branch had any definite course or channel prior to such time, and if you further find from a preponderance of the evidence that the diverting of such waters caused the lands of plaintiffs to be overflowed and if you further find from a preponderance of the evidence that such overflow caused a destruction of crops which the defendant Rimmer was attempting to grow upon said lands, then your verdict should be for the plaintiffs for the value of the crops so destroyed and injured, if any, not exceeding the sum of $850.

"(3) You are further instructed that the defendant had a right to protect his own land from being overflowed by surface waters which had no outlet by any defined water course or channel, provided he took such means as would not have the effect of turning such waters upon the lands of the plaintiffs, and if you believe and find from the evidence that the defendant in digging the ditch in question merely did so as a protection against surface waters, and that no defined water course was thereby changed from its original course or channel, then your verdict should be for the defendant, even though you should find that the plaintiffs suffered damage to their crops at such time as there were extraordinary heavy rainfalls in and above the region where plaintiff's lands were situated."

[2, 3] The law applicable to the control and disposition of surface water in the state of Oklahoma has been announced in a number of well-considered cases heretofore decided by the courts. See C., R. I. & P. Ry. Co. v. Groves, 20 Okl. 101, 93 Pac. 755, 22 L. R. A. (N. S.) 802; Town of Jefferson v. Hicks, 23 Okl. 688, 102 Pac. 79, 24 L. R. A. (N. S.) 214; C., R. I. & P. Ry. Co. v. Johnson, 25 Okl. 762, 107 Pac. 662, 27 L. R. A. (N. S.) 879; Gulf, Colorado & Santa Fé Ry. Co. v. Richardson et al., 42 Okl. 457, 141 Pac. 1107. These have held as follows:

"The common law governing the diversion of surface water, as adopted and applied in this state has been modified and restricted to this extent, namely: That each proprietor may divert the same, cast it back, or pass it along to the next proprietor, provided he can do so without injury to such adjoining proprietor. Under this rule of law, no one is permitted to sacrifice his neighbor's property in order to protect his own."

Instruction No. 2 placed the burden upon the plaintiff to prove every necessary and material allegation required to be proved in an action for damages of this kind. Instruction No. 3, given by the court, does not correctly state the law, but the same was more favorable to the defendant than he was entitled to, and the defendant cannot complain by reason thereof. Every material issue requested by the plaintiff in error in his instructions Nos. 2, 3, and 4 are included in instructions Nos. 2 and 3 given by the court. This court has held that it is not error to refuse instructions covered substantially by instructions given. St. L. & S. F. Ry. Co. v. Walker, 31 Okl. 494, 122 Pac. 492; Hagerman v. Thatch, 34 Okl. 772, 127 Pac. 254. We think the instructions given cover the law of the case and include the instructions requested by the plaintiff. No. 3 is objectionable, but in defendant's favor, and he cannot complain. While it is true the court did not instruct the jury as to the definition of surface water, this does not appear to be a question that requires a definition, as the plaintiff's action was based on damming up a water course, and the refusal to define surface water would not be prejudicial.

Assignment of error No. 23 is that the court

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refused to give instruction No. 7, requested by the plaintiff in error, which is as follows:

"If you find from the evidence that the waters of Salt fork of Red river, in times of high water, or rises, in said Salt Fork river, overflowed the plaintiff's lands and damaged or contributed to the damage done to the growing crops thereon, then you are instructed that plaintiff is not entitled to recover for any damage to crops caused by overflows of Salt fork. And if you should further find that, notwithstanding defendant's ditches and dams contributed to overflows of Spring branch which overflowed the plaintiff's lands and crops, still if you find that, had it not been for the overflows of Salt fork, the overflows of Spring branch would not have been sufficient to damage plaintiff's crops, then you will find for the defendant."

There was some evidence that Salt fork of Red river had overflowed on this land during the years of 1912, 1913, and 1914, but there was no evidence as to the condition of the crops at the time of this overflow, whether there were crops on the land or not, or how long the overflow stayed on the land, or that said water from Salt fork contributed to the damage to any crops. The evidence was only to the effect that Salt fork overflowed two or three times each year, or that they thought it did. There was no evidence that any damage to any of the crops sued for was caused by the overflow of Salt fork, unless we content ourselves with saying, if a certain piece of land overflowed in a certain year, that would be sufficient for the jury to say that it would be damage to a certain crop. There was no evidence as to what effect this had on the crop, or the condition of the crop at the time. The evidence was properly introduced, not for the purpose, under the pleading, of an affirmative defense, but for the purpose of showing that the waters from Spring branch had not caused the injury. The instruction given by the court places the burden of proof upon the plaintiff to show, first, that the water was diverted from the said Spring branch, if the jury found that it had any definite course or channel; second, the jury must find from a preponderance of the evidence that the diverting of the water from Spring branch was what caused the water to overflow; third, that such overflow caused the destruction of the crops—the court having placed the burden of all of these issues upon the plaintiff before he was entitled to a recovery. The defendant's answer was a general denial. Not having pleaded any affirmative facts or defense, nor that anything contributed to the damage, then, under the evidence offered on behalf of the defendant, not specific as to any damage that said overflow had caused, or contributed, to said crops, the issue raised by the pleadings and the evidence introduced was not sufficient to warrant such an instruction, and it was not error to refuse the same.

We cannot say, from reading the entire record in this case, that the jury could have been in any way misled by the refusal of the court to give said instructions. The case, we think, was fairly tried. Both sides submitted their evidence. The court instructed the jury as to the law of the case, placing the burden of all issues upon the plaintiffs. There was a question of fact for the jury, the court placing the burden of proving all the material allegations upon the plaintiffs. The question of fact being submitted to the jury, the jury found in favor of the plaintiffs. We see no material error in the record.

The judgment is therefore affirmed.

All the Justices concur.

(72 Okl. 310)

STROTHER v. BOLEN, Judge of Seventh Judicial District. (No. 10453.)

(Supreme Court of Oklahoma. May 13, 1919.)

(Syllabus by the Court.)

1. MANDAMUS ⟸10—JUDGE'S CERTIFICATION OF DISQUALIFICATION—PROOF.

In order to disqualify a district judge and compel him by mandamus to certify that he is disqualified, on account of bias and prejudice, to proceed to the trial of a cause pending before him, the applicant must show a clear, legal right to the writ; otherwise such application will be denied.

(Additional Syllabus by Editorial Staff.)

2. MANDAMUS ⟸7—DISCRETION OF COURT.

Mandamus is not a writ of right, but one resting within the sound discretion of the court.

Original mandamus by Minnie Strother against Hon. J. W. Bolen, Judge of the Seventh Judicial District, State of Oklahoma. Writ denied.

Ramsey, De Meules, Rosser, Martin & King, of Muskogee, Wm. S. Wittler, of St. Louis, Mo., and J. W. Willmott, of Wewoka, for plaintiff.

Davis & Patterson, of Wewoka, for defendant.

JOHNSON, J. This is an original action of mandamus wherein Minnie Strother is plaintiff and J. W. Bolen, judge of the Seventh judicial district of the state of Oklahoma, is respondent.

In an action pending in the district court of Seminole county, over which Judge Bolen presides, the relator herein, a party thereto, filed an affidavit seeking to disqualify the said judge from trying the case. A showing was attempted to be made in said affidavit establishing the bias and prejudice of the respondent. This he held insufficient to justify

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his certifying to his disqualification. Whereupon this action was brought and a writ of mandamus sought to compel a change of judge.

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The plaintiff's application to this court for writ of mandamus is duly verified, to which is attached as exhibits thereto copies of the petition of the plaintiff, and answer and cross-petition of the defendant in a cause pending in the district court of Seminole county, wherein O. D. Strother is plaintiff and Minnie Strother, the applicant herein, is defendant, wherein the plaintiff, O. D. Strother, brought an action for divorce against the defendant, Minnie Strother, upon the grounds of extreme cruelty, and wherein the defendant, Minnie Strother, in her answer and cross-petition therein, sued for a divorce from the plaintiff upon the same grounds, and for permanent alimony, and to establish her property rights in the property of the plaintiff, and in which action a hearing was had in said cause before the respondent, as judge between the said parties on the 6th day of July, 1918, on the defendant Minnie Strother's motion for alimony pendente lite, at the conclusion of which the respondent made an order for the defendant for $200 attorney's fees, $50 a month for the support of the defendant pendente lite, and $25 suit money, and thereafter the defendant, Minnie Strother, presented application to the respondent for the disqualification of such respondent, which application was overruled by the respondent, who reduced his ruling to writing, signing the same, and copy of defendant's motion for alimony pendente lite and respondent's ruling thereon, and the defendant's application for disqualification and the respondent's ruling thereon, and a transcript of the testimony taken by the respondent upon the hearing of the defendant's application for alimony pendente lite, duly certified by the reporter, are all attached to the plaintiff's application herein and made a part thereof, to which application of the plaintiff herein the respondent had filed herein his verified answer, to which verified answer the plaintiff herein had filed a reply consisting of a general denial.

The plaintiff herein has presented in support of her said application her own affidavit and those of her attorneys of record, to wit, William S. Wittler, Malcolm E. Rosser, and John W. Willmott. There is also presented herein the affidavit of one S. D. Powell, A. B. Douglass, and A. L. Frederick, containing an itemized list and appraisement of the property of the plaintiff in said divorce action; also O. D. Strother's affidavit, containing an itemized list and appraisement of his property and an itemized list of his indebtedness at the time of said hearing, is presented by the defendant.

The specific grounds upon which the plaintiff herein based her right of action are that said defendant, Hon. J. W. Bolen, is so biased and prejudiced against her and her cause of action against the said O. D. Strother, and is so biased and prejudiced in favor of the said O. D. Strother and his cause of action against the plaintiff, that this plaintiff cannot secure and have before said defendant a fair and impartial trial, and alleges in support thereof:

"That the said O. D. Strother, almost immediately after the decision of the said defendant upon the motion of this plaintiff for alimony pendente lite, became a very active worker in the campaign for the election or the re-election of the said defendant as judge of the Seventh judicial district, and secured many citizens of said Seminole county and in and about the town of Seminole who pledged themselves to vote for the said defendant judge, all of which facts were well known to said judge, and this plaintiff further alleges that, by reason of the activity of the said O. D. Strother in procuring the re-election of the defendant as judge of said district in manner aforesaid, the said defendant is further biased and prejudiced in favor of said O. D. Strother, though unconsciously against the plaintiff."

The actions and sayings of the respondent relied upon by the plaintiff as set forth in her affidavit and those of her attorneys in substance are: That the said respondent, at the hearing of her motion for alimony pendente lite, insisted upon going into the merits of the cause upon said hearing over the objection of her counsel when said defendant was not prepared on the merits and had no proof to offer in rebuttal of said merits of the cause, and that the respondent commented upon the nativity of the said Minnie Strother, inquiring what her maiden name was, which happened to be Ulrich, evidently supposing that she was German-born, and that by his attitude and actions accepted as absolute facts all statements made by attorney for plaintiff in said cause in reference to and upon the merits of said cause when there was no trial upon said merits, that he could not understand, and thought it was highly improper for any litigant in his court to be represented by so many counsel from all over the United States, remarking that this woman has a St. Louis lawyer, a prominent firm representing her from Muskogee, and also local counsel, and that there was entirely too much marshaling of forces, and no necessity of having so many lawyers, and that, when she was placed upon the witness stand, the respondent examined her on his own motion and asked her if she did not intend to break up Oscar Strother, and stated that he did not believe in tolerating any attempt on the part of any woman to break up her husband and mulct him for attorney's fees, and in commenting upon the question of the correction of one of the nieces of the said Minnie Strother, who was no kin to Oscar Strother, that he, the court, began fighting school-teachers when

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he was about the age of 14 or 16 years, and that in his opinion it was right for children to indulge in a rebellious attitude, and, further, that the objection of said Oscar D. Strother to the correction of the nieces of the plaintiff was proper and showed that he was a good man, and not a bad man, as it was attempted to show by the cross-petition of the defendant in said cause; that he asked her what her earnings had been before she was married, and as to what occupation the brother of the plaintiff, Alexander Wolfe, was engaged in, as to what he was earning and as to what her relations were with her other kinsfolk, in all of which inquiry he showed a hostile and partisan attitude toward the defendant, and as to whether her brother paid any board to said Oscar D. Strother while he stayed at the home of the parties, and that he commented upon the fact that the said Oscar D. Strother had evidently married a woman beneath his station of life, and that, of course, such marriages never led to any good.

The respondent in his answer herein denies the allegations of the plaintiff, except such as are admitted. He admitted that he was judge of said court and presided at the hearing of the plaintiff's motion in said cause for alimony pendente lite, and specifically denies that he was in any way biased or prejudiced in the hearing, and, further answering, says, in substance, that on the hearing of the application for temporary alimony he only inquired into such matters as would enable him to intelligently form his opinion as to the amount which the plaintiff was able to pay without destroying his estate and at the same time to enable the defendant to properly prepare her cause for trial and present the issues into court for trial at the hearing of such application; he had never seen the plaintiff, Minnie Strother, in his life before; that he was barely acquainted with the plaintiff, O. D. Strother, and had never had any conversation with the said O. D. Strother in his life. He further alleges that the questions which have been complained of in the petition of the plaintiff, asked at the time of the hearing of the petition for alimony pendente lite, was for the purpose of ascertaining the possibility of a settlement of said cause between the parties, and, if possible, to reconcile them to each other, and no question was asked the plaintiff which could possibly have been construed to be disrespectful or in any way reflect upon her character and condition in life, and that he was only actuated by the motive of good will between both the parties in interrogating them as to their former marital relations. He admits that he inquired of the plaintiff as to what position she had occupied in life prior to her marriage to O. D. Strother, but for the purpose of ascertaining her earning capacity, if any and from what station in life she came, and that these questions were asked her in order to enable the respondent to intelligently make provision for her out of the means of her husband; admits that he made the award of $50 per month alimony, $25 suit money, and $200 attorney's fees, and that in answer to his inquiry at the time he was informed by the plaintiff and her attorney, Wm. S. Wittler, that they only had one witness to produce at the trial of the case, that he made a careful examination as to the property holdings of O. D. Strother, and that he found that the same consisted of approximately 4,000 acres of land, and about $1,000 in personal property, which was heavily mortgaged, some of which mortgages were then due and creditors pressing for payment, and that the plaintiff, O. D. Strother, stated in court under oath that he owed between $75,000 and $80,000, and it was with much difficulty that he was able to meet the annual interest payments on this indebtedness, that he believes that he made as liberal allowance as the facts in the case could possibly justify, admits that he is grateful to all those who supported him in his campaign for district judge, but denies that he is at all influenced in his court by the fact that a litigant is a political friend or enemy, admits that he was not favorably impressed with the plaintiff's attitude in bringing so many and such prominent counsel to present her application for temporary alimony, and that he stated that it was not necessary for the purpose of protecting the rights of women, that the court would have protected her rights whether she had any attorney at all, admitted that he asked the plaintiff while she was upon the witness stand as to whether or not she intended to destroy O. D. Strother financially, but that the question was asked her for the purpose of impressing upon her the necessity of permitting Mr. Strother to remain financially solvent until such time as a division of the property could be made, that none of the things that were said or done at the time of the hearing were actuated by any other than the most friendly motive and desire to do entire justice between the parties and to preserve the estate of O. D. Strother intact during the time he was laboring under heavy financial difficulties so that the best provision possible would be made for both the said litigants out of the estate of the said Strother and that entire justice might be done to the litigants in said case, and that he is aware of no bias, prejudice, or ill will toward the plaintiff in this case.

By an examination of the entire record in this case we find there is but little conflict, if, in fact, any at all, as to what the respondent did and said that is sought to be made the basis of the plaintiff's cause of action herein, but, when analyzed, it is, at most, a difference of opinion merely as to the proper

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inference to be drawn therefrom. The plaintiff and her compurgators express the opinion that the respondent is so biased and prejudiced against the plaintiff as to prevent him, as judge, from giving the plaintiff and her cause of action a fair and impartial consideration and reaching a fair and just conclusion in her behalf. The respondent insists that his conduct as shown by the record was without any improper motive toward or in behalf of either party; that he was not conscious of any feeling of bias or prejudice in the matter of the rights of either, but, on the contrary, all things were said and done with a friendly motive and desire to do entire justice between the parties and to preserve the estate of O. D. Strother intact during the time he was laboring under heavy financial difficulties, so that the best provision possible would be made for both of said litigants out of the same and that entire justice might be done to the parties.

[1, 2] This, we think, presents the issues involved fairly, and, unless we can say from the record before us that the plaintiff has a clear, legal right to the writ, her application should be refused. Stearns, Mayor, v. Sims, 24 Okl. 623, 104 Pac. 44, 24 L. R. A. (N. S.) 475; Turner v. McCain, 26 Okl. 132, 109 Pac. 821; State ex rel. West, Atty. Gen., v. McCafferty Co., Treas., 25 Okl. 2, 105 Pac. 992, L. R. A. 1915A, 639; Myers v. Bailey, Dist. Judge, 26 Okl. 133, 109 Pac. 820.

The question of compelling a trial judge to certify his disqualifications has frequently been before the Criminal Court of Appeals of this state as well as this court, and that honorable court and this are in perfect harmony in announcing the rule above stated, and that mandamus is not a writ of right, but one resting within the sound judicial discretion of the court. Ex parte Hudson, 8 Okl. Cr. 393, 106 Pac. 540, 107 Pac. 735; Ingles v. McMillan, Judge, 5 Okl. Cr. 130, 113 Pac. 998, 45 L. R. A. (N. S.) 511.

From an examination of the record we are clearly of the opinion that the plaintiff's application is not within the rules of law announced herein, and it is therefore denied.

SHARP, RAINEY, HARRISON, and McNEILL, JJ., concur.

(75 Okl. 13)

LOVELAND v. TANT. (No. 9315.)

(Supreme Court of Oklahoma. May 27, 1919.)

(Syllabus by the Court.)

APPEAL AND ERROR ⊜773(5)—FAILURE TO FILE BRIEF—REVERSAL.

Where plaintiff in error has completed his record and filed it in this court, and has served and filed a brief in compliance with the rules of the court, and the defendant in error has neither filed a brief nor offered any excuse for such failure, this court is not required to search the record to find some theory upon which the judgment below may be sustained; but, where the brief filed appears reasonably to sustain the assignments of error, the court may reverse the case in accordance with the prayer of the petition of plaintiff in error.

Error from County Court, Tillman County; W. H. Hussey, Judge.

Action by T. O. Loveland against Chas. S. Tant. Judgment for defendant, and plaintiff brings error. Reversed and remanded, with direction to grant a new trial.

Williams & Latch, of Frederick, for plaintiff in error.

Mounts & Davis, of Frederick, for defendant in error.

KANE, J. This was an action upon a promissory note for $50, commenced by the plaintiff in error, plaintiff below, against the defendant in error, defendant below.

The action was commenced before a justice of the peace, was tried without any written pleadings on the part of the defendant, and resulted in a judgment in his favor. It is contended that the judgment rendered in favor of the defendant ought to be reversed for the reasons:

"(1) That nearly all of defendant's testimony was improper and that part heretofore set out under assignment No. 11 should have been excluded on plaintiff's objection; and (2) there being no evidence which by any stretch of imagination could constitute a defense to the suit, the trial court should have sustained plaintiffs' demurrer; not having done so, the motion for a new trial should have been sustained."

The plaintiff in error has filed a brief which purports to contain a fair statement of all the evidence offered on behalf of the defendant in error. The defendant in error has filed no brief. Taking as true the statement made by the plaintiff in error in his brief, it seems to us his contentions are well taken. The rule is well settled that where plaintiff in error has completed his record and filed it in this court, and has served and filed a brief in compliance with the rules of the court, and the defendant in error has neither filed a brief nor offered any excuse for such failure, this court is not required to search the record to find some theory upon which the judgment below may be sustained; but, where the brief filed appears reasonably to sustain the assignments of error, the court may reverse the case in accordance with the prayer of the petition of plaintiff in error. Butler v. McSpadden, 25 Okl. 465, 107 Pac. 170; Ellis et al. v. Outler et al., 25 Okl. 469, 106 Pac. 957; Buckner v. Oklahoma Nat.

⊜For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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Bank of Shawnee et al., 25 Okl. 472, 106 Pac. 959.

For the reasons stated, the judgment of the court below is reversed and the cause remanded, with directions to grant a new trial.

All the Justices concur.

(75 Okl. 55)

GENERAL BONDING & CASUALTY INS. CO. v. OKLAHOMA FIRE INS. CO. et al. (No. 8865.)

(Supreme Court of Oklahoma. May 7, 1918. On Rehearing, June 10, 1919.)

(Syllabus by the Court.)

1. CORPORATIONS ⟸387(2), 542(1) — NOTICE ⟸5 — ULTRA VIRES — VALIDITY OF MORTGAGE—CONSTRUCTIVE NOTICE.

Same as in No. 8849, Union Trust Co., a Corporation, v. Mollie N. Hendrickson, as Administratrix, et al., 172 Pac. 440.

2. APPEAL AND ERROR ⟸773(5)—FAILURE TO FILE BRIEF—REVERSAL.

Where plaintiff in error has completed his record and filed it in this court, and has served and filed a brief, in compliance with the rules of this court, and the defendant in error has neither filed a brief nor offered any excuse for such failure, the court is not required to search the record to find some theory upon which the judgment may be sustained; and where the brief filed appears reasonably to sustain the assignments of error, the court may reverse the judgment in accordance with the prayer of the plaintiff in error or the rights of the parties.

Commissioners' Opinion, Division No. 3.

Error from District Court, Oklahoma County; W. C. Crow, Judge.

Action between the General Bonding & Casualty Insurance Company and the Oklahoma Fire Insurance Company, the Union Trust Company, the Occidental Fire Insurance Company, and others. From the judgment the General Bonding & Casualty Insurance Company brings error. Affirmed as to the Union Trust Company, and reversed and remanded as to the other defendants in error, with directions to grant a new trial except as to the Occidental Fire Insurance Company, and action as to it dismissed.

Chas. West and Albert L. McRill, both of Oklahoma City, for plaintiff in error.

Ames, Chambers, Lowe & Richardson, of Oklahoma City, for defendant in error Union Trust Co.

PRYOR, C. [1] This appeal arises out of the same cause as the appeal in the case of Union Trust Co. v. Mollie N. Hendrickson et al. (No. 8849) 172 Pac. 440. The only question involved on appeal pertains to the controversy over the priority of the claims of the parties against certain real estate of the Oklahoma Fire Insurance Company, which constitute its principal assets.

The Union Trust Company held, at the time of the action in the lower court, a first mortgage on said real estate, and the General Bonding & Casualty Company had a subsequent mortgage. As the validity of the mortgage of the Union Trust Company is sustained by the decision of this court in the case of Union Trust Co. v. Mollie N. Hendrickson et al. (No. 8849), this question between the bonding company and the trust company is settled, and this cause, so far as it pertains to the rights between the plaintiff in error and the Union Trust Company, is affirmed.

[2] As to the other defendants in error, Oklahoma Fire Insurance Company, Occidental Fire Insurance Company, M. M. Hendrickson, administratrix of the estate of W. B. Hendrickson, M. C. Reddington, L. S. Johnson, A. L. Welch, insurance commissioner of the state of Oklahoma, Marie Kimpel, and J. A. Baker, the plaintiff in error having perfected its appeal to this court and filed briefs reasonably sustaining its assignments of error, and the defendants in error having filed no brief, nor given any reasonable excuse for their failure to do so, this court will not search the record to find a theory upon which to sustain the judgment of the trial court. The cause should be reversed and remanded as to such defendants in error, with directions to the court to grant a new trial.

PER CURIAM. Adopted in whole.

On Rehearing.

PER CURIAM. It appears, on petition to modify the opinion filed May 7, 1918, that defendant in error Occidental Fire Insurance Company was only a nominal party, and the action should have been dismissed as to this company.

Therefore that portion of the opinion reversing the cause as to this defendant is modified, and the action dismissed as to the Occidental Fire Insurance Company, and the opinion in all other respects adhered to.

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(72 Okl. 313)

COLEMAN v. BOWLES. (No. 9109.)

(Supreme Court of Oklahoma. May 13, 1919.)

(Syllabus by the Court.)

EXECUTORS AND ADMINISTRATORS ⟸222(2)—PRESENTATION OF CLAIMS—STATUTE.

Under section 6348, Rev. Laws 1910, providing that, when an action is pending against a decedent at the time of his death, the plaintiff must present his claim to the executor or administrator for allowance or rejection, properly authenticated, and that no recovery shall be had in the action unless proof be made of the presentation required, *held*, that the purpose of the statute is substantially complied with where the case has been revived in the name of the administrator, who files an answer, denying liability on grounds other than failure to present claim, and cross-petition, asking for affirmative relief against the plaintiff within the time allowed for presenting claims.

Error from District Court, Bryan County; Jesse M. Hatchett, Judge.

Action by R. P. Bowles against W. D. Coleman, revived in the name of Ella L. Coleman, his administratrix. Judgment for plaintiff on review of testimony before referee, and defendant brings error. Affirmed.

Utterback & MacDonald and Porter Newman, all of Durant, for plaintiff in error.

Hayes & McIntosh and H. H. Loden, all of Durant, for defendant in error.

PITCHFORD, J. The defendant in error commenced this action in the district court of Bryan county on the 5th of November, 1914, against W. D. Coleman for an accounting. The parties will be designated as they appeared in the court below. The plaintiff and defendant had been engaged in a partnership business of buying, selling, leasing, and handling real estate in Bryan county since the 5th of May, 1911, up to September, 1913, at which time by mutual consent the partnership was dissolved, but at that time no settlement was had between the parties. The business had been conducted in the name of the defendant, W. D. Coleman, who it is alleged had received all the moneys and profits pertaining to the business, had appropriated same to his own use, and denied the right of the plaintiff to participate in any portion of the profits so received. The plaintiff in the petition asked that the defendant be required to account and settle said partnership business, and to produce in court an itemized statement of the amount paid out and expended in operating the partnership and all other matters necessary to determine the exact status of the business. The plaintiff prayed for judgment against the defendant in the sum of $1,500, and for any balance that might be found due the plaintiff from the defendant.

After filing the action, and before the cause came on for trial, the defendant died. No answer had been filed prior to the death of defendant, which occurred in December, 1914. In June, 1915, the cause was revived in the name of Ella L. Coleman, as administratrix. July 8, 1915, defendant adminstratrix filed a motion to require the plaintiff to make his petition more definite and certain, which motion was sustained. On October 14, 1915, the plaintiff filed amended petition, being practically the same as the original petition; the only difference being as to a fuller description of certain lands mentioned in the original. On the 18th of October thereafter defendant filed her answer and cross-petition, in which she specifically denied that plaintiff was entitled to judgment for any sum against her. In her cross-petition she alleged that the plaintiff was indebted to the defendant in a large sum and prayed judgment against the plaintiff for $2,030.53. When the cause came on for trial, the same was referred by the court to Robert Crockett, Esq., for hearing, to take testimony and report his findings of fact, conclusions of law, and his recommendations thereon. The referee proceeded to take testimony in the cause over the objection of the defendant, the defendant objecting on the ground that the plaintiff had failed to present his claim to her as administratrix, and, having failed to present the claim, he was not entitled to recover. The objection was overruled, the referee proceeded to take testimony in the case, and later on filed his report. The court, after examining the report and reviewing the testimony, found in favor of the plaintiff in the sum of $304.40. The defendant appeals.

While there are several assignments of error alleged, they may be treated under one general statement:

"That the defendant objected to the introduction of any testimony on the ground that it was first necessary for the plaintiff to prove that his claim had been presented to and filed with the administratrix of the estate of W. D. Coleman, deceased."

Our statutes relative to presentation of claims against a decedent are found in the Revised Laws of 1910 under sections 6336, 6338, 6339, and 6348, which are as follows:

"Sec. 6336. Every executor or administrator must, immediately after his appointment, give notice to the creditors of the decedent, requiring all persons having claims against said decedent to present the same, with the necessary vouchers, to such executor or administrator, at the place of his residence or business, to be specified in the notice, within four months from the date of said notice; such notice must be

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posted up in three public places in the county, one of which shall be at the courthouse where the county court is held, and published in some newspaper printed in said county for two consecutive weeks. Such notice shall be substantially in the following form:

"All persons having claims against A. B., deceased, are required to present the same with the necessary vouchers, to the undersigned administrator at ..... within four months of the date hereof, or the same will be forever barred.

"Dated ....., 19.. A. B., Administrator."

"Sec. 6338. If a claim arising upon a contract heretofore made be not presented within the time limited in the notice, it is barred forever, except as follows: If it be not then due, or if it be contingent, it may be presented within one month after it becomes due or absolute; if it be made to appear by the affidavit of the claimant, to the satisfaction of the executor or administrator and the judge of the county court, that the claimant had no notice as provided in this article, by reason of being out of the state, it may be presented at any time before a decree of distribution is entered; a claim for a deficiency remaining unpaid after a sale of property of the estate mortgaged or pledged must be presented within one month after such deficiency is ascertained. All claims arising upon contracts hereafter made, whether the same be due, not due or contingent, must be presented within the time limited in the notice; and any claim not so presented is barred forever: Provided, however, that when it is made to appear by the affidavit of the claimant, as above provided, that he had no notice by reason of being out of the state, it may be presented as therein provided: Provided, further, that nothing in this section, nor in this chapter contained, shall be construed to prohibit the right or limit the time of foreclosure of mortgages upon real property of decedents, but every such mortgage may be foreclosed within the time and in the mode prescribed in civil procedure, except that no balance of the debt secured by such mortgage remaining unpaid after foreclosure shall be a claim against the estate, unless such debt was presented as required by this Code.

"Sec. 6339. Every claim which is due when presented to the administrator must be supported by the affidavit of the claimant or some one in his behalf, that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the claimant or affiant. If the claim be not due when presented, or be contingent, the particulars of such claim must be stated. When the affidavit is made by a person other than the claimant, he must set forth in the affidavit the reason why it is not made by claimant. The executor or administrator may also require satisfactory vouchers or proofs to be produced in support of the claim. If the estate is insolvent, no greater rate of interest shall be allowed upon any claim, after the first publication of notice to creditors, than is allowed by law on judgments obtained in the district court."

"Sec. 6348. If an action is pending against the decedent at time of his death, the plaintiff must in like manner present his claim to the executor or administrator, for allowance or rejection, authenticated as required in other cases; and no recovery shall be had in the action unless proof be made of the presentation required."

There is nothing in the answer filed by the defendant denying that the claim had been presented by the plaintiff. There was no issue upon this point raised by the pleadings, either by answer, demurrer, or motion, or by any kind of proceeding, until the plaintiff sought to introduce his evidence. There was nothing to indicate prior thereto that the defendant was relying upon this failure on the part of the plaintiff as a defense. It was probably considered by the defendant that it was unnecessary to raise the question until the plaintiff offered to introduce evidence.

As we have seen, under section 6338, supra, no recovery could be had in the action unless proof be made of the presentation required. The statute seems to be plain, and ordinarily there would be no question but that the plaintiff would be required to make this proof before being entitled to a recovery. However that may be, it is not necessary for us at this time to decide this question, or as to whether or not the claim herein was of the kind that would come within the provisions of the statute. This, as we have seen, is an action commenced in the lifetime of W. D. Coleman for an accounting. The plaintiff was seeking the production of the books of the partnership into court for the purpose of having the court ascertain the amount due from the defendant to the plaintiff. The allegation of the petition was that the defendant, W. D. Coleman, had kept the books, had collected the rents and the profits, and had refused to account to the plaintiff for his interest in the partnership. The very nature of the action clearly demonstrates that the plaintiff could not consistently make the affidavit required in presenting the claim to the administratrix. In making the affidavit he would be required to swear that no payments had been made on the claim which were not credited thereon, and that there were no offsets to the same. The petition shows he was groping, as it were, in the dark; he sought for light by having the books of the partnership brought into court that the same might be inspected. The object of this action was to ascertain from the books and papers of the partnership what sum or sums were due plaintiff, if any. The petition itself discloses that, when plaintiff asks for judgment for $1,500, the amount named is purely conjectural. While we do not hold that a claim of the kind herein involved is not within the provisions of the statute, we are, however, constrained to remark we are unable to understand how the plaintiff could subscribe to the affidavit required. In the case of Jones v. Woodward, 50 Okl. 704, 151 Pac. 586, decided by this court, it was held that an action on account

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of fraud of an intestate is not one arising on contract, and that a claim therefor need not be presented to the administrator before bringing suit. As we observed, it is not necessary to decide this point, as in our judgment the defendant is not in position to claim any relief on account of the failure of plaintiff to present his claim to the administratrix.

There is nothing appearing from the evidence to show that the defendant ever gave notice to creditors as required by the statute to present claims, and immediately upon the cause being revived in the name of the administratrix she filed a motion to have the petition made more definite and certain, which was sustained by the court, whereupon defendant filed her answer denying any indebtedness whatever to plaintiff, but, on the contrary, claiming that the plaintiff was indebted to her intestate in a large sum. We are of the opinion that, when the defendant filed her answer in which she denied the indebtedness, she thereby made it unnecessary for the plaintiff to file his claim, especially when there is no evidence that the notice to creditors had ever been given, and in view of the further fact that the plaintiff at no time made this an issue until the plaintiff offered testimony, we are loath to believe that the statute contemplated an act on the part of the plaintiff which would have been futile under the circumstances, for the reason that the attention of the administratrix could not have been brought more forcibly to a knowledge of the existence of the claim than by having the action revived in her name, and immediately thereafter filing the answer denying the claim of the plaintiff. If the court's attention had been called to the point now relied upon by the defendant for reversal before answering, we presume it would have correctly decided upon the proper course that should have been thereafter followed, but when the answer is filed denying the indebtedness, it is made plain that it would have been useless to have presented the claim, as it is shown by the answer that the claim could not and would not have been allowed if presented.

The sections above quoted were evidently intended as a condition precedent to fix the liability of the administrator for costs in the event action should be brought, and until the claim had been properly verified, presented, and rejected, the administrator would not be held liable for the costs of the action. The great majority of claims against an estate are in most instances settled without the necessity of bringing action. In the instant case an answer had not been filed prior to the death of the deceased. Had an answer been filed before the action was revived in the name of the administratrix, and she had then demanded that no further action be taken until the plaintiff had filed the claim for allowance, she would be in better position to insist upon this contention and also asking affirmative relief, and all her rights could have been saved by a timely objection, but when she filed her answer denying the liability, and by her cross-petition sought affirmative relief against the plaintiff, and no issue being raised on the ground that the claim had not been presented, the court did not commit error in overruling her objections to the introduction of evidence on the part of the plaintiff. The case of Frazier v. Murphy et al., 133 Cal. 91, 65 Pac. 326, cited by defendant, is in keeping with the foregoing statement. In that case the defendant died pending the suit, but an answer had been filed prior to his death. His executors were made parties defendants, and, as we understand the case, objected to the introduction of any evidence or further proceedings in the case on the ground that the claim had not been presented for allowance or rejection. The case of Steen v. Hendy (Cal.) 40 Pac. 21, cited by defendant, was in many respects similar to the case at bar. There the defendant died after the institution of the suit. His death was suggested, and it was ordered that the case be continued in the names of the executors. At the first session after his death defendants objected to further proceedings with the trial or the taking of further testimony in the case upon the ground that the claim had not been presented for allowance to the executors of the deceased. It was there held that proof of the presentation of the claim was not a fact essential to the validity of a judgment where no issue had been made upon that question.

There is a long line of decisions holding that, where the plaintiff, after the death of the defendant, pending the suit and within the time limited for the presentation of claims, obtains an order reviving the cause in the name of the administrator, and making the administrator a party to the suit, this order is equivalent to and dispenses with the actual presentation of the claim. By it every purpose and object of a strict compliance with the terms of the statute were obtained, especially where the answer is filed by the administrator denying the claim of plaintiff, and by cross-petition asking for judgment against plaintiff for a large sum. Malone v. Hundley, 52 Ala. 147; Eddins v. Graddy, 28 Ark. 500; 18 C. J. 453.

We are of the opinion that the judgment of the lower court should be affirmed; and it is ordered.

All the Justices concur, except Justices SHARP and HARRISON, not participating.

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(75 Okl. 13)

CHICAGO, R. I. & P. RY. CO. v. WILLIS, County Treasurer. (No. 9920.)

(Supreme Court of Oklahoma. May 27, 1919.)

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(Syllabus by the Court.)

CONSTITUTIONAL LAW ⟸53 — JUDICIAL DEPARTMENT — ENCROACHMENT BY LEGISLATURE.

Section 5, c. 30, Session Laws 1916, construed, and *held* to be amendatory of section 2, art. 3, c. 173, Session Laws 1915, and not a construction thereof, and therefore not unconstitutional as a legislative incroachment upon the power conferred upon the judicial department of the state by the Constitution.

Error from District Court, Blaine County; Thomas A. Edwards, Judge.

Action by the Chicago, Rock Island & Pacific Railway Company against Bert R. Willis, as County Treasurer of Blaine County, Okl., and personally. Demurrer to petition sustained, and judgment for defendant, and plaintiff brings error. Affirmed.

John E. Du Mars, C. O. Blake, and R. J. Roberts, all of El Reno, and W. H. Moore, of McAlester, for plaintiff in error.

Ben Smith and J. P. Wishard, both of Watonga, S. P. Freeling, Atty. Gen., and John B. Harrison, Asst. Atty. Gen., for defendant in error.

KANE, J. This was an action for the purpose of recovering certain taxes paid under protest commenced by the plaintiff in error, plaintiff below, against the defendant in error, defendant below. Hereafter, for convenience, the parties will be called "plaintiff" and "defendant," respectively as they appeared in the trial court.

The petition of plaintiff was in 12 paragraphs, to the last of which the trial court sustained a demurrer, whereupon, the plaintiff electing to stand upon its petition, judgment was entered in favor of the defendant, to reverse which this proceeding in error was commenced.

Whilst the demurrer raises several questions of law, the only one we are called upon to notice is stated in the second assignment of error as follows:

"The court erred in sustaining defendant's second ground of demurrer to plaintiff's petition for the reason stated therein, 'that said twelfth cause of action does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against defendant.'"

The taxes covered by this particular paragraph of the petition was a levy of 1.50 mills for the county road construction fund, made under and in pursuance of the authority of section 5, c. 30, of the Session Laws of 1916. The contention is that this section is unconstitutional and void for the reason that it purports to be merely an interpretation of another unambiguous statute, to wit, section 2 of article 3, c. 173, of the Session Laws of 1915, which grant to the county the right to levy only 0.25 mills for county road construction fund, and that, the former statute being unconstitutional, the latter prevails, and governs the levy that may be made for the purpose named. On the other hand, whilst counsel for the defendant concede that, if the plaintiff's assumption that section 5, supra, is merely a legislative construction of section 2, c. 173, supra, then the authorities cited by them are in point, and their contention should be held to be well taken, they say:

"If we rightly comprehend the case and correctly view the act of 1916, then plaintiff's whole premise is wrong; for, as we construe the act, it is not in fact nor in effect a construction of the act of 1915, but in reality is an amendment of such act."

So the question for consideration then is whether section 5 was intended merely as a construction of section 2, or whether it was intended to be an amendment of that act. Section 5, which embraces section 2, reads as follows:

"Whereas section 2, article 3, chapter 173, Session Laws of Oklahoma, 1915, reads as follows:

"'Sec. 2. The county excise board in each county in the state is hereby authorized, at the option of said board, to make a levy of one-fourth of one mill upon all property in any said county subject to taxation upon an ad valorem basis; said levy when made and collected shall be converted into a county road construction fund, and shall be used for the construction and maintenance of county highways, under the supervision of the board of county commissioners as provided in this act; provided, that in order to carry into effect the provisions of this act, the county board may levy for current expenses of said county not to exceed eight (8) mills.'

"It is hereby declared that the meaning and intent of said section is as follows:

"'Sec. 2. In addition to the one mill levy authorized for common school purposes and in addition to the levies authorized for current county expenses by chapter 195, Session Laws, 1913, the county excise board in each county in this state is hereby authorized at the option of said board, to make an additional levy for road purposes upon all property in said county subject to taxation upon an ad valorem basis, in an amount which, together with the aforesaid levies authorized to be made in said chapter 195, Session Laws, 1913, shall not exceed a total of eight (8) mills; said additional levy when made and collected shall be credited to the county road construction fund, and shall be used for the construction and maintenance of state highways under the supervision of the board of county commissioners as provided in this act.'"

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The part of the title of the act necessary to notice reads as follows:

"An act, amending sections 1, 6 and 8, of article 2, chapter 173, and sections 1, 2 and 3, of article 3, chapter 173, and section 10 of article 2, chapter 173, of the Session Laws of Oklahoma, 1915, relating to the appointment and employment of county engineer."

The contention of counsel for the plaintiff is that the words of the act following the proviso, "it is hereby declared that the meaning and intention of said section is as follows," stamp the provision as a declaratory act, and, inasmuch as the act which it purports to construe is unambiguous, the Legislature was without authority to pass the declaratory act, for the reason that the power to construe statutes was granted to the judicial departments of the state by section 1, art. 4, of the Constitution, which provides:

"The powers of the government of the state of Oklahoma shall be divided into three separate departments: The legislative, executive, and judicial; and except as provided in this Constitution, the legislative, executive, and judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others."

On the other hand, it is contended that in construing those statutes it is the duty of the court to consider not only the language quoted above, but the whole act in connection with the title and proviso, and that, when this is done, it can be clearly seen that the Legislature intended to amend section 2, art. 3, c. 173, Session Laws 1915.

We think the latter contention is correct. Section 57, art. 5, of the Constitution provides:

"Every act of the Legislature shall embrace but one subject, which shall be clearly expressed in its title," etc.

Mr. Black, in his work on Interpretation of Laws, p. 175, states the rule as follows:

"Where the Constitution of the state provides that each act of the Legislature shall relate to but one subject, which shall be expressed in the title, the effect is to make the title a part of the enactment, so that any provisions of the act which lie outside the title will be rejected by the courts as unconstitutional, if that can be done without destroying the entire law. In this case it is very clear that the title may be resorted to as an aid in the interpretation of the statute, and that it will be entitled to greater weight than belongs to it in the absence of this constitutional provision, since it must be presumed that the mind of the Legislature was directed to the title no less than to the provision of the enacting clause."

We think the preamble also tends to throw some light upon this queston to the same effect.

Black on Interpretation of Laws, p. 176, says:

"The preamble to a statute is an introductory clause which sets forth the reasons which have led to the enactment by reciting the state of affairs intended to be changed, the evils designed to be remedied, the advantages sought to be secured or promoted by the new law, or the doubts as to the prior state of the law which it is meant to remove. It is thus an exposition of the motives of the Legislature, and in some sense a key to the meaning of the terms which they have employed to express their avowed intention."

Interpretation clauses are not uncommon in legislation, and when a statute contains such a clause, the courts are bound to adopt the construction which it prescribes, and to understand the words in the sense in which they are therein defined, although otherwise the language might have been held to mean something different. Black on Interpretation, p. 191.

We think, when this act is viewed in its entirety, together with its title and preamble, it becomes quite clear that it was not intended as a construction of the act of 1915, but was intended to be an amendment of that act, and that the words by which the section itself is introduced are merely declaratory of the meaning which the Legislature intended the amendment to have.

For the reasons stated, the judgment of the court below must be affirmed.

All the Justices concur, except HARRISON, J., not participating.

(76 Okl. 90)

CITY OF ENID et al. v. GENSMAN et al.
(No. 7521.)

(Supreme Court of Oklahoma. June 3, 1919.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS ⇐302(4) — IMPROVEMENT RESOLUTION—JURISDICTION.

Where a city council initiated proceedings to pave certain streets, by passing a resolution declaring said improvement necessary, as provided in section 444, Wilson's Rev. & Ann. Statutes 1903, but failed to publish said resolution as provided in said section. The proceedings based thereon are void, as the publication of the resolution declaring the improvement necessary is a condition precedent to jurisdiction.

2. MUNICIPAL CORPORATIONS ⇐514(3)—IMPROVEMENTS — REASSESSMENT ORDINANCE — STATUTE.

Section 451, Wilson's Rev. & Ann. Statutes 1903, does not give the city council authority to pass a reassessment ordinance where the original proceedings were void for want of jurisdiction.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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8. MUNICIPAL CORPORATIONS ⟸538—ACTION TO SET ASIDE SPECIAL ASSESSMENT—LIMITATIONS.

The period of limitation by statute (Wilson's Rev. & Ann. St. Okl. § 450) within which an action may be brought to set aside a special assessment made against the lots abutting upon a street to pay the cost of grading the same does not apply to bar a lot owner of an action to enjoin the collection of such assessment, when the proceedings upon which it is based are void.

Error to District Court, Garfield County; James B. Cullison, Judge.

Suit for injunction by George J. Gensman and others against the City of Enid and others. Judgment for plaintiffs, and defendants bring error. Affirmed, former opinion withdrawn, and opinion herein substituted, and second petition for rehearing denied.

W. J. Otjen, Geo. W. Buckner, and W. O. Cromwell, all of Enid, for plaintiffs in error.

Hills & Manatt, of Enid, for defendants in error.

McNEILL, J. This cause was before the court and reported in 158 Pac. 377, but on second petition for rehearing it is agreed by all parties that in briefing the case they were in error as to the law applicable to the case. Both sides briefed the case on the theory that the law applicable was the Revised Laws of 1910, and the court decided the case by referring to said statute, while the proceedings are to be governed by Wilson's Rev. & Ann. Statutes of 1903.

The facts in this case are that the city of Enid attempted to proceed to pave and improve certain streets in the city. The city council passed a resolution of necessity, as required by section 444, Wilson's Rev. & Ann. Statutes of 1903, but said resolution was not published. The street was paved and the assessment placed against the land of defendants in error. The defendants in error, being the property owners, brought an action against the city clerk and county treasurer in the district court of Garfield county, and enjoined them from collecting the assessment. The trial court rendered judgment against the said city declaring said assessment void, and enjoined the county treasurer from collecting said taxes. Thereafter the city authorities, without taking any steps to acquire the necessary jurisdiction to pave in the first instance, passed a reassessing ordinance, and under it sought to reassess the lands of the defendants in error.

The defendants in error filed their petition in the district court of Garfield county, seeking to enjoin the city from making a reassessment against said property, and alleging that the district court of Garfield county in a former action held that the original assessment was void, for the reason that no publication of the resolution was had, and alleging that the city was without jurisdiction to reassess said property for the reason they had never acquired jurisdiction in the first instance, therefore would be unable to reassess the property until they had first acquired jurisdiction. Not having acquired jurisdiction in the first instance, they would be unable to pass a reassessment ordinance. The city filed a demurrer, the court overruled the demurrer, the city excepted, and refused to plead further. The court rendered judgment enjoining the city from proceeding further under the reassessment ordinance or from attempting to fix a lien upon defendants' property. From this judgment the city appeals, and brings the case here for review.

The paving was initiated under and by virtue of section 444, Wilson's Revised Statutes 1903, and it is agreed the controversy is governed by provision of Wilson's Revised Statutes of 1906, and it is admitted that the resolution of necessity was never published.

[1] The plaintiffs in error now contend that the publication of said resolution was not jurisdictional, but this court has held contrary to said view in the case of Kerker v. Bocher, 20 Okl. 729, 95 Pac. 981, and on page 757 of 20 Okl., on page 992 of 95 Pac., the court used the following language:

"The declaring by resolution and the publication of the same for four consecutive weeks in some newspaper of general circulation in the city as a condition precedent to jurisdiction, and, when that is done without protest on the part of the property owners to be affected, then the council shall have the power to cause such improvement to be made."

[2] It is next contended that, by reason of section 451, Wilson's Revised Laws 1903, plaintiff in error has the right to pass a reassessment ordinance and to reassess the property for the improvements already made. A portion of said statute is as follows:

"Provided further, that in the event any special assesament shall be set aside or be invalid in whole or in part, the city council may, at any time, in the manner herein provided for an original assessment, proceed to cause a new assessment to be made, which shall have the like force and effect as an original assessment."

The question presented is whether the statute is broad enough to permit the city council to pass an ordinance reassessing the property for the improvements made, when the original proceedings were void. The plaintiff in error argues that it makes no difference whether the city council had jurisdiction in the first instance or not, or whether the proceedings were void; that the statute authorized the passing of a reassessment ordinance in either event. In sup-

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port of their contention they cite cases from different states, but an examination of those cases discloses that the statute of those states are very different from our statute, the case of Kansas City v. Silver, 74 Kan. 851, 85 Pac. 805, being one of the cases they rely upon, which is a per curiam opinion, but the Kansas statute contains the following language:

"Which special assessment order may be informal, illegal, irregular or void for want of sufficient authority, to make or levy the same, or for any cause whatever."

They also cite the case from the state of Washington, Frederick v. City of Seattle, 13 Wash. 428, 43 Pac. 364. The statute there in regard to reassessing property contains the following provision:

"Or for any legal improvement which has heretofore been made or which hereafter may be made by any city or town has been or may hereafter be declared void."

They also cite or rely upon the case of Sanderson v. Herman, 108 Wis. 662, 84 N. W. 890, 85 N. W. 141. This was a case from Wisconsin, but the statute there provides "is or may be invalid for certain reasons." But the court held in that case that the invalidity of the first assessment came entirely within the provision of the latter act, but did not pass upon the question as to what ruling the court would make if the city had no jurisdiction in the first instance.

Plaintiffs in error cite State ex rel. v. District Court of Ramsey County et al., 97 Minn. 147, 106 N. W. 306, this case following the case of State ex rel. St. Anthony Park North Trust Co. v. District Court of Ramsey County, 95 Minn. 183, 103 N. W. 881, a decision of the Supreme Court of Minnesota, but the statute of Minnesota provides as follows:

"And no error or omission or irregularity, whether jurisdictional or otherwise, shall prevent a reassessment to the extent of the benefits conferred by such improvement."

We do not think these cases are in point. These cases support the theory of the constitutionality, or the authority of the Legislature to enact a curative statute, by providing that the Legislature may provide, where the proceedings are void, that a reassessment ordinance may be passed. It is not necessary for us to pass upon the question of the constitutionality in the case at bar for the reason the question is whether our statute is broad enough to include a case to remedy jurisdictional defects. Our statute does not attempt to grant any such power or authority. It provides that a new assessment shall have like force and effect as the original assessment, and of course, if the council had no jurisdiction in the first instance, they would acquire none in the second.

In support of cases where the statute and charters are almost similar to the statute of Oklahoma we find that the constructions placed upon similar statutes by the Supreme Court of Michigan, Illinois, Indiana, and Iowa hold that such statutes do not authorize the reassessment of property where the proceedings are void.

The Supreme Court of Michigan, in the case of Crawford v. City of Detroit, 169 Mich. 293, 135 N. W. 314, stated as follows:

"These cases establish the law that the failure of the village council to pass the resolution required by these sections is a jurisdictional defect, and, if it is a jurisdictional defect, it was not cured by the subsequent resolution of council.

"Second, that the city relies upon section 197 (1904) of its charter to give force to its resolution, the material portion of which reads as follows: 'Whenever in any proceedings heretofore or hereafter made for the purpose of paving any street or alley or public places, or for the construction or repairing of any sidewalk or sewer, * * * and the same shall, in the opinion of the common council, be invalid, said common council may vacate and set the same aside, and when any errors or omissions may appear in any such proceedings in the making of said improvement, or in any assessment roll or in any certificate thereto, the common council may order the same to be corrected, and when any such special assessment shall be so vacated or held invalid by the judgment or decree of any court of competent jurisdiction on account of any error or omission in said proceedings or in said assessment, the common council may cause a new special assessment to be made, for the purpose for which the original assessment was made.'

"The power conferred by this charter provision would not authorize the council to cure jurisdictional defects; nor did it attempt by its resolution to cure any defect in the proceedings anterior to the assessment. It is obvious that the ordering of a reassessment would not cure a defect in the proceeding which lay at the foundation of the proceeding. If the village proceedings were declared void for a jurisdictional defect, * * * then it follows that the whole controversy was disposed of on the first hearing, and, no appeal having been taken therefrom, the conclusions and decree of the trial court are final."

The Supreme Court of Iowa, in the case of Comstock v. Eagle Grove City, 133 Iowa, 589, 111 N. W. 51, used the following language:

"In the first place, if such were possible in any case, it cannot be said with any propriety that by the enactment of section 823 the Legislature contemplated that a city council which had proceeded without jurisdiction might supply the want of jurisdiction and give legality to its past acts done in defiance of the statutes, by simply holding a meeting to hear objections, correct errors, etc."

The court further stated:

"To conclude with, we hold that the sections of the Code relied upon were intended to cover

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errors and irregularities arising out of the exercise of a jurisdiction acquired. They have no relation to cases involving a want of jurisdiction."

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The Supreme Court of Illinois, in the case of City of Geneseo v. Schultz, 100 N. E. 926, syl. 1, 257 Ill. 273, the court said:

"Where an ordinance under which an improvement is made is not a nullity, but merely defective or insufficient, a new assessment can be levied under a supplemental ordinance under the Local Improvement Act."

The Supreme Court of Illinois, in the case of People ex rel. v. Hayes, 258 Ill. 243, 101 N. E. 549, said:

"We consider it necessary to discuss but one of the questions raised by appellants. They contend that the original ordinances—the one of 1906 relating to the sidewalk in front of Barbara Hayes' property, and the one of 1909 relating to the sidewalk in front of A. T. Hayes' property—were void, and that no tax could be imposed against the property by new ordinances to pay for the walks previously constructed under void ordinances. Authority given by the Sidewalk Act to pass a new ordinance levying a special tax for work already done by the city or village in good faith pursuant to an ordinance, but which has been set aside by a court, cannot be exercised if the previous ordinance was void. If the original ordinance was merely defective, but not void, then a new ordinance may be passed for the levy of the special tax. City of Chicago v. Calt, 225 Ill. 368, 80 N. E. 285."

The Supreme Court of Indiana, in the case of Curless v. Watson, 54 Ind. App. 110, 100 N. E. 576, said:

"The power and duty of the board of trustees or common council, as the case may be, under the statute to make an assessment for such improvements continue in that tribunal until legally exercised. While it is true that a void assessment may be defeated or set aside and held for naught in a collateral action, still, under such circumstances, if the principal proceedings of the board upon which an assessment must rest are not also void, a valid reassessment may be made, by which the objectionable matters or grounds which resulted in rendering the first assessment invalid may be avoided." Hibben v. Smith, 158 Ind. 206, 62 N. E. 447.

There are many other cases upon this same question from other states, upholding this same rule, but we have been unable to find any, nor has counsel cited us a case, where the statute was similar to ours, where a new assessment or a reassessment was ever sustained in a case where the city council had acquired no jurisdiction in the first instance, but has only been sustained in cases where the state has a statute broad enough to include proceedings that were void in the first instance, and only then has said reassessment been sustained.

It is not proper for the court to read into the statute exceptions or words not contained therein. The statute in its literal meaning can only be construed to mean a reassessment in proceedings where the city in the first instance acquired jurisdiction, and, if their proceedings became illegal or invalid for any reason, then the city has a right to go back and correct the irregularities and pass a new reassessment ordinance and reassess the property the same as in the first instance, but, having acquired no jurisdiction in the first instance under our statute, they would be unable to pass a reassessment ordinance.

Counsel in one of their briefs argue the question of the statute of limitations, but the law in this state appears to be well settled that the statute of limitations does not apply to an assessment when the proceedings upon which it is based are void.

[3] This court, in the case of Morrow v. Barber Asphalt Paving Co., 27 Okl. 247, 111 Pac. 198, stated as follows:

"The period of limitation by statute (Wilson's Rev. & Ann. St. Okl. § 450) within which an action may be brought to set aside a special assessment made against the lots abutting upon a street to pay the cost of grading the same does not apply to bar a lot owner of an action to enjoin collection of such assessment, when the proceedings upon which it is based are void."

This same contention has been followed by the court in construing the statute of 1910 in the case of City of Muskogee v. Nicholson, 171 Pac. 1102; Southern Surety Co. v. Jay, 178 Pac. 95.

For the reasons stated, the judgment of the trial court is affirmed.

The former opinion of the court is therefore withdrawn, and this opinion substituted therefor, and the second petition for rehearing denied.

OWEN, C. J., and SHARP, PITCHFORD, and HIGGINS, JJ., concur.

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(75 Okl. 64)

CLINTON & O. W. RY. CO. v. DUNLAP.

(No. 9198.)

(Supreme Court of Oklahoma. June 10, 1919.)

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(Syllabus by Editorial Staff.)

1. EVIDENCE ⟸363, 556 — ADMISSIBILITY — EXCERPTS FROM MEDICAL AND SCIENTIFIC BOOKS.

In action for death of railroad repairman and boilermaker from a shock from an electric light he was carrying, an examination by plaintiff's counsel by reading from several medical and scientific books as to the voltage that would produce death and the testimony of a medical witness that he agreed with the author was improper, and the excerpts from the text were inadmissible.

2. APPEAL AND ERROR ⟸1170(7)—ADMISSION OF CUMULATIVE EVIDENCE — PREJUDICE — STATUTE — "SUBSTANTIALLY PREJUDICIAL."

In such action, where plaintiff offered independent expert testimony that voltage received was sufficient to cause death, and where that was the logical deduction from the circumstances, the erroneous admission of cumulative evidence in nature of excerpts from medical and scientific books was not substantially prejudicial to defendant within Rev. Laws 1910, § 6005, prohibiting a reversal for trial error not resulting in a miscarriage of justice.

Kane and Sharp, JJ., dissenting.

On rehearing. Judgment affirmed.

For former opinion, see 179 Pac. 749.

RAINEY, J. [1] After a careful examination and re-examination of the record in this case, we are of the opinion that the conclusion of the commissioner is correct, and the judgment should be affirmed. It is true, however, as urged by counsel for defendant, that the commissioner has not discussed one of the principal assignments of error relied upon by it for reversal. During the examination of Dr. McBurney, one of plaintiff's witnesses, plaintiff's counsel read from several medical books and books of science relative to the amount of voltage that would produce death, the witness testifying that he agreed with the author of the text, and it is most earnestly insisted that this was error and prejudicial to the rights of the defendant, for the alleged reason that it was the particular evidence upon which the court based its opinion. While there are some authorities to the contrary, we agree that, according to the great weight of authority, this method of examination was improper, and the excerpts from the text were inadmissible, but our examination of the record discloses that this evidence was merely cumulative. Drs. McBurney, Ellis Lamb, and M. C. Conner, regularly practicing physicians who had had some experience in the use of electricity, qualified as expert witnesses, and testified from their general knowledge, obtained from observation and research in their profession, that the voltage was sufficient to produce death. Although reference was made to the medical journals in the manner above stated while Dr. McBurney was testifying, he testified independently thereof that in his opinion 65 volts of electricity was sufficient to cause death under favorable circumstances, such as existed in this case. Dr. M. C. Conner testified that in his opinion, under the conditions stated in the court's opinion, from 50 volts up might produce death, and Dr. Ellis Lamb testified that 110 volts of electricity might be dangerous to life under the most favorable circumstances, depending upon the length of time connected. Al. Roach, one of plaintiff's witnesses, testified that by coming in contact with a similar domestic wire used in an automobile shop in Clinton he received a shock that knocked him 10 or 12 feet and rendered him unconscious. The defendant did not introduce any medical experts, but relied solely on the testimony of its electrical experts, who testified that 115 voltage was not sufficient to produce death.

[2] This is the second time this case has been to this court; the respective trials resulting in jury verdicts for the plaintiff in the sum of $7,000 and $7,500, respectively. On the first trial defendant offered its expert testimony to the effect that the voltage carried by the electric wire was not sufficient to produce death, and the plaintiff relied upon the circumstances of the case without offering any expert or opinion evidence. After having fully stated the facts of the case and after having found against the defendant company on every issue except the probative effect of the expert evidence, the court, in an opinion by Commissioner Mathews (Clinton & O. W. Ry. Co. v. Dunlap, 56 Okl. 755, 156 Pac. 654), with reference to this testimony, said:

"There was no attempt made upon the part of the plaintiff to meet or discredit this testimony. It stands in the record uncontradicted, and is not the kind of testimony that can be ignored or dismissed as unreasonable and not worthy of credit. It devolved upon the plaintiff to meet it, and, failing so to do, we are of the opinion the case failed with it."

It will readily be seen from the quoted language that in the former opinion the court gave the defendant's expert testimony all the weight it was entitled to, and more than it is given in many jurisdictions, and it was solely on the ground that this testimony was not contradicted or discredited the cause was reversed for a new trial. Now, in the instant case plaintiff, in our opinion, abundantly proved by expert witnesses that the voltage received by the deceased was

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sufficient, under the circumstances of the case, to cause death, which is also the logical deduction to be drawn from the circumstances, and the error of the court in permitting cumulative evidence to be introduced cannot be said to have substantially prejudiced the rights of the defendant. By the express provisions of section 6005, Rev. Laws of 1910, we are prohibited from setting aside a judgment in any case on the ground of the improper admission or rejection of evidence, unless we can say, after an examination of the entire record, that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right. All the witnesses to the accident resulting in the deceased's death believed at the time that he was killed by an electric shock. This is the conclusion reached by two juries, whose verdicts were approved by the trial court, and after an examination of the entire record we cannot say that justice has miscarried, but, on the contrary, we are convinced that the deceased received an electric shock in the manner contended by plaintiff, and that his death was proximately caused thereby.

OWEN, C. J., and HARRISON, PITCHFORD, JOHNSON, HIGGINS, and McNEILL, JJ., concur.

KANE and SHARP, JJ., dissent.

(75 Okl. 57)

MISSOURI, K. & T. RY. CO. v. BANDY.
(No. 8794.)

(Supreme Court of Oklahoma. March 25, 1919. Rehearing Denied June 10, 1919.)

(Syllabus by the Court.)

1. RAILROADS ⟸411(1) — INJURIES TO ANIMALS—FENCES AND CATTLE GUARDS.

It is the duty of every person or corporation owning or operating a railroad in Oklahoma to build and maintain a fence along its right of way, except at public highways and station grounds, and this imposes the duty upon such person or corporation to construct and maintain suitable cattle guards and wing fences at points where public highways cross the tracks of such person or corporation.

2. RAILROADS ⟸411(18)—INJURIES TO ANIMALS—FENCES AND CATTLE GUARDS—HIGHWAY CROSSING.

Where a public highway crosses a railway at an oblique angle, the railway company must construct its cattle guards and erect its wing fences upon the margin of the highway, so that the highway is not encroached upon, and all of its right of way near the highway is fenced and protected, and if the company erects its cattle guards and fences back from the highway, so as to form a pocket, it may be held liable for animals killed at such place, on the ground that it had not discharged its duty in fencing its track as required by law.

3. RAILROADS ⟸411(16)—INJURIES TO ANIMALS—FENCES AND CATTLE GUARDS—"STATION GROUNDS."

Station grounds prima facie include all the right of way left unfenced between switches and cattle guards on either side of the platform, with the switches and side tracks, unless they are shown to be unreasonable in extent.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Station Grounds.]

4. RAILROADS ⟸446(7) — INJURIES TO ANIMALS — QUESTION FOR JURY—FENCES—STATION GROUNDS OR PUBLIC HIGHWAY.

Whether a certain place constitutes a part of the station grounds, or a public highway, where a railway company is by statute exempt from maintaining a fence, is a question of fact for the jury.

5. RAILROADS ⟸441(6) — INJURIES TO ANIMALS—BURDEN OF PROOF—FENCES.

The burden was upon the defendant to show that the animals were killed at a point where it was not required by statute to maintain a fence.

6. RAILROADS ⟸411(3) — INJURIES TO ANIMALS—EFFECT OF FAILURE TO FENCE RIGHT OF WAY.

Where animals enter upon railroad tracks at a point where the railroad company had failed to erect and maintain a fence as required by law, and it is not shown that the owner was willfully negligent in permitting them to stray upon the track, the railway company is liable for the value of such animals, regardless of negligence in the running or operating of its trains.

7. RAILROADS ⟸411(3) — INJURIES TO ANIMALS—EFFECT OF FAILURE TO FENCE RIGHT OF WAY—LAST CLEAR CHANCE.

The fact that the accident could not have been avoided after the discovery of the animals upon its track does not relieve defendant from liability because of the fact that the animals entered upon defendant's tracks at a point where it had failed to erect a fence in accordance with its statutory duty.

Error from County Court, Washington County; Robert D. Waddill, Judge.

Action by G. T. Bandy against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Clifford L. Jackson, W. R. Allen, and M. D. Green, all of Muskogee, for plaintiff in error.

A. O. Harrison, of Bartlesville, for defendant in error.

HARDY, C. J. G. T. Bandy commenced this action against the Missouri, Kansas & Texas Railway Company to recover $550 damages for two horses struck and killed by south-bound passenger train of defendant at

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Dewey, Okl., on the night of June 29, 1915. The acts of negligence alleged were the operation of defendant's train at an excessive rate of speed, failure to give any warning signal for the public crossing near which the animals were killed, and that the point where the accident occurred was near a public road crossing, and was not within the station ground limits, and that defendant had failed to maintain right of way fences at that point. Verdict was for plaintiff, and defendant appeals.

To reverse the case defendant urges that the evidence shows the animals were struck and killed on a public crossing. The point where the animals were killed was south of the depot at and outside the city limits of the town of Dewey, and several hundred feet south of the south end of the passing track at said station. According to the plat introduced by plaintiff, from the south end of the passing track to the center of the public highway crossing is a distance of 793 feet. The tracks of defendant are crossed by the public highway at an oblique angle of about 30 degrees. South of this highway the tracks of defendant are fenced, and at a point from 30 to 80 feet south of the center line of this highway defendant had erected cattle guards and wing fences across its track, which connect with the right of way fence. On the west side of the track the right of way fence extends north beyond the cattle guards and wing fence to the south line of the highway, where it connects with another fence extending in a northwesterly direction along the south line of the highway. There is left south of the public crossing a space on the west side approximately 80 feet from the center of the highway to the cattle guards, and on the east side approximately 30 feet of open space in the shape of a right-angled triangle. The horses were struck, according to the testimony of the engineer, and immediately rolled off the pilot against the west wing fence, and the force of the impact broke down the wing fence. The engineer testified that the horses were not carried any distance by the engine, but immediately rolled off against the fence. He also testified that the horses were struck right on the crossing. The fireman testified that he did not see the horses when they were struck, but that he thought they were struck on the crossing, or a little south of it. The section foreman testified that he examined the track at the place of the accident the next morning; that the horses were knocked or thrown against the wing fence; he saw no marks on the track to indicate where the train picked up the horses; that he saw marks where something was dragged from the end of the outside crossing to the place where the horses were found.

[1] Upon this evidence it was for the jury to say whether the horses were struck upon the crossing or south of the crossing. If the horses had gotten upon the tracks at the crossing, and were killed at the point where the cattle guards and wing fence connected with the right of way fence, the plaintiff would be entitled to recover. By sections 1435 to 1438, inclusive, Rev. L. 1910, it is made the duty of every person or corporation owning or operating a railroad in Oklahoma to build and maintain a fence along its right of way, except at public highways and station grounds, and this imposes the duty upon such person or corporation to construct and maintain suitable cattle guards and wing fences at points where public highways cross the tracks of such person or corporation. Union Pacific Railway Co. v. Harris, 28 Kan. 206.

[2] The defendant showed by its witnesses that it was considered good railroading to construct cattle guards and wing fences at right angles to its track, and not along the margin of the highway, although said highway crossed its track at an oblique angle; but it further appeared that they were sometimes constructed obliquely across the tracks along the margin of the highway. There is no great inconvenience, unnecessary expense, or other disadvantage in constructing them at an oblique angle made to appear, such as would prevent the construction of cattle guards and wing fences along the margin of the highway, and in the absence of such reasons it was the duty of defendant to construct said cattle guards and wing fences along the margin of the highway, so as not to leave a pocket or trap into which animals passing along the highway could be driven and killed. If such were not the law, no duty would rest upon persons or corporations operating lines of railroad to fence its track, except to the extreme point of contact between highways and its own right of way, and should a highway cross the tracks at an acute angle the distance between the points of contact would sometimes be great. In one reported case it appears that the distance between cattle guards was 860 feet. Andre v. Chicago & N. W. R. R. Co., 30 Iowa, 107.

It is usually held that, where a public highway crosses a railway at an oblique angle, the railway must construct its cattle guards and erect its wing fences upon the margin of the highway, so that the highway is not encroached upon and all of its right of way near the highway is fenced and protected, and if the company erects its cattle guards and fences back from the highway, so as to form a pocket, it may be held liable for animals killed at such place, on the ground that it had not discharged its duty in fencing its track as required by law. 3 Elliott, Railroads, § 1197, p. 444; 2 Thompson on Negligence, § 2057, p. 706.

[3-5] It is next urged that plaintiff is not liable because the place of the accident was

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on the station grounds. The highway crossing, cattle guards, and wing fences were outside and south of the limits of the town of Dewey, and according to plaintiff's plat it was 793 feet from the south point of the passing track to the center of the highway and from the center of the highway to the west wing fence, 80 feet. This court has held that station grounds prima facie, include all the right of way left unfenced between the switches and cattle guards on either side of the platform with the switches and sidetracks, unless they are shown to be unreasonable in extent. St. L. & S. F. R. Co. v. Brown, 32 Okl. 483, 122 Pac. 136.

Whether a certain place constitutes a part of the station grounds, or a public highway, where a railway company is by statute exempt from maintaining a fence, is a question of fact for the jury. St. L. & S. F. Ry. Co. v. Smith, 41 Okl. 163, 137 Pac. 714. The burden was upon defendant to show that the animals were killed at a point where it was not required by statute to maintain a fence. St. L. & S. F. Ry. Co. v. Brown, supra; A., T. & S. F. Ry. Co. v. McCall, 48 Okl. 602, 150 Pac. 173.

[6, 7] It appears that some of the passenger trains operating over defendants' line of railway are more than 500 feet in length, and that some of its freight trains are half a mile in length. Some of the witnesses testified that it was necessary to have as part of the yard limits a distance beyond the end of the switch equal to the length of the trains passing over defendant's track. If plaintiff's plat be correct, the distance from the point of the switch to the highway was greater than the length of passenger trains, but less than the length of some freight trains passing this point. If the plat introduced by defendant be correct, the distance from the point of the switch to the wing fence and cattle guards would be much less than the length of either freight or passenger trains. In addition to the passing track referred to there was a long track extending from a point north of the highway south to the junction of defendant's road with that of the Atchison, Topeka & Santa Fé Railway Company, known as the "Jim Track," or storage track, used principally for the purpose of furnishing cars by both railroads to a large cement plant. Cars intended for the cement plant were frequently stored along this track. It also appeared that, until about three years prior to the trial of this case, a cattle guard had been maintained at a point north of the highway crossing, but had been removed to its present location. Defendant had fenced its track south of the highway, and there was evidence that the cattle guards and wing fences were constructed at right angles because it was considered "good railroading," and not because it was necessary as part of the station grounds; for if it had been necessary to leave unfenced south of the south end of the passing track a distance equal to the length of its longest trains, the cattle guards would have been located at a point much further south than they were. Some of defendant's witnesses gave as the reason for the construction of the cattle guards and wing fences south of the highway that it was impracticable to maintain them north of the highway, and that they were placed south of the highway for the purpose of getting around to and from the crossing. The jury were therefore warranted in finding that the animals were killed outside the station grounds of defendant. From the fact that the company built right of way fences south of the highway a strong inference arises that they were built only at a place required by statute. Midland Valley v. Hardesty, 38 Okl. 559, 134 Pac. 400.

It is urged that the animals were unlawfully at large, and therefore trespassing upon the premises of defendant, and that defendant owed no duty to sound statutory crossing alarms, and no duty other than to use ordinary care after their discovery. Had the animals been killed upon the highway or within the station grounds, this contention would be well taken; but inasmuch as it appears that the animals entered upon the tracks at a point where defendant had failed to erect and maintain a fence as required by law, and it was not shown that plaintiff was willfully negligent in permitting them to stray upon the track, defendant is liable for the value of such animals, regardless of negligence in the running or operation of its trains. St. L., I. M. & S. Ry. Co. v. Dawson, 57 Okl. 655, 157 Pac. 751; C., R. I. & P. Ry. Co. v. Westheimer & Daube, 44 Okl. 287, 144 Pac. 356; St. L. & S. F. Ry. Co. v. Steele, 37 Okl. 536, 133 Pac. 209.

The fact that the accident could not have been avoided after the discovery of the animals does not relieve defendant from liability. This contention, like the preceding one, fails because of the fact that the animals entered upon defendant's tracks at a point where it had failed to erect and maintain a fence in accordance with its statutory duty.

The judgment is affirmed.

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(15 Okl. Cr. 44)

CRILLEY v. STATE. (No. A-2799.)

(Criminal Court of Appeals of Oklahoma. May 18, 1918. Rehearing Denied June 21, 1919.)

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(Syllabus by Editorial Staff.)

1. INDICTMENT AND INFORMATION ⟸125(47) —DUPLICITY.

In view of Rev. Laws 1910, § 5741, relating to different counts, an information charging that defendant unlawfully and willfully and wrongfully attempted to use force on the person of another and to do corporal hurt to such other by throwing a heavy stick or club at him, and did by words threaten and offer to hit such other, was not duplicitous, as the charge as to threatening and offering to hit might be treated as surplusage, leaving a complete information charging simple assault.

2. ASSAULT AND BATTERY ⟸51—SIMPLE ASSAULT—OFFENSE.

It is not an offense to threaten by words to hit another, but there must be an overt act or offer or an attempt to hit before the crime of assault is committed.

3. ASSAULT AND BATTERY ⟸95—SIMPLE ASSAULT—QUESTION FOR JURY.

On conflicting evidence in a prosecution for a simple assault, *held*, that defendant's guilt was a question for the jury.

4. CRIMINAL LAW ⟸1159(2)—APPEAL—VERDICT.

Where there is evidence from which the jury could with reason have found that defendant was guilty, the court will not disturb the verdict for alleged insufficiency of the evidence.

Appeal from County Court, Alfalfa County; F. M. Gustin, Judge.

C. J. Crilley was convicted of simple assault, and his punishment fixed at a fine of $50 and costs, and he appeals. Judgment affirmed.

W. E. Wiles, Ira A. Hill, and Guy D. Talbot, all of Cherokee, for plaintiff in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. C. J. Crilley was convicted in the county court of Alfalfa county of simple assault. The court assessed the punishment at a fine of $50 and costs of the action, from which judgment he has appealed, and asks this court to reverse the judgment for the following reasons: (1) That the court erred in overruling demurrer to the information upon the ground that the same is duplicitous.

[1, 2] The information is as follows (omitting the formal parts):

"I, the undersigned, county attorney of Alfalfa county, Okl., in the name, by the authority, and on behalf of the state of Oklahoma, give information that on the 13th day of May, A. D. 1916, in said county of Alfalfa and state of Oklahoma one C. J. Crilley did then and there unlawfully and willfully and wrongfully attempt and offer to use force and violence upon the person of another person, and that is to say that the said C. J. Crilley did attempt to do corporal hurt to one I. E. Bradley by throwing a heavy stick or club at the person of I. E. Bradley and did by words threaten and offer to hit the said I. E. Bradley over the head with said stick or club. Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Oklahoma."

We cannot agree with the contention of counsel for plaintiff in error that this information is duplicitous. Down to the words "and did by words threaten and offer to hit," etc., the information charged fully and completely the crime of simple assault for which a conviction was had, and beginning with the words above quoted, which was an attempt upon the part of the county attorney to charge the assault (which the evidence shows to have been a continuing transaction) to have been committed by the use of different means (1) by throwing the stick or club at Bradley, and (2) by offering to hit said Bradley with the stick or club, and such pleading would have been permissible under section 5741, Revised Laws 1910, and such allegations would have been sufficient had not the language "by words threaten and" been inserted, because it is not an offense to threaten by words to hit another, but there must be an overt act or offer or an attempt to hit before the crime of assault is committed, so that the information as drawn does not charge two separate offenses, and the language beginning "and did by words threaten and offer to hit the said I. E. Bradley" may be treated as surplusage, and we still have a complete information charging the crime of simple assault. The demurrer therefore was properly overruled.

[3, 4] It is also contended that the trial court erred in not sustaining the motion to direct a verdict of not guilty. If the evidence of the defendant and his witnesses was to be believed by the jury, then he should have been acquitted, but the evidence on the part of the prosecuting witnesses and several persons who corroborated them was equally positive as to the guilt of defendant of the crime charged. There was a direct conflict, therefore, in the evidence, which it is the sole province of the jury to decide. This court has repeatedly said that, where there is evidence from which the jury could have with reason reached the conclusion that the defendant was guilty, this court will not disturb the verdict because of the alleged insufficiency of the evidence.

It is contended, also, that the court erred in admitting incompetent, irrelevant, and immaterial evidence which was prejudicial to the substantial rights of the de-

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fendant. The evidence complained of relates to certain testimony by I. E. Bradley, the prosecuting witness, and his wife, who was present at the time of the alleged assault, concerning the statements made by the defendant of a threatening nature, such as "Damn you, stop, or I'll throw this clear through you," and "I'll hit you any time I want to," etc.

It is claimed that these statements do not in themselves constitute any element of the crime charged. Admitting that the statements of themselves would not support a conviction, they were undoubtedly admissible as part of the res gestæ, because they occurred right at the time of the alleged assault, were voluntary expressions of ill temper on the part of the defendant tending to explain his condition of mind at the time, and were properly to be considered by the jury in explanation of his conduct in throwing a cane or club in the direction of the prosecuting witness; the contention of the state being that he threw the cane or club with the intention of injuring the prosecuting witness, while defendant claimed that he did not throw it at the prosecuting witness but threw at the wheel of the automobile in which said prosecuting witness was riding in order to get him to stop the car; the defendant being the city marshal and claiming his purpose was to call attention of prosecuting witness to the fact that he was in the act of driving his automobile at night without lights. It is apparent that under the circumstances the voluntary outbursts of defendant at the time were competent.

Complaint is made also that the court erred in excluding certain competent and relevant evidence. After an examination of the record, we cannot say that there was error in this respect sufficient to justify a reversal of this judgment.

The judgment of conviction is therefore affirmed.

(16 Okl. Cr. 151)

CUNNINGHAM v. STATE. (No. A-3012.)

(Criminal Court of Appeals of Oklahoma. June 3, 1919.)

(Syllabus by the Court.)

BURGLARY ⊂=18 — BURGLARY IN THE FIRST DEGREE—INFORMATION.

For information held insufficient to charge the crime of burglary in the first degree, see body of opinion.

Appeal from District Court, Oklahoma County; John W. Hayson, Judge.

George Cunningham was convicted of burglary in the first degree and sentenced to serve a term of seven years in the state penitentiary, and he appeals. Reversed and remanded, with instructions.

Loyal J. Miller, of Oklahoma City, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

MATSON, J. The Attorney General has filed the following confession of error in this case:

"On the 27th day of December, 1916, in the district court of Oklahoma county, state of Oklahoma, plaintiff in error was convicted of the crime of burglary in the first degree, and sentenced to serve a term of seven years in the state penitentiary. On the 22d day of May, 1917, he lodged in this court his appeal from said judgment of conviction.

"Plaintiff in error was convicted upon an information which reads in words and figures as follows, to wit:

" 'In the District Court in and for Oklahoma County, State of Oklahoma. The State of Oklahoma, Plaintiff, v. George Cunningham, Floyd Monroe, Knox Atkinson, Defendants. Information. (Filed in District Court, Oklahoma County, Oklahoma, May 22, 1917. James Beaty, Court Clerk, by Cliff Myers, Deputy.)

" 'In the name and by the authority of the state of Oklahoma comes now John Embry, the duly qualified and acting county attorney in and for Oklahoma county, state of Oklahoma, and on his official oath gives the district court in and for said Oklahoma county and state of Oklahoma to know and be informed that heretofore, to wit, on the 2d day of July, A. D. 1916, in Oklahoma county, state of Oklahoma, George Cunningham, Floyd Monroe, Knox Atkinson, whose more full and correct names are to your informant unknown, then and there being, did then and there willfully, unlawfully, and feloniously commit the crime of burglary in manner and form as follows, to wit: The said defendants George Cunningham, Floyd Monroe, and Knox Atkinson, then and there being, did then and there in the nighttime break and enter a certain building, to wit, a building located at No. 1311 North Barnes street in Oklahoma City, Oklahoma county, state of Oklahoma, then and there occupied by Mrs. Ollie Edwards and her two children as her permanent dwelling; that the said Mrs. Ollie Edwards and her said children were in the building at the time of the offense herein alleged; that the said Mrs. Ollie Edwards then and there had in her possession and then and there owned and held certain personal property consisting of jewels, jewelry, and coins, all of the value of about $800 good and lawful money of the United States; that the said breaking and entering of said building as aforesaid was accomplished by the said defendants, George Cunningham, Floyd Monroe, and Knox Atkinson, by breaking and unfastening a screen and window, the same being a part of said dwelling house, and after so having broken the said window and unfastening said screen window then and there entering through said open window, all of said acts of the said defendants, George Cunningham, Floyd Monroe, and Knox Atkinson, being contrary to the form of the statutes in such cases made and provided

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and against the peace and dignity of the state of Oklahoma. John Embry, County Attorney, Oklahoma County, by John Du Marrs, Assistant County Attorney.'

"A demurrer to this information was duly filed and overruled by the court. The information fails to charge that defendant broke into and entered the building with the 'intent to commit some crime.' The information alleges the naked breaking into the building without alleging the breaking into said building with any intent to commit a crime, or that even any crime, larceny, or some other offense, was committed.

"In view of the fact that this information was challenged by a demurrer, it is our opinion that the information upon which plaintiff in error was convicted is fatally defective, and that the judgment of the lower court will necessarily have to be reversed."

Burglary in the first degree, of which crime the defendant was convicted, is defined in section 2611, Revised Laws 1910, as follows:

"Any person who breaks into and enters in the nighttime the dwelling house of another, in which there is at the time some human being, with intent to commit some crime therein, either:

"First. By forcibly bursting or breaking the wall, or an outer door, window, or shutter of a window of such house or the lock or bolts of such door, or the fastening of such window or shutter, or,

"Second. By breaking in any other manner, being armed with a dangerous weapon or being assisted or aided by one or more confederates then actually present; or,

"Third. By unlocking an outer door by means of false keys or by picking the lock thereof, or by lifting a latch or opening a window, is guilty of burglary in the first degree."

One of the material ingredients of the offense is that the breaking and entering must have been done with intent to commit some crime in the dwelling house. There is no allegation in the information of an intent to commit some crime, neither does the information allege that a larceny was committed by said defendants within the dwelling house. Had such an allegation been contained in the information, the inference might have been drawn that the breaking was with intent to steal, but the information above set forth is wholly deficient in that it fails entirely to directly allege any intent to commit some crime or to allege facts from which the inference would necessarily arise that the breaking was with intent to commit some crime.

For these reasons, we think that the confession of error of the Attorney General is well taken, and the cause is reversed and remanded, with instructions to the trial court for further proceedings not inconsistent with this opinion.

Mandate forthwith.

DOYLE, P. J., and ARMSTRONG, J., concur.

(16 Okl. Cr. 155)

BROWN v. STATE. (No. A-2967.)

(Criminal Court of Appeals of Oklahoma. June 9, 1919.)

(Syllabus by the Court.)

CRIMINAL LAW ⟸721(3)—COMMENT ON DEFENDANT'S FAILURE TO TESTIFY.

Code Cr. Proc. § 5881, Rev. Laws 1910, prohibits any comment by a prosecuting attorney in a criminal case on the failure of the defendant to testify, and such comment constitutes reversible error, even though it be made in disclaiming any intention of referring to the failure of the defendant to testify in his own behalf.

Appeal from Superior Court, Muskogee County; H. C. Thomas, Judge.

Morris Brown was convicted of a violation of the prohibitory liquor law, and he appeals. Reversed, and remanded for a new trial.

P. A. Gavin, of Muskogee, McAdams & Haskell, of Oklahoma City, and J. Fentress Wisdom, of Muskogee, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

DOYLE, P. J. The plaintiff in error, Morris Brown, was by information filed in the county court of Muskogee county charged with having unlawful possession of 21 quarts of whisky with intent to sell the same. The case was transferred to the superior court of said county, where upon trial he was convicted and sentenced to four months imprisonment in the county jail and to pay a fine of $250. To reverse the judgment rendered he prosecutes this appeal.

The defendant objected to the jurisdiction of the court to proceed with the trial of the case upon the ground that the case has not been transferred from said county to this court in the manner provided by law. The objection was overruled and exception allowed.

The evidence shows or tends to show that on the 4th day of June, 1916, the defendant purchased a drug store in the city of Muskogee known as the Indiana drug store; that said drug store had the reputation of being a place where intoxicating liquors were kept and sold; that on the 10th day of June, 1916, said drug store was searched by officers in the execution of a search warrant, and 21 quart bottles of whisky found therein; that the defendant was not in the store at the time that said whisky was found, the store being in charge of a clerk who, two hours previous to the search, had been employed by the defendant. There was no evidence of any sale of intoxicating liquor having been made by the defendant.

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Upon the conclusion of the evidence the defendant moved the court to direct the jury to return a verdict of acquittal. The motion was denied and exception allowed.

In the view we have taken of the disposition necessary to be made of this case it is neither important nor necessary to consider more than one of the various questions presented in the record and brief. It is insisted that the court erred in refusing to grant a new trial because the county attorney in his argument to the jury commented on the failure of the defendant to testify as a witness in his own behalf.

It appears from the record that in the course of his address to the jury the county attorney made some statements which counsel for the defendant objected to as improper. The record is as follows:

"Counsel for the defendant interrupted the county attorney and objected to his remarks as follows: Since the defendant has offered no evidence, there is no conflict in the testimony, and the defendant excepts to the argument of counsel for the state.

"County Attorney: I desire now to withdraw the statement.

"Counsel for Defendant: I now move the court to discharge the jury and order a new trial.

"County Attorney: I did not say that the jury ought to consider the fact that the defendant did not take the stand.

"Whereupon the court overruled the motion to discharge the jury and order a new trial and allowed exceptions."

Our Code of Criminal Procedure (section 5881, Rev. Laws) provides:

"In the trial of all indictments, informations, complaints and other proceedings against persons charged with the commission of crime, offenses or misdemeanor before any court or committing magistrate in this state, the person charged shall at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him nor be mentioned on the trial; if commented upon by counsel, it shall be ground for a new trial."

This statutory provision is mandatory, and when the defendant does not elect to testify as a witness in his own behalf, and the prosecuting attorney in his argument to the jury comments on the failure of the defendant to testify as a witness, such comments constitute reversible error. Wilson v. Territory, 9 Okl. 331, 60 Pac. 112; Sturgis v. State, 2 Okl. Cr. 362, 102 Pac. 57; Brown v. State, 3 Okl. Cr. 442, 106 Pac. 808; Nowlin v. State, 7 Okl. Cr. 27, 115 Pac. 625, 121 Pac. 791.

In the case of Weinberger v. State, 8 Okl. Cr. 441, 128 Pac. 160, it is said:

"The statute is in accordance with the constitutional guaranty that 'no person shall be compelled to give evidence which will tend to incriminate him, except as in this Constitution specifically provided.' The clear intent of the statute is that the jury in determining their verdict shall entirely exclude from their consideration the fact that the defendant did not elect to testify, and any reference by the prosecuting attorney in his address to the jury to the fact that the defendant did not testify constitutes misconduct, and, under the terms of the statute, the trial court has no discretion, but must grant a new trial. Every person accused of crime is entitled to a fair trial under the forms of law before he may be convicted."

We are inclined to think that the proper procedure for the county attorney, if he desired to discuss the effect of his remarks, would have been to ask the court to have the jury retire before discussing the objections made to the same. As it appears from the record, the effect of his remarks in disclaiming any intention of referring to the failure of the defendant to testify was to call to the attention of the jury the fact that the defendant did not elect to testify as a witness in his own behalf. For this reason, the judgment must be reversed, and the cause remanded for a new trial.

ARMSTRONG and MATSON, JJ., concur.

(42 Nev. 472)

Ex parte MING. (No. 2379.)

(Supreme Court of Nevada. May 29, 1919.)

1. CONSTITUTIONAL LAW ⟸7 — AMENDMENT OF CONSTITUTION—ENTRY IN HOUSE AND SENATE JOURNALS.

Under Const. art. 16, § 1, requiring that proposed constitutional amendments shall be "entered" on the respective journals of the Senate and Assembly, a proposed constitutional amendment need not be entered on the journal in full; it being sufficient if it be entered by an identifying reference.

2. CONSTITUTIONAL LAW ⟸14 — STATUTES ⟸188 — CONSTRUCTION — MEANING OF WORDS.

When a word is used in a statute or Constitution, it is supposed that it is used in its ordinary sense, unless the contrary is indicated.

3. HABEAS CORPUS ⟸27—MATTERS REVIEWABLE—MOOT QUESTIONS.

Where petitioner was arrested for violating the initiative prohibition act, and the district attorney elected to have the justice hold a preliminary hearing to bind over, on an original application for writ of habeas corpus to the Supreme Court, such court will not pass upon the objection that the proceedings were void as conferring upon the district court jurisdiction of a misdemeanor until a court without jurisdiction proceeds to exercise it, since until such time the question is moot.

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Original application by Frank Ming for a writ of habeas corpus. Writ discharged, petitioner remanded, and proceedings dismissed.

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McCarran, Miller & Mashburn, of Reno, for petitioner.

L. B. Fowler, Atty. Gen., Robert Richards, Deputy Atty. Gen., and L. D. Summerfield, Dist. Atty., of Reno, for respondent.

J. M. McNamara, of Elko, and S. W. Belford, of Reno, amici curiæ.

COLEMAN, C. J. This is an original proceeding in habeas corpus. A complaint was filed in the justice court of Reno township charging petitioner with having violated the initiative prohibition statute which was adopted by a vote of the people at the general election in November, 1918 (Stats. 1919, p. 1). After the arrest of the petitioner, the district attorney of Washoe county, pursuant to section 28 of the statute, filed with the justice of the peace an election to have that officer hold a preliminary hearing in said case.

Two grounds are strenuously urged for the issuance of the writ in this proceeding. The first is that the amendment to our Constitution providing for the enactment of laws upon the initiative of the people was not properly adopted; the second that the statute, wherein it authorizes the district attorney to elect to have a justice of the peace hold a preliminary hearing, attempts to confer upon both the justice of the peace and the district court jurisdiction of a misdemeanor, and is therefore in violation of the constitutional rights of petitioner.

The main question in this case is as to whether or not the amendment to our Constitution providing for the enactment of laws by submitting proposed statutes to the people by an initiative petition was adopted as provided by our Constitution. Section 1, art. 16, which provides the method of amending our Constitution, reads as follows:

"Any amendment or amendments to this Constitution may be proposed in the Senate or Assembly; and if the same shall be agreed to by a majority of all the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their respective journals, with the yeas and nays taken thereon, and referred to the Legislature then next to be chosen, and shall be published for three months next preceding the time of making such choice. And if in the Legislature next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the Legislature to submit such proposed amendment or amendments to the people, in such manner and at such time as the Legislature shall prescribe, and if the people shall approve and ratify such amendment or amendments by a majority of the electors qualified to vote for members of the Legislature voting thereon, such amendment or amendments shall become a part of the Constitution."

It is conceded by petitioner that all requirements of this section relating to amendments were complied with, except as to entering the amendment upon the journal. The Journal of the Assembly of 1908–1909, at page 79, shows:

"*Motions and Resolutions.*—By Mr. Brooks: Assembly Joint and Concurrent Resolution No. 7, proposing to amend section 1 of article IV of the Constitution of Nevada, pertaining to the initiative and referendum, and other legislative authority, and power connected therewith. On motion of Mr. Brooks, duly seconded, rules suspended, reading so far had considered first reading, rules further suspended, resolution read second time by title, and referred to committee on judiciary."

The resolution was thereafter adopted, the journal (page 143) showing that it was designated thereupon as "Assembly Joint and Concurrent Resolution No. 7." After the adoption in the Assembly it went to the Senate. The journal of that body shows:

"*Introduction and First Reading.*— * * * Assembly Joint and Concurrent Resolution No. 7, proposing to amend section one of article four of the Constitution of Nevada, pertaining to the initiative and referendum, and other legislative authority and power connected therewith. Senator Tallman moved that the rules be suspended, reading so far had considered first reading, rules further supended, bill be read second time by title, and referred to committee on judiciary. Carried. * * *

"*Reports of Committees.*—Mr. President: Your committee on judiciary have had Assembly Bill No. 107 under consideration and beg leave to report on the same with the recommendation that it be referred to committee on education.

"Also, Assembly Joint and Concurrent Resolutions Nos. 7 and 8, and beg leave to report the same by introducing substitutes, and recommending that the substitutes do pass. Clay Tallman, Chairman. * * *

"*Introduction and First Reading.*—Senate substitute for Assembly Joint and Concurrent Resolution No. 7, proposing to amend article nineteen of the Constitution by adding to said article section three, relating to the initiative and referendum and the powers thereby conferred upon the qualified electors.

"Senator Tallman moved that the rules be suspended, reading so far had considered first reading, rules further suspended, resolution be read second time by title, and referred to committee on judiciary. Carried."

Thereafter all references to the resolution, as appears from the journal, were to "Senate Substitute for Assembly Joint and Concurrent Resolution No. 7," and as such it was adopted by both houses of the Legislature. The question is: Do the statements contained in the journals constitute such an entry as the Constitution contemplates?

At the very threshold of the consideration of this question we are confronted with the case of State v. Tufly, 19 Nev. 391, 12 Pac. 835, 3 Am. St. Rep. 895, which counsel for petitioner contend is decisive of this mat-

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ter. We are unable to see that the case mentioned decides the point which is now under consideration. The court there says:

"No entry of the proposed amendment was made upon the journal of either house, and the question presented is whether or not this omission was fatal to the adoption of the amendment."

In this connection, we wish to call attention to certain language which we find in the work entitled "The Revision and Amendment of State Constitutions" (Dodd), commenting on the Tufly Case, where it is said, at page 148:

"* * * In Nevada, where an entry upon the journal was required, no entry whatever was made, and the proposed amendment was held invalid because of failure to comply with a specific constitutional requirement."

In a note to the text above quoted we find the following:

"* * * An examination of the journals shows no entry of any sort which can be identified as that of the amendment under consideration."

The enrolled resolution which was attacked shows that it passed February 28, 1883, and after a most exhaustive examination of the journals we fail to find in them any allusion whatever to the passage or adoption of the resolution, nor does counsel for petitioner point out in his brief where any allusion to its adoption or passage appears therein. Thus it is seen that not even an attempt was made "to enter" in the journal the proposed amendment involved in the Tufly Case.

In that case it was evidently a conceded fact that no entry had been made upon the journal of the proposed amendment. Not so in this matter. The real question here is: Was an entry made? If we find that no entry was made upon the journal, the Tufly Case would be an authority sustaining counsel's contention. It is true that in that case some expressions are found which seem to sustain the contention urged for it; but, as they are not based upon facts involved in the case, they are mere dicta, and the case cannot aid us in the least in determining the question before us. The law laid down in the Tufly Case cannot be questioned.

The case of Koehler v. Hill, 60 Iowa, 543, 14 N. W. 738, 15 N. W. 609, is the only authority cited in the Tufly Case which can be said to sustain the contention that, when a vote is had upon a proposed amendment in the legislative bodies, it must be entered in full upon the journals, and it is even conceded in that opinion that "to enter" on the journal does not necessarily mean spreading the same at length thereon; while the quotations from Judge Cooley are merely to the effect that the constitutional requirements are mandatory. Nowhere in the language quoted from him is it held that "to enter" the proposed amendment upon the journal means that the same must be spread at length thereon. Nor is such the holding in the case of Collier v. Frierson, 24 Ala. 108, referred to therein. The question involved in this proceeding was not before the court in that case. For the reasons given, we do not think we should be influenced by the Tufly Case.

But learned counsel for petitioner strenuously urges that the provision of the Constitution to the effect that a proposed amendment to the Constitution, when adopted by either branch of the Legislature, must be entered at length upon the journal of the body so adopting such amendment, is sustained by the weight of authority, and in support of this assertion, in addition to the authorities already mentioned by us, calls our attention to the following cases: Oakland Paving Co. v. Hilton, 69 Cal. 479, 11 Pac. 3; Kadderly v. City of Portland, 44 Or. 118, 74 Pac. 710, State v. Tooker, 15 Mont. 8, 37 Pac. 840, 25 L. R. A. 560; Durfee v. Harper, 22 Mont. 354, 56 Pac. 582; McBee v. Brady, 15 Idaho, 761, 100 Pac. 97; Nesbit v. People, 19 Colo. 441, 36 Pac. 221; People v. Sours, 31 Colo. 369, 74 Pac. 167, 102 Am. St. Rep. 34; People v. Loomis, 135 Mich. 556, 98 N. W. 262, 3 Ann. Cas. 751; State v. Marcus, 160 Wis. 354, 152 N. W. 419.

We will consider these cases in the order in which they have been named. The case of Oakland Paving Co. v. Hilton did not determine the question here involved. The opinion by Thornton, J., which lays down the rule invoked, was concurred in by only one justice, the other justices concurring in the order only.

The case of Kadderly v. City of Portland is no authority sustaining the contention which it is cited to support. It is said in the opinion:

"There is no question but that all the forms prescribed by the Constitution were strictly and accurately observed. * * *"

The contention in that case was that the Legislature of 1899 had no authority to propose the amendment. The question involved in this case was not under consideration.

As to the Colorado and Montana cases, learned counsel for petitioner concede that there is a "slight difference" between the constitutional provisions of those states and that of Nevada relative to the method of proposing amendments to the Constitution. We think the difference is very pronounced. The Constitution of Nevada provides that the proposed amendment shall "be entered" upon the journal, while the Constitutions of the states mentioned provide that the proposed amendment shall be "entered in full." This is such a marked difference that we feel it would be a waste of time to dwell

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upon the lack of applicability of the opinions from those states.

As to the case of McBee v. Brady, 15 Idaho, 761, 100 Pac. 97, it need only be said that the question as to what constituted an entry upon the journal (which is the point here involved) was not even considered. The court held that the method provided by the Constitution for its amendment must be followed, but it did not go into or determine the question of what was necessary to constitute an entry of an amendment upon the journal. Thus it will be seen that the case is not an authority sustaining the contention.

As to the case of People v. Loomis, the court expressly declined to pass upon the question here involved, saying:

"But it is unnecessary to determine the question, as we think that the journal of each house shows the resolution in full as passed by it."

It may be said that, when originally considered, the court, in State v. Marcus, 160 Wis. 354, 152 N. W. 419, adopted the view that is contended for by petitioner. However, upon rehearing the original opinion was reversed, and the opposite rule held to be the correct one. Marshall, J., who wrote the original opinion, filed an opinion vigorously dissenting from the prevailing opinion filed on rehearing, in which he said that "an entry by mere number or number and title is not sufficient, nor is an entry in extenso necessary." Thus it will be seen that upon rehearing he conceded that the proposed amendment did not have to be spread in full upon the journal. But Timlin, J., who participated in the consideration of the case upon both hearings, in his opinion upon rehearing says:

"When the first decision in this case was approved unanimously by this court, and filed, the opinion of the court was written by Justice Marshall, with a concurring opinion by Chief Justice Winslow. I think it is nowhere expressly stated in either of these opinions that the word 'entered' found in article 12 of the Constitution could be satisfied only by a verbatim record or a record in extenso of the proposed amendment."

This disposes of the authorities relied upon by the petitioner, and we think from an analysis of them that it is fair to say that the views urged by petitioner are sustained by the decisions from the court of last resort of the state of Iowa only; and there was a dissenting opinion in the first of those cases.

We will now consider the authorities that hold that the proposed amendment does not have to be entered in full upon the journal, but that an identifying reference is all that is necessary. The Supreme Court of California, in Oakland Paving Co. v. Tompkins, 72 Cal. 5, 12 Pac. 801, 1 Am. St. Rep. 17, speaking through Temple, J., said:

"The only question submitted is whether the constitutional amendment No. 1, ratified by the electors at the general election in 1884, being an amendment to section 19, art. 11, was proposed by the Legislature as required by section 1, art. 18, of the Constitution. That section provides that amendments may 'be proposed in the Senate and Assembly, and if two-thirds of all the members elected to each of the two houses shall vote in favor thereof, such proposed amendment or amendments shall be entered in the journals, with the yeas and nays taken thereon,' etc. The objection is, that the proposed amendment was not entered in the journal of either house, as required by the Constitution. It was not copied into the journal, but there was entered an identifying reference, such as is always entered in regard to legislative bills; that is, it was proposed as a Senate Bill and was referred to by title and number. The yeas and nays were entered as directed. It is agreed that the amendment thus proposed was submitted to the people, and received a very large majority of the votes cast. * * * All admit that the constitutional requirement must be strictly performed. But it does not follow from this that the language of the instrument must be understood literally. The same rules of construction must be applied, to ascertain what its requirements are, as though it were not mandatory and prohibitory. And we think, when an act commanded or authorized may be done in different ways, either of which would be a strict compliance with the terms of the instrument understood in some common and popular sense, either mode may be pursued, unless some reason is discoverable for holding that one of such modes only will answer. If, for instance, the direction to enter the amendment in the journal is complied with, in some usual and popular sense of the language, either by copying the amendment into the journal or by placing upon the journal an identifying reference only, either will do unless the context shows a different intention. Now, the word 'enter' primarily means to go in, or to come in, but has many derivative meanings, and is often employed in elliptical expressions, and is quite apt to be so used that the literal or most obvious meaning cannot be attributed to it. We read, for instance, in the laws of Congress that citizens may enter at the land office a tract of land, and the expression is repeated in different forms many times. We are often told that a certain horse has been entered for a race, or an animal has been entered at a fair. What is really done in each instance is to make a record of certain important facts for preservation or notice. And such is certainly a very ordinary meaning of the word 'enter' when used in this derivative sense; that is, to register the essential facts concerning the thing said to be entered. And we think it may be fully admitted that the most natural and obvious meaning of the word when employed in this derivative sense is to copy, without greatly affecting the argument. We find near the title page of nearly every book printed that it has been entered in the office of the Librarian of Congress. What is really left with the Librarian is the title page of the proposed book, and this constitutes the entry, although after it is printed the author is now required to present a copy of the book for the congressional library. We sometimes read that a certain play of Shakespeare was entered at Stationers' Hall. We find that the

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entry really made was a brief identifying reference, preliminary to obtaining license to print. Such instances of the use of the word, and of the phrase in which it occurs, might be multiplied indefinitely, but these are enough to show that this usage is quite common. Now, if we substitute in all these and like cases the word 'copy' or the phrase 'enter at large' for the word 'enter,' we are conscious at once that a great change has been made. Indeed, the mere fact that the qualifying words 'at large,' 'at length,' 'in full,' do so often accompany the word 'enter' is proof that all feel that it is not a synonym of the word 'copy.' * * * This is sufficient to uphold the amendment, unless we can see from the context that something else was meant. We perceive no such intent. The evident purpose of the entire provision doubtless was to preserve a record of the vote. As a majority controls the journals, it may have been apprehended that it might be made to appear that the proposal was duly passed, although lacking the requisite majority, and so it was required that the yeas and nays be entered. But, however this may be, the principal thing is the record of the yeas and nays, and this purpose is accomplished as perfectly by the entry made as it would be by any other. As to preserving the identity of the amendment proposed, there is no greater difficulty in this matter than with reference to bills."

This view was adhered to in an opinion by Thornton, J., in Thomason v. Ashworth, 73 Cal. 73, 14 Pac. 615.

Mr. Justice Brewer, than whom few, if any, have brought greater learning, ability, and wisdom to the Supreme Court of the United States, in Prohibitory Amendment Cases, 24 Kan. 700, in considering the identical question now presented for our consideration, said:

"The Constitution provides that the 'proposed amendments, together with the yeas and nays, shall be entered on the journal.' Article 14, § 1. Is the failure to enter this amendment at length on the journals fatal? It is well said by counsel that no change can be made in the fundamental law, except in the manner prescribed by that law. * * * In other words, proceedings under a Constitution to change that Constitution must be in accord with the manner prescribed by that Constitution. But this only brings us to the real question in this case: Is a proposition to amend the Constitution in the nature of a criminal proceeding, in which the opponents of change stand as defendants in a criminal action, entitled to avail themselves of any technical error, or mere verbal mistake; or is it rather a civil proceeding, in which those omissions and errors which work no wrong to substantial rights are to be disregarded? Unhesitatingly we affirm the latter."

The decision just mentioned was considered and quoted from at length by Maxwell, J., long an able and honored member of the Supreme Court of Nebraska, in Senate File No. 31, 25 Neb. 864, 41 N. W. 981. The court, in an unanimous opinion, concurred in the views expressed by Brewer, J., in the Kansas case.

In Cudihee v. Phelps, 76 Wash. 314, 136 Pac. 367, the Supreme Court of Washington, in an opinion by Parker, J., and unanimously concurred in, quoted with approval the language of the Supreme Court of California which we have quoted from Oakland Paving Co. v. Tompkins, supra. The same question was again before the court in Gottstein v. Lister, 88 Wash. 462, 153 Pac. 595, Ann. Cas. 1917D, 1008, the court adhering to the views formerly expressed.

The Supreme Court of South Dakota, in State ex rel. Adams v. Herried et al., 10 S. D. 109, 72 N. W. 93, in considering this question, said:

"The conflict in the adjudications results from a diversity of opinion regarding the meaning of the phrase 'enter on their journals,' as used in the several state Constitutions in reference to proposed amendments. The decisions cannot be reconciled. Perhaps it is proper to conclude that there is a slight preponderance of authority in favor of the identifying reference theory. This conflict existed in 1885, when our Constitution was framed. It should be presumed that the members of the constitutional convention exercised the utmost care in selecting appropriate language to express the results of their deliberations. What the convention intended should be the method of amending the instrument then prepared should govern the Legislature, and control this court in determining whether any alteration therein has been effected. In ascertaining what meaning the convention intended should be given the phrase in question, it would seem proper to presume that the convention was acquainted with the constructions which had been placed upon the same language, when used in the same connection, by the courts of the other states, and to presume that, had it been intended to restrict the Legislature to one of these constructions, all doubt would have been removed by employing the words 'entered at large.' Not having added the words 'at large,' it is reasonable to infer that it was intended to allow the Legislature the liberty of adopting either method of entry. In any event, language was employed which courts of the highest respectability have held to warrant either an entry in full or by an identifying reference. Under the modern methods of conducting legislative business, and preserving bills and joint resolutions, the action of the two houses and the contents of proposed amendments can be as safely and as surely preserved by one manner of entry as the other. The Legislature having adopted a construction sustained by, perhaps, the greater weight of authority—one which does not defeat any object intended to be secured by the Constitution—such action on its part is entitled to consideration by this court in ascertaining what interpretation shall be given to the language under discussion."

The Constitution of Maryland provides, as does ours, that a proposed amendment shall be entered on the journal. The Supreme Court of that state, in Worman v. Hagan, 78 Md. 152, 27 Atl. 616, 21 L. R. A. 716, in passing upon the sufficiency of the entry of a proposed amendment which read, "An act

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to amend section one of article seven of the Constitution of this state," said:

"We find that the Legislature by the act of 1890 (chapter 255), proposed an amendment to section 1st of article 7, and that the act was passed by three-fifths of all the members elected to each house. It was stated on the journal of each house that 'An act to amend section one of article seven of the Constitution of this state' was passed; and the yeas and nays are set forth, being more than three-fifths of all the members elected to each house. The requirements of the Constitution were in all respects observed, unless it is necessary, as maintained by the appellants, that the act should be set out verbatim on the journals. Each house had the bill in its possession when it passed it; and the bill was fully and clearly identified by its title. There would have been no greater certainty if every word of it had been recited. We must give a reasonable construction to the words of the Constitution. There was but one bill with this title. The entries on the journals of the two houses that this bill had been passed by the yeas and nays which were stated, described their legislative action as distinctly as it could be expressed. The yeas and nays were associated as closely as possible with the enactment contained in the bill; that is to say, with the proposed amendment. It was not in the power of any person to mistake the meaning of the entry.

[1] We have reviewed every case that has been called to our attention, or which we have been able to find, throwing any light upon the question under consideration, and we are of the opinion that the authorities, when carefully analyzed, will be found to be opposed to the view urged in behalf of petitioner, except in the cases from the state of Iowa, and the first case in that state on the subject was by a divided court. In view of the holding by the great majority of the courts, it would seem that we would not hesitate in reaching the conclusion that the entry in the journal in question is a sufficient compliance with the constitutional requirements.

[2] It is the contention that the constitutional convention intended that proposed amendments should be spread in full, at large, in extenso, upon the journal, so that no doubt might arise as to the provisions. This, in our opinion, is the only reason that can be urged to sustain the contention; yet, in view of another section of the Constitution, we do not think there is any reason why we should hold that the constitutional convention so intended, but there are persuasive reasons to justify our taking the contrary view. We think it a fair presumption that the men comprising the constitutional convention were among the most learned, experienced, and careful men of the then territory. Appreciating the great importance of the choice of the language which should be used, every word was carefully weighed. Hours were spent by our Constitutional convention, in some instances, in considering the propriety of using a particular word. When a word is used in a statute or Constitution, it is supposed it is used in its ordinary sense, unless the contrary is indicated. A careful investigation fails to show that the constitutional convention used the word "entered," in the connection in which it is now considered, in any other sense than that ordinarily given it; and that the convention did not mean, when it provided that, when a proposed amendment should be "entered" upon the journal, it should be spread thereupon in full, at large in extenso, is, we think, amply justified from consideration of other sections of the Constitution. Section 18 of article 4 provides that "all bills or joint resolutions" passed by each house "shall be signed by the presiding officers of the respective houses, and by the secretary of the Senate and the clerk of the assembly," and section 20 of article 5 provides:

"The secretary of state shall keep a true record of the official acts of the legislative and executive departments of the government, and shall, when required, lay the same * * * before either branch of the Legislature. * * *"

Thus we see that ample provision was made for the preserving of the joint resolutions which might be adopted, in the identical language in which adopted. This seems to conclusively show the lack of necessity of spreading joint resolutions at large upon the journals, and hence the probable reason why the Constitution does not provide for the entering in full of proposed amendments thereupon. In this connection, we think the language of this court in an unanimous opinion in the case of the State of Nevada v. Swift, 10 Nev. 185, 21 Am. Rep. 721, wherein the constitutional provisions mentioned were under consideration, is conclusive. The court said:

"Obviously, then, the journals have no greater intrinsic value as evidence than the enrolled bill, which, in compliance with the above-quoted provision of the Constitution, is signed and attested by the very same officers who sign the journals."

While we do not deem it necessary, in the light of what has been said, to present further reasons for sustaining the sufficiency of the journal entry questioned in this proceeding, it may nevertheless be of interest, as well as of value, to call attention to a rule of law laid down by Hawley, C. J., one of our distinguished predecessors. The language to which we allude will be found in the opinion in the case of State v. Glenn, 18 Nev. 35, 1 Pac. 189, and reads as follows:

"The Constitution does not deal in details. In construing the provision in question we must consider the modes of thought which give expression to the language used, in connection with the usage and custom pertaining to the duty of officer named in the Constitution, in order to determine what was meant. The inten-

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tion of those who framed the instrument must govern, and that intention may be gathered from the subject-matter, the effects and consequences, or from the reason and spirit of the law. Even where the language admits of two senses, each conformable to common usage, that sense should be adopted which, without departing from the literal import of the words, best harmonizes with the object which the framers of the instrument had in view. 'Perhaps the safest rule of interpretation, after all, will be found to be to look to the nature and objects of the particular powers, duties, and rights with all the lights and aids of contemporary history, and give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed.' 1 Story, Const. § 405a. This rule is subject to some qualifications, which it is here unnecessary to discuss. Id. § 406. * * *

"We glean from this history that the co-ordinate departments of the state government, including among its numbers several persons who were members of the constitutional convention, have for the past 19 years construed the provision of the Constitution as giving the authority to the assistant clerk of the assembly and the assistant secretary of the Senate to sign the bills and joint resolutions which passed the respective houses. The people of the state have acquiesced in that construction, and it has received the apparent sanction of the courts, although it has never before, to our knowledge, been called in question. Property and other rights have vested, and ought not to be overthrown unless it is manifest that the construction given by the other departments is absolutely erroneous. Even in such cases courts of great ability have hesitated, and, in some extreme cases, refused, to declare the law unconstitutional. But, from the views we have expressed, it will be observed that we do not consider the construction, as given by the other departments, erroneous. We believe it is correct; still, if it is not free from doubt—and that, it seems to us, is the most that can be said—it is clearly our duty to give some weight to the construction which has been deliberately given by the legislative and executive departments. Evans v. Job, 8 Nev. 338. 'Great deference is certainly due to a legislative exposition of a constitutional provision, and especially when it is made almost contemporaneously with such provision, and may be supposed to result from the same views of policy and modes of reasoning which prevailed among the framers of the instrument expounded.' People v. Green, 2 Wend. [N. Y.] 275."

See, also, 6 R. C. L. 63.

The force of this language will be readily realized, in view of the fact that at an early period in the history of this state a proposed constitutional amendment was adopted, and the journal entry thereof was not in full, but was in the nature of an identifying reference only. See Journal of the Assembly 1879, Ninth Session, at page 301, relative to Senate Joint Resolution No. 28, and Senate Journal of the same session, at page 221, relative to the same resolution.

It is urged by the learned Attorney General that the courts should not hold the amendment to the Constitution in question invalid, for the reason that, if we were to do so, it would necessarily follow that many important laws upon the statute books would be affected thereby, among which he enumerates the act providing for the prosecution of felonies by information, the law conferring the right of suffrage upon the women of the state, certain laws relative to taxation, and laws pertaining to bonds for highway improvements. Respectable authority exists sustaining the contention made, but, in view of the conclusion we have reached, we do not deem it necessary to pass upon this point, and for the same reason we do not think that we need to review other points urged upon us in behalf of respondent.

[3] We come now to the second contention made in behalf of petitioner. After setting forth the fact that the district attorney had elected to have the justice of the peace hold a preliminary hearing, and that the justice made an order directing that a preliminary hearing be had upon the charge, the petition alleges "that said proceedings, election, and order, and the whole thereof, are contrary to law and void," for the reason that the justice of the peace has no jurisdiction to proceed with a preliminary hearing upon the ground that the district court has no jurisdiction in misdemeanor cases. To sustain the contention our attention is invited to the case of Moore v. Orr, 30 Nev. 458, 98 Pac. 398. We have no doubt but that the court reached the correct conclusion in that case; and should the justice of the peace go through the formality of holding a preliminary hearing, and at the conclusion thereof order that the petitioner be held to answer to the district court, we are not prepared to say that jurisdiction would be acquired by the district court to proceed with the trial. On the other hand, if the contention of petitioner to the effect that the election of the district attorney and the order of the justice that a preliminary be held are null and void, such action stands, in legal effect, as though it had never been taken, and the justice of the peace has complete jurisdiction to proceed to trial upon the merits. Thus, assuming the contention of learned counsel for petitioner to be correct as to the law, for us to undertake to pass upon the legal question until a court which is without jurisdiction proceeds to exercise jurisdiction would be to pass upon a moot question—something courts invariably refuse to do. Pacific Live Stock Co. v. Mason Valley Mines Co., 39 Nev. 105, 153 Pac. 431.

It follows from what we have said that the writ heretofore issued herein must be discharged, the petitioner remanded, and these proceedings dismissed.

It is so ordered.

SANDERS and DUCKER, JJ., concur.

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(56 Mont. 63)

KELLEY v. JOHN R. DAILY CO.
(No. 3973.)

(Supreme Court of Montana. May 10, 1919.)

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1. FOOD ⟸25—PURE FOOD AND DRUG ACT—POLICE REGULATIONS—LIABILITY OF DEFENDANT IN DAMAGES FOR VIOLATION OF LAW.

The Pure Food and Drug Act is a general police regulation, recognizing that the sale of adulterated foodstuff is a constant menace to the health of the consuming public, and the duty it enjoins upon the seller is such that a violation thereof renders him liable for special damages sustained by the consumer.

2. FOOD ⟸25—PURE FOOD AND DRUG ACT—ACTION FOR DAMAGES FOR INJURY TO HEALTH—COMPLAINT—SUFFICIENCY.

A complaint alleging that, at the time of the sale of impure food by defendant to plaintiff, defendant was engaged in selling at retail, to the public generally, meat and meat products for human consumption, is sufficient to bring the case within the statute, and disclose the duty defendant owed to the public, including plaintiff, to see that its food products offered for sale were not adulterated within the meaning of such statute.

3. FOOD ⟸25—PURE FOOD AND DRUG ACT—PERSONAL INJURY — NEGLIGENCE — COMPLAINT.

A charge in a complaint that defendant sold and delivered to plaintiff's husband, for immediate use in his family, including plaintiff, adulterated meat containing "diseased, infected, putrid, decomposed, poisonous acid and animal matter," charges defendant with a violation of the Pure Food and Drug Act, and with breach of duty constituting legal negligence.

4. FOOD ⟸25—PURE FOOD AND DRUG ACT—SALE OF ADULTERATED FOOD—SELLER'S LIABILITY AS INSURER—GOVERNMENT STAMP OF APPROVAL.

The seller is made insurer of the purity of food products he sells, and his guilty knowledge is not an ingredient of the offense, and the obligation is personal, and cannot be avoided by showing that the impure food was purchased from a foreign concern and bore the stamp of approval by the government inspectors.

5. FOOD ⟸25—PURE FOOD AND DRUG ACT—VIOLATION—LIABILITY OF SELLER—NEGLIGENCE OR WARRANTY.

A seller's warrant of purity extends to the public generally, and his liability rests upon the principle that his sale of impure food was unlawful, that he is responsible for the natural consequences of his wrongful act, and his liability arises from violation of statute, and it is immaterial whether the foundation is laid in negligence or warranty.

6. FOOD ⟸25—PURE FOOD AND DRUG ACT—VIOLATION—ACTION FOR DAMAGES FOR PERSONAL INJURIES—COMPLAINT—SUFFICIENCY.

A complaint alleging that as the direct and proximate result of the sale of impure food by defendant to plaintiff's husband, and her partaking of such food, she was made violently ill, to her great damage, discloses the duty, the breach, and the resulting damage, and is sufficient.

7. PLEADING ⟸35, 48—COMPLAINT—SUFFICIENCY—FORM OF ACTION.

Under Rev. Codes, § 6425, there being but one form of civil action in this state, a statement of facts constituting the cause of action, with other matters enumerated in section 6532, is sufficient, and a complaint disclosing a violation of statute and resulting damage is not rendered insufficient because it contains superfluous allegations.

8. STATUTES ⟸279 — PLEADING JUDICIAL NOTICE OF GENERAL STATUTES.

In an action for personal injuries for violation of the Pure Food and Drug Act, it is not necessary for plaintiff to refer to the act, since the court takes judicial notice of the general and public domestic statutes, and they need not be specially pleaded (Rev. Codes, § 7888).

9. FOOD ⟸25 — PLEADING ⟸35 — PURE FOOD AND DRUG ACT—VIOLATION—INJURY—COMPLAINT—ALLEGATION OF KNOWLEDGE.

In an action for damages for personal injuries resulting from defendant's violation of the Pure Food and Drug Act, it is unnecessary that the complaint allege that defendant knew, or in the exercise of reasonable care should have known, of the impure condition of the food at the time of sale, and such an allegation is surplusage.

10. FOOD ⟸25—PURE FOOD AND DRUG ACT—VIOLATION—ACTION FOR DAMAGES—UNWHOLESOMENESS—CHEMICAL ANALYSIS.

While there must be substantial evidence proving, or tending to prove, the causal connection between defendant's negligent selling of impure food in violation of law and plaintiff's injury from eating the same, the rule does not require that a chemical analysis of the food be made in order to establish its impurity or unwholesomeness.

11. FOOD ⟸25—PURE FOOD AND DRUG ACT—VIOLATION—DAMAGES FOR PERSONAL INJURIES.

In an action for injuries resulting from eating impure meat sold by defendant in violation of law, evidence *held* sufficient to warrant finding that the meat was adulterated when sold by defendant, and that plaintiff's illness resulted proximately from eating it.

12. ACTION ⟸38(1)—PURE FOOD AND DRUG ACT—VIOLATION—ACTION FOR DAMAGES—COMPLAINT — CAUSE OF ACTION — COMPELLING TO ELECT.

A complaint in an action for damages against a seller of meat for violation of the Pure Food and Drug Act, *held* to state but a single cause of action for damages arising from violation of statutory duty, so that defendant's motion to compel plaintiff to elect was properly overruled.

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13. FOOD ⟸25—SALE OF IMPURE FOOD—VIOLATION OF LAW—LIABILITY FOR INJURIES—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

Notwithstanding the statutory liability of the defendant seller of impure food, the defense of plaintiff's contributory negligence in eating it was available; but contributory negligence is not to be presumed, but must be made to appear by evidence offered either by plaintiff or defendant.

14. TRIAL ⟸252(7)—REFUSAL OF INSTRUCTION—EVIDENCE.

An instruction on contributory negligence, not justified by the evidence, was properly refused.

15. TRIAL ⟸253(9) — INSTRUCTION — IGNORING EVIDENCE.

In an action for injuries against the seller of impure meat, where there was nothing in its appearance to justify plaintiff in discarding it as unfit for human consumption, and she could rightfully assume that the Pure Food and Drug Act had been observed, and that the meat was wholesome, and she was assured by defendant that its bleached condition was occasioned by overcooking, and that it was all right, an offered instruction ignoring such circumstances, and predicating negligence upon plaintiff's opportunity to examine the meat, was properly refused.

16. DAMAGES ⟸149—PURE FOOD AND DRUG ACT — VIOLATION — MENTAL SUFFERING—PLEADING.

In an action for injury arising out of defendant's violation of the Pure Food and Drug Act, a contention that the complaint alleges no suffering other than physical is without merit, where the complaint alleges plaintiff "has suffered great and excruciating pains and mental suffering."

17. DAMAGES ⟸216(1)—TRIAL ⟸296(11)—INSTRUCTIONS.

An instruction in action for injuries from sale of impure food that, if jury found issues for plaintiff, they might award damages in such amount "as they believed" would compensate her, is erroneous, but it is a case of nondirection, for which judgment should not be reversed, in view of Rev. Codes, § 6745, relating to duty of jury, and in view of instructions on preponderance of evidence.

18. TRIAL ⟸256(4) — INSTRUCTION — OMISSION TO INSTRUCT—FAILURE TO GIVE SPECIFIC INSTRUCTION.

The failure of the court to impress upon the jury's attention the necessity of rendering a verdict on the evidence alone, being one of omission rather than commission, was not reversible error, in the absence of appellant's request for a more specific instruction (Rev. Codes, § 6593).

19. EVIDENCE ⟸555—PHYSICIAN'S TESTIMONY BASED ON EXAMINATION AND HISTORY.

In an action for personal injuries, it was proper for a family physician, who had attended plaintiff, to give his opinion or diagnosis of the case, based upon his examination and the history of the case as disclosed by plaintiff.

20. EVIDENCE ⟸506—EXPERT TESTIMONY—CONCLUSION—ULTIMATE FACT.

When the conclusion to be drawn from the facts stated depends upon professional or scientific knowledge or skill, not within the range of ordinary training or intelligence, the conclusion may be stated by a qualified expert, even though it is the statement of an ultimate fact to be found by the jury.

21. EVIDENCE ⟸553(2, 3), 570—EXPERT TESTIMONY — HYPOTHETICAL QUESTION — WEIGHT.

In putting a hypothetical question counsel may assume as established for the time being all facts in evidence tending directly or by fair inference to establish his theory, and need not embody all the evidence on the subject, and, if opposing counsel does not think the question incorporates all of the facts in evidence, he can include them in questions propounded by himself, and it is for the jury to say whether the facts assumed by the question are really established, and whether the opinion of the witness has any probative value.

22. TRIAL ⟸133(6)—MISCONDUCT OF COUNSEL—PREJUDICE—REMOVAL BY COURT'S ADMONITION.

In an action for injuries resulting from defendant's violation of the Pure Food and Drug Act, the act of plaintiff's counsel in asking questions, to show that defendant had been previously prosecuted for violation of such law, if prejudicial misconduct, must be regarded as removed by the court's admonition to the jury thereon.

23. NEW TRIAL ⟸77(2)—EXCESSIVE DAMAGES AS GROUND FOR NEW TRIAL—PASSION AND PREJUDICE.

That a verdict for damages appears to be excessive is not ground for a motion for new trial unless the excessive damages appear to have been given under the influence of passion or prejudice, and new trial will not be granted for that reason (Rev. Codes, § 6794, subd. 5).

24. DAMAGES ⟸96 — EXCESSIVE DAMAGES — MEASURE—LATITUDE FOR JURY'S JUDGMENT.

There being no standard fixed by law for measuring the value of human health and happiness, in every personal injury case wide latitude must be allowed for exercise of the jury's judgment, and, unless the amount is so grossly out of all proportion to the injury received as to shock the conscience, the court cannot substitute its judgment for that of the jury.

25. APPEAL AND ERROR ⟸1001(1)—VERDICT—SUFFICIENCY OF EVIDENCE.

A verdict based on sufficient evidence will not be disturbed.

26. DAMAGES ⟸132(2)—EXCESSIVE DAMAGES—INJURY RESULTING FROM EATING IMPURE FOOD.

In an action for damages resulting from defendant's sale of impure food in violation of law, where plaintiff was 37 years of age, in good health, the mother of two young boys, and as the result of eating meat contracted diarrhœa, which became chronic, and lost control of other organs of the body, and became

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practically a nervous wreck, and any prospect of improvement is problematical, and she suffered mental distress, a recovery of $10,000 is not out of proportion to the extent of the injury.

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Appeal from District Court, Missoula County; R. Lee McCulloch, Judge.

Action by Lillie M. Kelley against the John R. Daily Company. From a judgment for plaintiff and an order denying its motion for a new trial, defendant appeals. Judgment affirmed.

Wm. L. Murphy, E. E. Hershey, and A. N. Whitlock, all of Missoula, for appellant.

H. H. Parsons, of Missoula, and John G. Brown and Ed. Horsky, both of Helena, for respondent.

HOLLOWAY, J. Hugh Kelley, the husband of plaintiff, purchased from the defendant six cooked and spiced pigs' feet for food for his family, consisting of himself, his wife, and two sons. On the day following the members of the family ate of the meat, and immediately thereafter the husband, the wife, and one son became ill. Plaintiff brought this action to recover damages, and prevailed in the lower court. Defendant appealed from the judgment and from an order denying its motion for a new trial.

[1] Counsel for appellant discuss at great length, and with much learning, the several theories under which recovery may be permitted in an action for damages arising from the sale of impure food. It is the contention that this complaint does not state facts sufficient to make out a cause of action under any theory recognized by the law. If we had no governing statute in this state, the question of the sufficiency of the complaint might present an interesting subject of inquiry; but, in our judgment, much of the argument of appellant's counsel is beside the mark.

Chapter 130, Laws of 1911 (the Pure Food and Drug Act), makes it unlawful for any person, firm, or corporation to sell, or offer for sale, any article of food which is adulterated. The term "food" is defined to include "all articles used as food, drink, confectionery or condiment by man or animals." Section 1. An article of food is deemed to be adulterated "if it contains any proportion of a filthy, diseased, decomposed, putrid or rotten animal or vegetable substance," or "if it contains any added poisonous or other added deleterious ingredient." Section 2.

"Actionable negligence arises only from a breach of legal duty, and, to state a cause of action for damages resulting from negligence, it is necessary that the complaint disclose the duty, the breach, and the resulting damages." Fusselman v. Yellowstone Valley L. & I. Co., 53 Mont. 254, 163 Pac. 473, Ann. Cas. 1918B, 420. It is elementary that the duty, the breach of which is made the gist of the action, must be a duty which the defendant owes to the plaintiff.

In Conway v. Monidah Trust, 47 Mont. 269, 132 Pac. 26, L. R. A. 1915E, 500, we reviewed at length the authorities which have considered statutes of the same general character, and the discussion need not be repeated here. It is sufficient for the purpose of this case to say that the Pure Food and Drug Act is a general police regulation, which recognizes the fact that the sale of adulterated foodstuff is a constant menace to the health of the consuming public, and the duty enjoined by it upon the seller is such that a violation of it can affect the public health only through the individuals who are injuriously affected by partaking of such food. The duty imposed upon the vendor is one which extends to the public considered as a composite of individuals, and, if the plaintiff sustained some special injury by reason of defendant's violation of the statute, her right to recover cannot be questioned.

[2] It is alleged in the complaint that at the time of the sale the defendant was engaged in business in Missoula county, selling at retail, to the public generally, meat and meat products for human consumption. These facts are sufficient to bring the case within the statute and to disclose the duty which the defendant owed to the public, including the plaintiff, to see to it that the food products offered for sale were not adulterated, within the meaning of that term as employed in the statute.

[3] It is further alleged that the defendant sold and delivered to Hugh Kelley, for the immediate use of his family, including plaintiff, six cooked and spiced pigs' feet, which were adulterated, in that they "contained in and on them diseased, infected, putrid, decomposed, and poisonous acid and animal matter." By this allegation the defendant is charged with a violation of the statute and a breach of duty, and such violation is of itself legal negligence. The subject is not a new one. It has been before this court on many occasions.

By an Act approved September 13, 1887 (Extra Session 15th Territorial Legislature, p. 68), the amount of high explosives which any one was permitted to store in a city, town, or village was limited to 50 pounds. The violation of that statute resulted in the death of several members of the police force of Butte. It was held that the corporation guilty of the violation was subject to punishment as for a misdemeanor, and was likewise liable for damages in a civil action at the suit of the personal representative of one of the deceased firemen. Cameron v. Kenyon-Connell Com. Co., 22 Mont. 312, 56 Pac. 358, 44 L. R. A. 508, 74 Am. St. Rep. 602.

Section 8536, Revised Codes, requires the

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use of safety cages in certain mining operations, and it was held that the violation of the statute gives rise to an action for damages to an employé injured by the failure of the employer to observe the law. Monson v. La France C. Co., 39 Mont. 50, 101 Pac. 243, 133 Am. St. Rep. 549.

Section 4289 requires a railway company, in the operation of trains, to give certain designated signals on approaching crossings, and this court held that the failure of a railway company to observe the law constitutes negligence. Hunter v. Montana C. Ry. Co., 22 Mont. 525, 57 Pac. 140; Sprague v. Northern Pac. Ry. Co., 40 Mont. 481, 107 Pac. 412; De Atley v. Northern Pac. Ry. Co., 42 Mont. 224, 112 Pac. 76.

By section 8535, Revised Codes, the owner of a mining shaft within the limits of a city, town, or village, or within one mile of such limits, is required to protect the same by fence or covering. It was held that the owner who disregarded the statute was liable in damages to one injured by reason thereof, and that failure to observe the law is negligence per se. Conway v. Monidah Trust, above.

Section 1739, Revised Codes, limits the period of labor in underground mines to eight hours per day. Speaking of the application of the rule under consideration to the facts of that case, this court said:

"It is the general rule that, where a statute makes a requirement or prohibits a thing, for the benefit of a person or class of persons, one injured by reason of a violation of it is entitled to maintain an action against him by whose disobedience he has suffered injury; and this is true whether the statute is penal in its character or not. [Citing authorities.] A violation of the statute is negligence per se, or, properly speaking, legal negligence." Melville v. Butte-Balaklava Copper Co., 47 Mont. 1, 130 Pac. 441.

These cases sufficiently illustrate the principle involved. The statutes considered are all police regulations, designed to protect the health and safety of the people and promote the general welfare, and, in principle, are not distinguishable from the Pure Food and Drug Act. Meshbesher v. Channellene Oil & Mfg. Co., 107 Minn. 104, 119 N. W. 428, 131 Am. St. Rep. 441.

[4, 5] Prior to the enactment of chapter 130, above, there were in force at different periods of our history statutes obviously intended to protect the public health by regulating the sale of impure food, but in every instance the statute made the knowledge on the part of the seller of the impurity of the food sold the gist of the offense. Section 686, Penal Code 1895; Section 8496, Rev. Codes. Those statutes proceeded upon the theory that a dealer who sold impure food knowing it to be impure was guilty of perpetrating a fraud upon the public. Section 682, Penal Code 1895. In the enactment of the Pure Food and Drug Act, however, a different theory was adopted. The sale of adulterated food is absolutely prohibited. The seller is made the insurer of the purity of food products sold by him, and guilty knowledge on his part is no longer an ingredient of the offense. The obligation imposed by the statute is personal, and cannot be avoided by showing that the impure food was purchased from a foreign concern, and bore the stamp of approval of the government inspectors. Rinaldi v. Mohican Co., 171 App. Div. 814, 157 N. Y. Supp. 561; Catani v. Swift & Co., 251 Pa. 52, 95 Atl. 931, L. R. A. 1917B, 1272. Under section 5115, Revised Codes, the warranty of food offered for sale extended only to the immediate purchaser, evidently upon the theory that it arose out of the contractual relations of the parties. Under chapter 130 the warranty extends to the public generally, and the liability of the vendor rests upon the principle that his original act in selling impure food was unlawful, and that he is responsible for the natural consequences of his wrongful act. But, in any event, the liability arises from a violation of the statute, and it is immaterial whether the foundation is laid in negligence or warranty.

[6] The plaintiff alleges, further, that as the direct and proximate result of the sale of this impure food, and her partaking of it, she was made violently ill, to her great damage. The complaint discloses the duty, the breach, and the resulting damage, and is therefore sufficient under the authorities cited.

[7] There is but one form of civil action in this state (section 6425, Rev. Codes), and a statement of the facts constituting the cause of action, with the other matters enumerated in section 6532, Revised Codes, is all that is required. If the facts stated disclose a violation of the statute and the resulting damage, the complaint is not rendered insufficient because it contains other allegations which might have been omitted.

[8] It was not necessary for plaintiff to refer to the Pure Food and Drug Act in order to recover damages for injuries arising from a violation of it. The courts take judicial notice of the general and public domestic statutes, and they need not be specially pleaded. Rev. Codes, § 7888; 36 Cyc. 1236, 1237.

[9] Under the theory adopted, the allegation that defendant knew, or in the exercise of reasonable care should have known, of the impure condition of the food at the time of the sale, is surplusage, and the objection to instruction No. 2 was properly overruled.

[10, 11] This court has frequently recognized the rule for which appellant contends: That there must be substantial evidence proving, or tending to prove, the causal connection between defendant's negligence and

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plaintiff's injury; but the rule does not require that a chemical analysis be made of food in order to establish the fact that it is impure or unwholesome. Evidence was introduced to show the manner in which this meat was handled by defendant; that it was exposed to dust and flies; that it was sold for the use of plaintiff; that as a result of eating it she was made violently ill; and that her illness was attributable to food poisoning. The jurors likewise had before them the fact that the meat was kept by plaintiff 24 hours before it was used and the manner in which it was kept. Without reviewing the testimony at length, we think it is sufficient to warrant a finding that the meat was adulterated when sold by defendant, and that plaintiff's illness resulted proximately from eating it.

[12] The complaint states but a single cause of action, viz. a cause of action for damages arising from the violation of a duty imposed by statute. Defendant's motion to compel plaintiff to elect was therefore properly overruled.

[13-15] Notwithstanding the statutory liability of the defendant, the defense of contributory negligence was available. Melville, v. Butte-Balaklava C. Co., above. But contributory negligence is not to be presumed. It must be made to appear from the evidence, and it may appear from the evidence offered by the plaintiff. In Harrington v. Butte, A. & P. Ry. Co., 37 Mont. 169, 95 Pac. 8, 16 L. R. A. (N. S.) 395, we announced the rule as follows: "Whenever the plaintiff's own case presents evidence which, if unexplained, would make out prima facie contributory negligence on his part, there must be further evidence exculpating him or he cannot recover." Defendant offered no evidence of contributory negligence, but, in reliance upon the testimony of plaintiff, sought to have the question presented by an offered instruction. The court did not err in refusing the instruction, for either of two reasons: It does not state the rule of law correctly, and in our opinion the evidence does not justify the submission of the question. While the plaintiff had the opportunity to examine the meat before she ate it, there was nothing in its appearance to justify her in discarding it as unfit for human consumption. She had the right to assume in the first instance, that the law had been observed and that the meat was wholesome. Furthermore, she had the assurance of the defendant, conveyed to her by her husband, that the bleached condition was occasioned by overcooking and that the meat was all right. The offered instruction ignored the surrounding circumstances, and predicated negligence upon her opportunity to examine the meat, and upon that alone.

[16] The court refused to limit plaintiff's right to recover to damages arising from physical pain. It is not contended that mental suffering is not a proper element to be considered under appropriate pleadings; but it is said in appellant's brief that "the complaint alleges no suffering other than physical suffering." This contention is without merit. Plaintiff alleges that, as the direct and proximate result of eating the meat, she was made sick, describing the sickness in detail, and "plaintiff has suffered great and excruciating pains and mental suffering."

[17, 18] By paragraph 11 of the charge the jurors were told that, if they found the issues in favor of the plaintiff, they might award damages in such amount as they believed would compensate her, etc. It is urged that by this instruction the jurors were left free to disregard the evidence and base the amount of recovery upon their individual views of the extent of the injury; and Rugenstein v. Ottenheimer, 78 Or. 371, 152 Pac. 215, Ann. Cas. 1917E, 953, is cited to support the contention that for the error in this instruction a new trial should be ordered. While the law imposes upon the jurors the duty to consider the evidence alone in estimating the amount of damages, it does not follow that the judgment should be reversed because of the failure of the court to impress that fact upon their attention, and, so far as our investigation discloses, the case cited stands alone in the extreme view adopted. The authorities generally treat an instruction of this character as nonprejudicial. It presents a case of nondirection, rather than misdirection, of omission rather than commission. Every jury, before it enters upon its consideration of a case, is solemnly sworn to well and truly try the matter in issue and a true verdict render according to the evidence. Section 6745, Rev. Codes. The court in instruction No. 1 advised the jury that every element essential to a recovery must be established by a preponderance of the evidence, and, though this rule was not made applicable to the amount of recovery by specific direction, we think it is impossible that defendant suffered prejudice by reason thereof. It is equally the duty of the jury to accept the law as given by the court; but the failure of the court to so instruct the jury is not reversible error. These are questions common to the trial of every civil action, and some presumption in favor of the intelligence of the jurors must be indulged. The defendant did not request a more specific instruction, and, in the absence of some suggestion that prejudice resulted, we are not warranted in interfering. Rev. Codes, § 6593.

If every microscopic defect in the proceedings of a trial is to be counted prejudicial error, litigation will become interminable over subtle refinements and legal quibbles which never affect the decision of the merits. The late Henry B. Brown, afterwards Associate Justice of the Supreme Court of the United States, said:

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"There is nothing which tends to belittle the authority of courts or to impair the confidence of the public in the certainty of justice so much as the habit of reversing cases for slight errors in admitting testimony, or trifling slips in the charge. I have in mind one case which was carried to the Supreme Court six times and was reversed every time. Better by far the practice of the English courts and the federal Supreme Court, where every intendment is made in favor of the action of the lower court, and cases are rarely reversed except for errors going to the very merits—errors which usually obviate the necessity of a second trial." Report of American Bar Association 1889, p. 285.

For authorities supporting the view that the giving of this instruction did not constitute reversible error, see Burr v. McCallum, 59 Neb. 326, 80 N. W. 1040, 80 Am. St. Rep. 677; M. O. & G. Ry. Co. v. Adams, 52 Okl. 557, 153 Pac. 200; Birmingham & R. R. Co. v. Lee, 153 Ala. 386, 45 South. 164; Austin Fire Ins. Co. v. Sayles (Tex. Civ. App.) 157 S. W. 273; Isaacs v. McLean, 106 Mich. 79, 64 N. W. 2; Gorman v. People, 17 Colo. 596, 31 Pac. 335, 31 Am. St. Rep. 350; Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 29 Sup. Ct. 270, 53 L. Ed. 453.

[19] Dr. Dodds, the family physician who attended plaintiff, was permitted to give his opinion or diagnosis of the case based upon the examination he made of the patient and the history of the case as disclosed to him by her. It is contended that his opinion, based in part upon information furnished by the patient, was inadmissible, and cases may be found sustaining this view; but the overwhelming weight of authority approves the rule announced in Barber v. Merriam, 11 Allen (Mass.) 322. The discussion of the subject is lengthy, and cannot be reproduced here. Among other things the court said:

"The opinion of a surgeon or physician is necessarily formed in part on the statements of his patient, describing his condition and symptoms, and the causes which have led to the injury or disease under which he appears to be suffering. This opinion is clearly competent as coming from an expert."

It was held, further, that the physician, with the patient's consent, may testify to the statements made to him by the patient, and upon which, in part, he based his diagnosis and treatment. The reasoning of the court commends itself to our judgment. Cases supporting this rule will be found cited in Rogers on Expert Testimony, § 47, and in 11 R. C. L. 610.

[20, 21] A hypothetical question was propounded to Dr. Brooke, in which was recited a history of plaintiff's condition before she ate the meat in question, the fact that she ate of the meat, and the history of her subsequent illness, and upon the facts recited Dr. Brooke was asked to give his opinion as to the cause of the illness. It is urged that the evidence was improperly received (1) because the question called for a statement of an ultimate fact to be determined by the jury, (2) because the question was predicated upon part only of the evidence upon the subject, and (3) because the opinion could not have evidentiary value.

In Copenhaver v. Northern Pac. Ry. Co., 42 Mont. 453, 113 Pac. 467, we adopted the rule that whenever the conclusion to be drawn from the facts stated depends upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence, the conclusion may be stated by a qualified expert, even though the conclusion is a statement of an ultimate fact to be found by the jury. The rule as thus stated is supported by the decided weight of authority and by the better reasoned cases.

In Rogers on Expert Testimony, § 50, it is said that a witness skilled in the science and practice of medicine may state his opinion that a person's ill health resulted from a certain cause. In Transportation Line v. Hope, 95 U. S. 297, 24 L. Ed. 477, it is held that it is not an objection that an expert witness is asked a question involving the point to be decided by the jury. To the same effect are Daly v. City of Milwaukee, 103 Wis. 588, 79 N. W. 752; Mutual Life Ins. Co. v. Shipman, 119 N. Y. 324, 24 N. E. 177.

In De Sandro v. Missoula L. & W. Co., 52 Mont. 333, 157 Pac. 641, we said:

"In putting a hypothetical question, counsel may assume as established, for the time being, all the facts in evidence tending, directly or by fair inference, to establish his theory of the case. * * * He need not embody all the evidence on the subject to which it relates. If opposing counsel does not think the question incorporates all of the facts in evidence, he can include them in questions propounded by himself. * * * It is then for the jury to say whether the facts assumed by the question are really established and whether the opinion of the witness has any probative value."

This answers completely the other objections to the question propounded to Dr. Brooke.

[22] One of the counsel for plaintiff is charged with misconduct in asking certain questions intended to solicit the information that prior to the sale of the meat in question the defendant had been prosecuted for violating the pure food law. The court properly sustained objections to the questions, and directed the jury to disregard the fact that the questions had been asked. We do not agree with appellant that there was misconduct on the part of counsel; but, under any view of the matter, the admonition to the jury must be accepted as removing any prejudicial effect. Pascoe v. Nelson, 52 Mont. 405, 158 Pac. 317.

[23] Plaintiff was awarded damages in the

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sum of $10,000, and complaint is made that the verdict is excessive. In passing we may observe that the fact that a verdict appears to be excessive is not a ground for a motion for a new trial. It is only when the excessive damages appear to have been given under the influence of passion or prejudice that a new trial may be granted for that reason. Section 6794, subdiv. 5, Rev. Codes.

[24] There is no standard fixed by law for measuring the value of human health or happiness. In every case of personal injury a wide latitude is allowed for the exercise of the judgment of the jury, and, unless it appears that the amount awarded is so grossly out of all proportion to the injury received as to shock the conscience, this court cannot substitute its judgment for that of the jury. Armitage v. Chicago, M. & St. P. Ry. Co., 54 Mont. 38, 166 Pac. 301; White v. Chicago, M. & St. P. Ry. Co., 49 Mont. 419, 143 Pac. 561. The appearance of the witnesses on the stand, their manner in testifying, their apparent candor or lack of it, are all elements which enter into an estimate of their credibility. These elements were present in the lower court, but cannot be reproduced here.

[25] It was for the jury to determine whether the evidence touching the character and extent of plaintiff's illness was worthy of credit, and the verdict is their answer to the inquiry, Was she malingering or was she seriously injured? There is ample evidence from which the jury could conclude that at the time of partaking of the meat plaintiff was 37 years of age, in good health, and the mother of two young boys; that, as the result of eating this meat, she contracted diarrhœa, which has apparently become chronic, and that she has lost control of other organs of the body; that she is practically a nervous wreck; and that any prospect of improvement is problematical. Aside from the question of physical pain and suffering, the mental distress resulting from her injuries was an element of damages cognizable by the jury. Her appearance on the witness stand a year after the sale of the meat cannot be depicted by a printed record, yet it may have furnished the best evidence to the jury and presiding judge of the extent of her damage.

[26] The amount of the recovery is very large, but we cannot say that it is out of proportion to the extent of the injury, certainly not so far excessive as to indicate that it was prompted by the passion or prejudice of the jury.

We cannot treat the assignments in detail. We have examined them all, and content ourselves with saying that we find no reversible error.

The judgment and order are affirmed.

Affirmed.

BRANTLY, C. J., and COOPER, J., concur.

(56 Mont. 82)

UNION BANK & TRUST CO. v. HIMMELBAUER et ux. (No. 4269.)

(Supreme Court of Montana. May 17, 1919.)

1. PLEADING ⟸245(1)—AMENDMENT OF COMPLAINT PENDING MOTION TO DISCHARGE ATTACHMENT.

It was proper for court to permit a complaint to be amended pending the determination of a motion to discharge an attachment.

2. ATTACHMENT ⟸9—DEMANDS NOT MATURED—STATUTES—APPLICABILITY.

Rev. Codes, § 6658, allowing attachment before debt has become due, relates only to cases where defendant is leaving, or about to leave, the state and take his property with him, or disposing of the same to defraud creditors, and not to attachments based upon unsecured due debts.

3. ATTACHMENT ⟸9—UNPAID BALANCE OF INDEBTEDNESS ON EXPRESS CONTRACT—MATURITY.

Where, under the terms of a mortgage, plaintiff mortgagee was authorized to take possession of the mortgaged property whenever it considered possession essential to security of the note, and at its option to declare the note due and enforce collection of the balance due, and it did so, there was an indebtedness due upon an express contract for the payment of money, entitling plaintiff to an attachment action under Rev. Codes, § 6656, upon making and filing with the clerk the affidavit required by section 6657.

4. BILLS AND NOTES ⟸135—MORTGAGE AND NOTE—CONSTRUED TOGETHER.

A mortgage, and the stipulations embodied therein, must be construed as entering into and becoming a part of the note secured, and the two must be considered together for all purposes, in view of Rev. Codes, § 5031.

5. BILLS AND NOTES ⟸135—CONSTRUCTION—OPTION TO MATURE—"REGARD"—"DUE AND PAYABLE."

Where a chattel mortgage provides that, upon taking possession of the property, the mortgagee "may, at its option, regard the debt due and payable," the term "regard" is equivalent to "consider," and the expression "due and payable" is broad and comprehensive, and not limited by other terms, so that the option to regard the debt due and payable intends that the note representing the debt may become due, at the mortgagee's option, prior to due date, for all purposes, and not solely for purpose of foreclosure.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Due and Payable.]

6. CONTRACTS ⟸143—CONSTRUCTION—APPLICATION — MEANING — ENLARGING OR RESTRICTING.

Competent parties have the right to fix the terms and conditions of their contracts so long as they do not violate a public policy or some express provision of law, and, when they use language free from ambiguity or uncertainty, courts cannot enlarge or restrict its application or meaning.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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7. CHATTEL MORTGAGES ⟸287 — PROVISION FOR FORECLOSURE — OPTION TO DECLARE DEBT DUE AND SELL PROPERTY—DEMAND—NOTICE OF SALE—PLEDGE.

The parties to a debt represented by a note and secured by a chattel mortgage had the right, under Laws 1913, c. 86, § 12, to stipulate for sale of the property when mortgagee deemed himself insecure, and for mortgagee at his option to declare debt due, and the allegation of a complaint for the balance of the debt that such property was so sold is sufficient, and the property not being pledged under Rev. Codes, §§ 5774, 5775, demand for payment and notice of sale, as provided by sections 5789, 5790, are not essential, and need not be pleaded.

8. ATTACHMENT ⟸225, 248—MOTION TO DISCHARGE—NATURE AND QUESTIONS CONSIDERED.

A motion to discharge an attachment may not be made to serve the purpose of a demurrer to the complaint, the inquiry as to the sufficiency thereof being limited to ascertaining whether the action is upon a contract, express or implied, for the direct payment of money, and whether it states facts sufficient to constitute a cause of action against the defendants, and, if not, whether it can be amended to so state a cause of action, and a mere defective statement is insufficient for discharge of attachment.

9. ATTACHMENT ⟸91, 122(2) — AFFIDAVIT — SUFFICIENCY — TITLE OF CAUSE — AMENDMENT.

In view of Rev. Codes, § 7185, declaring that an affidavit, without title of the action or with defective title, is valid, if intelligently referable to the action or proceeding, an attachment affidavit bearing the title of the action, and filed as a part of the record at the time the complaint was filed, is sufficiently identified, although it could have been amended upon leave, which would be granted as of course.

10. ATTACHMENT ⟸109—AFFIDAVIT—ALLEGATION OF NOTE—OTHER SECURITY.

An attachment affidavit reciting that the original indebtedness had been secured by a chattel mortgage, property had been sold, and proceeds applied to payment of note, and that the balance set forth is the amount due, and that the payment of such balance has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property, is not subject to the objection that it does not allege the note was not secured by some other mortgage or pledge.

Appeal from District Court, Lewis and Clark County; R. Lee Word, Judge.

Action by the Union Bank & Trust Company against Anton Himmelbauer and wife. From an order of the district court refusing to discharge an attachment, defendants appeal. Affirmed.

Galen, Mettler & Toomey, of Helena, for appellants.

Day & Mapes, of Helena, for respondent.

BRANTLY, C. J. This is an appeal from an order of the district court of Lewis and Clark county refusing to discharge an attachment.

On December 17, 1917, Anton Himmelbauer and Mabel Himmelbauer, his wife, executed and delivered to the Union Bank & Trust Company, hereafter referred to as the bank, their promissory note for the sum of $9,600, due at the end of six months, with interest at the rate of 8 per cent. per annum. To secure the payment of the note, they at the same time executed and delivered to the bank a mortgage upon certain personal property. The mortgage provided that it should also be security for any and all advancements thereafter made to Himmelbauer and wife by the bank. At different dates from January 14 to February 6, 1918, inclusive, the bank advanced various sums which, in the aggregate, amounted to $760. On April 1st the bank commenced an action to enforce the payment of a balance, alleged to be due on the note, of $4,549.22, together with interest, attorney's fee, and costs. After reciting the execution and delivery of the note and the mortgage to secure its payment, the complaint alleged that the "defendants failed, neglected, and refused to pay said promissory note in accordance with the terms thereof, and that the plaintiff, acting under the power of sale contained in said chattel mortgage, did, on the 14th day of March, 1918, sell all the personal property covered by said chattel mortgage" in the manner provided therein; and thereafter, on March 30th, filed a report of the sale in the office of the county clerk and recorder. It was further alleged that certain payments had been made upon the principal sum named, at different times from December 20, 1917, to March 1, 1918, inclusive, amounting in the aggregate to $1,610.42, which had been credited thereon, together with the proceeds of the sale of the property, leaving a balance of the amount due on the note above stated unpaid, for which judgment was demanded, with interest from March 14th. The note contained no reference to the mortgage, nor any stipulation by which its payment could for any cause be accelerated, nor did the complaint contain any allegation in this behalf.

At the commencement of the action the bank procured an attachment upon filing the following affidavit by its vice president:

"In the District Court of the ——— Judicial District of the State of Montana, in and for the county of ———.

"Union Bank and Trust Company, a Corporation, Plaintiff, versus Anton Himmelbauer and Mabel Himmelbauer, Defendants.

"Affidavit for Attachment.

"State of Montana, County of Lewis and Clark —ss.:

"Frank Bogart, of lawful age, being duly sworn, says that he is an officer, to wit, the

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vice president of the above-named plaintiff, the plaintiff in the above-entitled action, commenced in the above-named court; that the defendants in said action are indebted to this plaintiff, above all legal counterclaims, in the sum of four thousand five hundred forty-nine 22/100 dollars, with 8 per cent. per annum interest thereon from the 14th day of March, A. D. 1918, upon an express contract for the direct payment of money now due, and that the payment of the original indebtedness was secured by a chattel mortgage upon certain personal property, all of which said property has been sold by plaintiff under said chattel mortgage, and the proceeds of said sale applied upon said indebtedness, and that the above amount is the balance due, and that the payment of said balance the same has not been secured by any mortgage or lien upon real or personal property or any pledge of personal property, or, if originally so secured, that such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless. Affiant further says that said attachment is not sought, and the action is not prosecuted, to hinder, delay, or defraud any creditor of said defendants. Wherefore affiant asks that a writ of attachment against said defendants may be issued in said action, as allowed by law in such cases.

"[Signed] Frank Bogart."

On May 11th the defendant Mabel Himmelbauer moved the court for an order discharging the attachment on the grounds (1) that the complaint did not state a cause of action, and (2) that the affidavit was insufficient to justify the issuance of the writ. Pending a hearing, the bank asked and was granted leave to amend the complaint by adding the following:

"(5) That the said chattel mortgage also provided as follows: If the said mortgagee shall at any time consider the possession of said property, or any part thereof, essential to the security of the payment of said promissory note(s), then and in such event, or in either of such events, the said mortgagee, its agent or attorney, successors or assigns, or such sheriff, shall have the right to the immediate possession of said described property, and the whole or any part thereof, and shall have the right, at its option, to take and recover such possession from any person or persons having or claiming the same, with or without suit or process, and for that purpose may enter upon any premises where the said property, or any part thereof, may be found, and may at its option regard the debt secured by the mortgage due and payable, and may thereon proceed and sell such property as above provided, and apply the proceeds of sale to the satisfaction of said debt as above provided.

"(6) That on or about the 7th day of March, 1918, the plaintiff, considering the possession of the property described in the said chattel mortgage essential to the security of the payment of the said promissory note, and by virtue of the provisions of the said chattel mortgage, took immediate possession of the property described in the chattel mortgage and the whole thereof, and declared the entire debt secured by the said mortgage due and payable."

The amended pleading was filed on May 22d, whereupon the court overruled the motion.

[1, 2] It was entirely proper for the court to permit the complaint to be amended pending the determination of the motion. Muth v. Erwin, 14 Mont. 227, 36 Pac. 43; Rev. Codes, § 6589. Counsel do not contend to the contrary. They do insist, however, that the complaint as amended does not state a cause of action because it shows that the unpaid balance of the note for which judgment is demanded was not due at the time the action was commenced, and because it does not allege the facts necessary to bring the action within section 6658 of the Revised Codes. We forbear consideration of the provisions of this section, for the reason that they relate only to actions for the recovery of debts not due when the defendant is leaving, or is about to leave, the state, taking his property with him, or is disposing, or about to dispose, of it for the purpose of defrauding his creditors.

[3-6] The plaintiff brought this action on the theory that under the terms of the mortgage it was authorized to take possession of the property described in the mortgage whenever it considered such possession essential to the security of the note, and, at its option, to declare the note due, and that it had exercised the option, with the result that it was at liberty to enforce collection of the balance remaining unpaid after it had sold the property and given defendants credit for the proceeds. If this theory is correct, the unpaid balance of the note was an indebtedness due upon an express contract for the payment of money, to recover which plaintiff was entitled to bring this action, and hence was entitled to the attachment under section 6656 of the Revised Codes, upon making and filing with the clerk the affidavit required by section 6657. Whether the action can be maintained, therefore, depends upon the answer to the inquiry, Was the plaintiff authorized by the terms of the mortgage to declare the note due upon taking possession of the property? Counsel concede that the plaintiff was authorized to take possession of the property whenever it considered this step essential to the security of the payment of the note, and at its option to declare the note due for the purpose of foreclosure, but contend that it was not authorized to declare it due for any other purpose.

Section 5031 of the Revised Codes declares: "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." Under the rule of construction here declared, the stipulation embodied in the mortgage must be construed as entering into and becoming a part of the

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note; for, if the two are to be taken together, they must be considered together for all purposes. The provision of the mortgage is that, upon taking possession of the property, the mortgagee "may, at its option, regard the debt due and payable." The term "regard" is here used as the equivalent of "consider." The expression "due and payable" is broad and comprehensive. It is not limited by any other term or expression in the same context. The note represents the debt. Therefore, in giving plaintiff the option to regard the debt "due and payable," the mortgagors clearly had reference to the note, and intended that it should become due for all purposes at any date prior to the time fixed as the due date, whenever the plaintiff concluded to take possession and exercise its option. Parties who are competent have the right to fix the terms and conditions of their contracts, so long as in doing so they do not violate public policy or some express provision of law; and, when the language employed by them is free from ambiguity or uncertainty, it is beyond the power of the courts to enlarge or restrict its application or meaning. To sustain the contention of counsel it would be necessary for this court to modify the language used by the parties by reading into it the restrictive expression, "for the purpose of foreclosure only," or other language of equivalent import, and thus make a contract for the parties. The decided cases are in conflict upon the question presented. They will be found collected in the notes in volume 8 of Corpus Juris, at page 199. We shall not undertake to discuss and distinguish them. Further discussion of the subject is foreclosed in this jurisdiction by the case of Cornish v. Woolverton, 32 Mont. 456, 81 Pac. 4, 108 Am. St. Rep. 598. True, the note considered in that case contained specific reference to the mortgage, whereas here the note does not refer to the mortgage. As between the original parties to the contract, as is the case here, this is not important, for no question can possibly arise affecting the rights of third parties.

[7] In a supplemental brief counsel make the contention that the complaint is defective because it does not allege that plaintiff made demand for the payment of the note after it took possession of the mortgaged property and declared the debt due and payable, and because it does not allege that plaintiff gave the defendants notice of the time and place of sale. This contention proceeds upon the assumption that, inasmuch as a pledge is "a deposit of personal property by way of security for the performance of another's act" (Rev. Codes, § 5774), and "every contract by which the possession of personal property is transferred, as security only, is to be deemed a pledge" (section 5775), when the plaintiff took possession of the property under the terms of the mortgage its relation to the defendants as mortgagee was ipso facto changed to that of pledgee; hence they insist that the complaint does not state a cause of action because it fails to allege a demand upon defendants for the payment of the note as required by section 5789, and that notice of the sale had been given as required by section 5790. Counsel cite no authority to sustain their argument in this behalf, nor do we know of any. It is alleged that the mortgagee, "acting under the power of sale contained in said chattel mortgage, did sell all the property covered by said chattel mortgage" in the manner provided therein. The parties had the right to stipulate in the mortgage how the sale should be made if foreclosure became necessary (section 12, c. 86, Laws of 1913, p. 381), and, in the absence of a demurrer, the allegation of the complaint in this behalf is sufficient.

[8] Throughout their argument counsel have proceeded upon the theory that the court below should have discharged the attachment if the complaint is defective in any respect. A motion to discharge an attachment may not be made to serve the purpose of a demurrer. The inquiry as to the sufficiency of the complaint may not go further than to ascertain whether the action is upon a contract, express or implied, for the direct payment of money; whether it states facts sufficient to constitute a cause of action against the defendants; and, if it does not, whether it can be amended so as to state a cause of action. Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741; Hale Bros. v. Milliken, 142 Cal. 134, 75 Pac. 653. A mere defective statement of a cause of action is not a sufficient ground for the discharge of an attachment. Cope v. U. M. M. & P. Co., 1 Mont. 53.

In support of their contention, counsel cite, among other cases, Porter v. Plymouth Gold Mining Co., 29 Mont. 347, 74 Pac. 938, 101 Am. St. Rep. 569, and Kyle v. Chester, 42 Mont. 522, 133 Pac. 749, 37 L. R. A. (N. S.) 230. In the opinion in each of these cases is found a general statement that, in order to maintain an attachment, the complaint must state a cause of action. This general statement, however, must be understood as having application to the case then under consideration. In the first case the appeal was from a judgment entered on demurrer. The court held that the action had been prematurely brought, and hence that the demurrer was properly sustained. The remark at the end of the opinion upon which counsel rely had reference to a complaint which was so defective that it could not be amended. In the second case the appeal was from an order discharging an attachment. It was held that the order had been properly made because the "complaint did not state a cause of action on a contract either express or

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implied." Neither of these nor any of the other cases cited by counsel sustain their position.

[9] Counsel insist that the affidavit is fatally defective because it omits to designate the court in which the action was commenced. This contention is without merit. Section 7185 of the Revised Codes declares:

"An affidavit, notice or other paper, without the title of the action or proceeding in which it is made or with a defective title, is as valid and effectual for any purpose as if duly entitled, if it intelligibly refer to such action or proceeding."

There is no provision of statute requiring the papers enumerated in this section to be entitled in any court. The particular affidavit or other paper is sufficient, though not entitled at all, if it makes intelligent reference to the action. The affidavit here bears the title of the action and was also filed as a part of the record at the time the complaint was filed. In this respect it was sufficiently identified. It does not appear that the plaintiff asked leave to amend it in the district court. If it had done so, the amendment would have been allowed as a matter of course. Josephi v. Madi Co., 13 Mont. 195, 33 Pac. 1; Muth v. Erwin, supra.

[10] Counsel assail the sufficiency of the affidavit on the ground that it does not allege that the note was not secured by some other mortgage or pledge. The affidavit is not drawn in the most approved form, but we think it sufficient to meet the requirements of the statute. Counsel is in error in assuming that it omits the allegation referred to. After reciting that the original indebtedness had been secured by a chattel mortgage, that the property had been sold, that the proceeds had been applied to the payment of the note, and that the balance set forth is the amount due, it proceeds: "That the payment of said balance (the same) has not been secured by any mortgage or lien upon real or personal property or any pledge of personal property," etc. The case of Continental Oil Co. v. Jameson, 53 Mont. 466, 164 Pac. 727, cited by counsel, is not in point. The defect in the affidavit there was both in form and substance. The defect in its form was that the notary failed to sign the jurat. The allegation in the body of it was that "the same (the debt) is now due, and that the payment of the same is not secured by any mortgage, lien, or pledge upon real or personal property." Clearly this did not meet the requirements of the statute prescribing what statements the affidavit shall contain.

The order is affirmed.

Affirmed.

HOLLOWAY and COOPER, JJ., concur.

(32 Idaho, 245)

HAMMITT v. VIRGINIA MINING CO.

(Supreme Court of Idaho. May 12, 1919.)

1. QUIETING TITLE ⟸34(5), 35(2)—ALLEGATIONS—OWNERSHIP—ADVERSE CLAIMS.

In an action to quiet title, an allegation in ordinary and concise terms of the ultimate fact that the plaintiff is the owner of the property is sufficient, without setting out probative facts which go to establish that ultimate fact, and an allegation that the defendant claims an adverse estate or interest is sufficient, without further defining it, to put him to a disclaimer or to allegation and proof of the estate or interest which he claims.

2. PRINCIPAL AND AGENT ⟸137(1)—APPARENT AUTHORITY OF AGENT—ESTOPPEL.

When a principal clothes an agent with apparent authority, his acts thereunder govern mutual rights and liabilities as between such principal and third persons, and the principal is estopped to deny such authority.

3. CORPORATIONS ⟸425(4) — AUTHORITY OF OFFICER—ESTOPPEL.

Where one, without collusion or fraud, deals with a corporation through an officer who is in the active management of its business, if the act done by said officer is one which the corporation might do, it will be estopped from relying upon any lack of authority in said officer as a defense against the rights of the party so dealing with the corporation.

4. PRINCIPAL AND AGENT ⟸171(1)—UNAUTHORIZED ACT OF AGENT — RETENTION OF BENEFITS.

A principal who seeks to retain a benefit derived from the fraudulent or unauthorized act of his agent is chargeable with the instrumentality thus employed, and will not be permitted to disclaim the responsibility flowing therefrom.

5. PLEADING ⟸381(2) — AVOIDANCE OF AFFIRMATIVE DEFENSE.

When a plaintiff has properly pleaded his case in his complaint, he may take advantage of any affirmative matter which would tend to avoid any affirmative defense pleaded in defendant's answer as fully as if he were permitted to specifically plead his matter defensive thereto by way of replication.

6. QUIETING TITLE ⟸43—ADVERSE CLAIM—EVIDENCE.

In an action to quiet title, wherein the defendant has affirmatively pleaded an interest in the property, derived from an alleged option, a subsequent option, given between the parties litigant, for the same property, is admissible under the issues raised by the pleadings to rebut defendant's contention that payments actually made under the second option should have been credited on the option pleaded in the answer, and as tending to show that all of the parties had treated the option pleaded in the answer as forfeited.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

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Appeal from District Court, Shoshone County; Wm. W. Woods, Judge.

Action to quiet title by Benjamin C. Hammitt against the Virginia Mining Company. Judgment for plaintiff, and defendant appeals. Affirmed.

S. S. Gundlach, of Wallace, and Joseph F. Morton, of Spokane, Wash., for appellant.

James A. Wayne and H. E. Worstell, both of Wallace, for respondent.

BUDGE, J. This is an action to quiet title to an undivided one-sixth interest in the Virginia lode mining claim in Shoshone county. The case was tried to the court without a jury. The court found the facts in favor of respondent, and entered judgment quieting title in him as prayed in the complaint. This appeal is from the judgment.

The court overruled appellant's general demurrer to the complaint. This ruling is assigned as error. The complaint alleges, in substance, that respondent is the owner and in possession of the property, describing it, an unpatented mining claim; that appellant asserts a claim and interest or interests therein adverse to him; that such claim is without any right whatsoever, and that the appellant has no estate, right, title, or interest in the premises, and prays that he be required to set forth the nature of his claim, that all adverse claims be determined by a decree of the court, and that it be decreed that respondent is the owner of the premises, and that appellant has no estate or interest therein, and that he be forever debarred from asserting any claim therein adverse to respondent.

[1] That the court did not err in overruling the demurrer is apparent from the following rule, stated by the Supreme Court of the United States:

"An allegation, in ordinary and concise terms, of the ultimate fact that the plaintiff is the owner in fee is sufficient, without setting out matters of evidence, or what have been sometimes called probative facts, which go to establish that ultimate fact; and an allegation that the defendant claims an adverse estate or interest is sufficient, without further defining it, to put him to a disclaimer, or to allegation and proof of the estate or interest which he claims, the nature of which must be known to him, and may not be known to the plaintiff." Ely v. New Mexico & Arizona Railroad Co., 129 U. S. 291, 9 Sup. Ct. 293, 32 L. Ed. 688.

To the same effect, see Pettengill v. Blackman, 30 Idaho, 241, 164 Pac. 358; Fry v. Summers, 4 Idaho, 424, 39 Pac. 1118; 17 Ency. Pl. & Pr. 328; 32 Cyc. 1351; Union Mill & Mining Co. v. Warren (C. C.) 82 Fed. 519; Stockton v. Oregon Short Line R. Co. (C. C.) 170 Fed. 627; New Jersey & N. C. Land & Lumber Co. v. Gardner-Lacy Lumber Co., 178 Fed. 772, 102 C. C. A. 220; Payne & Dewey v. Treadwell, 16 Cal. 220; Rough v. Simmons, 65 Cal. 227, 3 Pac. 804; Statham v. Dusy (Cal.) 11 Pac. 606; Heeser v. Miller, 77 Cal. 198, 19 Pac. 375; Davis v. Crump, 162 Cal. 513, 123 Pac. 294; Schlageter v. Gude, 30 Colo. 310, 70 Pac. 428; Parker v. Conrad, 74 Kan. 111, 85 Pac. 810.

The second, third, and fourth assignments of error attack the findings of fact. The record shows that the findings are clearly supported by the evidence, from which it appears that on May 14, 1913, respondent gave Patrick Burke an option on the property in question, which he later assigned to the Virginia Mining Company, appellant. The terms of this option are not material, so far as the disposition of this case on appeal is concerned, for the reason that both the company and Burke failed to comply therewith; it was forfeited, and a new option was given direct to the Virginia Mining Company on January 14, 1916, for a total consideration of $6,500, $500 to be paid upon the execution of the option, $500 on January 22, 1916, and $5,500 on May 14, 1916. The first two payments were made in accordance with the foregoing terms, but the final payment was never made, and all rights which the appellant had acquired under this latter option expired. Virginia Mining Co. v. Haeder, 32 Idaho, ——, 181 Pac. 141.

The fifth assignment, that the court erred in making certain conclusions of law, does not merit a detailed discussion. The conclusions follow logically from the facts found by the court. The same is true of the sixth assignment, predicating error upon the entering of the decree.

The seventh assignment of error attacks the ruling of the court in admitting in evidence respondent's Exhibit D, which is the second option contract of January 14, 1916, the contention of appellant being: First, that it was not admissible under the pleadings, and, second, that it was entered into without authority from the Virginia Mining Company and was not binding on it.

[2, 3] As to the latter contention, it need only be said that this contract was entered into by Burke as president and Morton as secretary of the company, acting ostensibly in its behalf and with apparent authority, Burke having acted for the company during all of the previous transactions. Since the company had thus clothed Burke and Morton with apparent authority to procure this second option, such authority governs the mutual rights and liabilities growing out of the transaction between the company as principal and the respondent as a third party, and the company is estopped to deny such authority. Pettengill v. Blackman, supra; Amonson v. Stone, 30 Idaho, 656, 167 Pac. 1029; Hudson v. Carlson, 31 Idaho, 196, 170 Pac. 100.

Moreover, the taking of the second option was an act which the Virginia Mining Company, a corporation, might do, which clearly

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appears from the fact that the company's whole claim in the premises depends upon a similar option previously taken by assignment from Burke, and upon which the company relies to establish its alleged adverse interest.

"Where one without collusion or fraud deals with a corporation through an officer who is in the active management of the business, if the act done by said officer of the corporation is one which the corporation might do, the corporation will be estopped from relying upon any lack of authority in said officer as a defense against the rights of the party so dealing with the corporation." Pettengill v. Blackman, supra.

There is nothing in the record to show that Hammitt in giving the second option, as he supposed, at least, to the Virginia Mining Company, was not acting in good faith, or was aware of any defect of authority on the part of Burke and Morton to act for the company, if any such defect in fact existed.

[4] Furthermore, it appears from the evidence that the company, through its president and secretary, paid money under the terms of the second option, and sought to have it credited to it under the first option. A principal who seeks to retain a benefit derived from the fraudulent or unauthorized act of his agent is chargeable with the instrumentality thus employed, and will not be permitted to disclaim responsibility flowing therefrom, and to claim or retain the fruits of the transaction. Davenport v. Burke, 30 Idaho, 599, 167 Pac. 481.

[5, 6] It therefore follows, as to the first contention, that since respondent's complaint had pleaded all of the facts which a complaint in an action to quiet title is required to set forth, the exhibit was admissible to rebut appellant's contention that any payments which had actually been made under this second option should have been credited upon the first option, which was pleaded in the answer. Moreover, it tended to show that all of the parties had treated the option pleaded in the answer as forfeited. If the first option had not expired, and the company's and Burke's rights had not become forfeited, why was it necessary to take a second option? Under such circumstances, the rule is that:

"The plaintiff may take advantage of any affirmative matter which would tend to avoid the affirmative matter set forth in the defendant's answer as fully as if he were permitted to specifically plead his matter defensive thereto" by replication. Pettengill v. Blackman, supra.

We find no reversible error in the record. The judgment is affirmed. Costs are awarded to respondent.

MORGAN, C. J., concurs.

RICE, J., did not sit with the court nor participate in the opinion in this case.

(93 Or. 160)

FULLER v. OREGON-WASHINGTON R. & NAV. CO.*

(Supreme Court of Oregon. June 4, 1919.)

1. APPEAL AND ERROR ⟸987(2)—REVIEW—VERDICT.

Under Const. art. 7, § 3, as amended, which declares that no fact tried by a jury shall be re-examined by any court unless the court can affirmatively say there is no evidence to support the verdict, the Supreme Court cannot consider the weight of the evidence, when there is any substantial testimony to support the verdict.

2. NEGLIGENCE ⟸101—COMPARATIVE NEGLIGENCE — INJURIES TO SERVANTS — FEDERAL EMPLOYERS' LIABILITY ACT.

Under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), contributory negligence goes only to the question of damages, and is not a defense.

3. MASTER AND SERVANT ⟸145 — RULES — "UNDER CONTROL."

Where rules of a railroad company required a train entering a block occupied by another train to proceed under control at a speed not exceeding six miles an hour, the words "under control" mean ability to stop within the distance the track is seen to be clear.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Under Control.]

4. EVIDENCE ⟸6—JUDICIAL NOTICE.

The courts will take judicial notice of the natural conditions of visibility early in the morning, as shown by the almanac.

5. MASTER AND SERVANT ⟸286(30)—INJURIES TO SERVANT—EVIDENCE—SUFFICIENCY.

In action for death of a rear-end trainman, killed in a collision, evidence *held* sufficient to carry to jury question of negligence of railroad company.

6. MASTER AND SERVANT ⟸281(12)—INJURIES TO SERVANT—EVIDENCE—SUFFICIENCY.

In an action for death of a rear-end trainman, killed in a collision, evidence *held* insufficient to show that his negligence was the sole cause of his death.

7. MASTER AND SERVANT ⟸204(3)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

While the defense of assumption of risk is available under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), it does not apply to extraordinary hazards created by the negligence of a fellow servant.

8. MASTER AND SERVANT ⟸291(12) — INJURIES TO SERVANT—INSTRUCTION—PRESUMPTIONS.

In an action for the death of a rear-end brakeman, killed in a collision, an instruction that the burden of proving contributory negligence was on the railroad company, and that there was a presumption that he exercised reasonable care, *held* correct.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied 181 Pac. 991.

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9. APPEAL AND ERROR ⟸1050(1)—REVIEW—HARMLESS ERROR.

In an action for the death of a rear-end brakeman, killed in a collision, where the pleadings admitted and the evidence showed that he was in the caboose at the time of the collision, questions as to his whereabouts a moment or two before *held* in no wise prejudicial.

10. MASTER AND SERVANT ⟸286(12)—INJURIES TO SERVANT—JURY QUESTION.

In an action under federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), for death of a rear-end brakeman, killed in a collision with a following train, an instruction submitting to the jury the question whether the company was negligent in operating the following engine backwards without a headlight, required by rules of the Interstate Commerce Commission, *held* proper.

In Banc.

Appeal from Circuit Court, Union County; J. W. Knowles, Judge.

Action by Grace F. Fuller, as administratrix of the estate of Walter Francis Fuller, deceased, against the Oregon-Washington Railroad & Navigation Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action, brought under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. §§ 8657–8665]), to recover damages for the death of plaintiff's intestate, Walter Francis Fuller, which was caused by a rear-end collision between two of defendant's trains at North Fork, Or. Deceased, at the time of the accident, and for more than 5 years previous thereto, had been rear brakeman and flagman on defendant's freight trains, operating in and out of La Grande, Or., and on the morning of the accident was acting as such on train No. 255, which left La Grande west bound at 5:45 on the evening of September 2, 1917. At Meacham station the train took on 5 or 6 carloads of sheep, the whole load from there comprising 70 cars, including the caboose. At 2:55 a. m. on September 3d, this train pulled out from Meacham bound west. While at Meacham, train 2140 arrived there, having backed down from Kamela, a station a few miles beyond Meacham, where it had acted as a helper engine, pulling a freight train from Reith, a station next west from North Fork to Kamela, which is the station situated upon the summit of the Blue Mountains. Train 2140 was merely a locomotive engine and its tank.

Defendant claims that the track leading to the turntable at Kamela was blocked by other trains, so it was necessary for 2140 to back down beyond North Fork, instead of turning, as is usual in such cases. Train 2140 had an electric headlight on the front of its engine, which would be at the east end while she was backing. At the rear end of the tank, which, as the locomotive was backing, would be the front or west end of the train, there were placed the usual marker lights, one at each corner, and a white light in the center; but those lanterns would not throw sufficient light ahead to enable the conductor and engineer on the locomotive to perceive objects on the track, if the morning were otherwise dark. Except as signals to trains proceeding east, they were of no value.

Before train 255 left Meacham McClure, the conductor, asked the conductor on 2140 to close the switch after his train, which was done. About a mile west of Meacham train 255 broke in two, and deceased went back to flag any train that might be following, and as the accident was soon remedied 255 went on without him. A few minutes later 2140 came along and was flagged by deceased, who was taken on board and carried to Huron, a station about 7 miles west of Meacham, where they overtook 255, and deceased boarded his own train and proceeded with it to North Fork. Near Camp station, about 4 miles west of Huron, 255 broke in two again and was delayed about five minutes, when it was coupled up and proceeded to North Fork, which is about 2 miles west of Camp.

Plaintiff's evidence indicated that the tail lights and indicator on 255 were burning at Camp station, and there was a considerable downgrade from there to North Fork. Train 255 had orders to side-track at North Fork for passenger train No. 4, bound east, which was due at that station at 4:07 a. m. What the running orders of 2140 were is not disclosed; but the conductor, Guy E. Chapin, testified that at Huron deceased showed him the orders directing 255 to side-track at North Fork for No. 4; that at that time it was agreed between himself and deceased that deceased should flag 2140 into North Fork, and that 2140 should close the switch, so as not to delay 255 when it left. According to the rules, 255 should have been in the clear upon the passing track at North Fork at 4:02 a. m. The evidence indicates that it arrived near the east end of the side track about 3:56 a. m., made the usual service stop to enable the head brakeman to throw the switch for the side track, which probably consumed not to exceed 4 or 5 minutes, and then started up, but had gone less than a car length when it broke in two again. The effect of breaking in two is to exhaust the air and set the brakes at emergency, causing a sudden stoppage of the train, and more or less of a bumping of the cars as the slack is taken up. It is difficult to estimate the difference in effect, as to the bumping of the cars from an emergency stop and an ordinary service stop. The conductor testified in this instance:

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"It was a little out of the way of making an ordinary stop for a switch or anything. * * * It would be a broken or break in two features where the air would be applied at once."

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Mr. Hoskins, who was the only witness called in relation to the accident who was not at the time in the employ of the defendant, testified:

That the stoppage resulted in a sudden bump, so that "we kind of tipped forward, and it gave a couple of bumps, so the air was set quickly. It was so we knew it had broke. * * * It was unusual or different from a stop. It was unusual enough so that you would know something had happened to the car; that is, it broke."

The witness testified, in substance, that when the break occurred he heard an engine coming down in the rear of the train, that the sound was so distinct that he knew it was within the block, and that the crash from the collision came immediately after. Upon cross-examination the witness said:

"It was not an almighty bump, * * * while a little bit more abrupt than just the stopping of a train. It was a sudden stop. We were not going very fast at the time. There was quite a jerk to it."

Witness further testified in substance that it was not over 2 minutes after the break occurred until the collision.

The testimony indicated that there was a bridge across the stream immediately east of North Fork station; that the bridge was 128 feet long; that the rear end of 255 was about 2 or 3 feet west of the west end of the bridge, and that the track approaches the bridge upon a curve; but that the curve was not sufficient to have prevented the rear end of 255 from being observed at a distance of 200 feet east of the bridge, if the other conditions as to light had been favorable, or the tail lights had been burning upon the rear of the caboose. The evidence indicated that they were burning at Camp station, 2 miles east.

The engineer of 2140 testified that he saw no lights as he approached the bridge. There was a downgrade from the east of about 1.37 to and across the bridge. The evidence was conflicting as to the physical light conditions. The witness Hoskins testified that day was just breaking, and that objects, such as a car or a man, could be seen 200 or 300 feet away.

Chapin, the conductor of 2140, testified that it was very dark and smoky from forest fires, so he was unable to see anything ahead by natural lights; that, if the tail lights of 255 had been burning, he would have been able to have seen them in time to have avoided the collision. We take judicial notice of the astronomical fact that the morning twilight began at 3:44 a. m., and that the moon was about 3 hours high at the time of the accident.

The following rules of the company were introduced in evidence:

"When a train stops or is delayed under circumstances in which it may be overtaken by another train, the flagman must go back immediately with stop signals a sufficient distance to insure full protection. One-fourth of a mile from the rear of the train he will place one torpedo on the rail, continuing back one-half mile from the rear of his train, he will place two torpedoes on the rail, two rail lengths apart. He may then return to the single torpedo where he must remain until relieved by another flagman or is recalled by the whistle of his engine. When recalled, if he does not see or hear an approaching train, the single torpedo will be removed (and not before), if conditions warrant, a red fusee will be displayed to protect his train while returning.

"During foggy or stormy weather, in the vicinity of obscure curves or descending grades, or if other conditions require it, the flagman will increase the distance.

"Should a train be seen or heard approaching before flagman has reached the required distance, he must, at once place one torpedo on the rail, and, if by night or during foggy or stormy weather, display a red fusee, continuing in the direction of the approaching train.

"If the flagman is recalled before reaching the required distance he will, if necessary, place two torpedoes on the rail two rail lengths apart by day, and by night display a red fusee in addition, to protect his train while returning.

"Lamps will be displayed one on each side of the rear of every train as markers to indicate the rear of the train; by day, unlighted, showing green lenses to the front and side and red lenses to the rear; by night, lighted, showing green lights to the front and side and red lights to the rear; except when train is clear of the main track, when by day green lenses and by night green lights must be displayed to the front, side and rear, and except when a train is turned out against the current of traffic, when by day green lenses and by night green lights must be displayed to the front and side, and to the rear by day green lenses and by night green light towards the inside and by day a red lens and by night a red light to the opposite side.

"By night freight trains will in addition display a light in cupola of the caboose, showing green to the front and red to the rear, except when a freight train is clear of the main track when green light must be displayed to the rear."

Other facts appear in the opinion.

At the close of plaintiff's testimony defendant moved for a nonsuit, which was denied, and at the close of all the testimony moved for a directed verdict, which was also denied. There was a jury trial, and a verdict and judgment in favor of plaintiff for $15,000, from which judgment defendant appeals.

W. A. Robbins, of Portland (A. C. Spencer, of Portland, and Crawford & Eakin, of La Grande, on the briefs), for appellant.

George W. Peterson, of St. Paul, Minn. (George C. Stiles, of Minneapolis, Minn., and R. J. Green, of La Grande, on the briefs), for respondent.

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McBRIDE, C. J. (after stating the facts as above). [1] There are several assignments of error, but the principal contention centers upon the court's refusal to grant a nonsuit, or direct a verdict, on the alleged ground that there was no evidence tending to show negligence on the part of the employés of defendant, who were in charge of train 2140. As a preliminary to the discussion, we may call attention to section 3 of article 7 of the Constitution, which, as now amended, provides that:

"No fact tried by a jury shall be otherwise reexamined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict."

We have frequently held that we are precluded by this section from considering the weight of evidence, where there is any substantial testimony to support the verdict, and in the present case we shall only consider the testimony of plaintiff, with a view of ascertaining whether there is such testimony shown in the record.

[2] Again, this being an action under the federal Employers' Liability Act, it follows from the terms of the act that, if there is evidence of negligence on the part of the defendant which contributed to the injury, we cannot consider the question of contributory negligence on the part of the plaintiff; such contributory negligence going only to the question of damages, concerning which phase of the case no fault is found with the instructions given at the trial. Stool v. Southern Pacific Co., 88 Or. 350, 172 Pac. 101.

[3-5] It is a fact not disputed, when 2140 arrived at the home signal, it indicated that a train was within the block a short distance ahead, and was therefore a warning of danger, and indicated to those in charge of that train the necessity of proceeding cautiously and under such control, which would seem necessary, in view of the circumstances, to prevent a collision with the train within the block. Under these circumstances, the rules of the company made it the duty of those in charge of 2140 to stop for 5 minutes and proceed under control at a speed not exceeding 6 miles an hour. The testimony of defendant in regard to the rate of speed actually made does not assume accuracy, but is to the effect that the train proceeded at about 6 miles an hour, but for the purposes of this discussion it may be assumed that the actual speed was 6 miles an hour, and it is assumed in defendant's argument that if this was the case the train was "proceeding under control" within the meaning of the rule; but this is a mere assumption not justified by the language of the rule. The words "under control" mean "to be able to stop within the distance the track is seen to be clear." The words "not to exceed 6 miles an hour" are words of limitation, and if a lower rate of speed is necessary to enable those in charge of the train to observe whether the track is clear ahead, and to stop in time to avoid a collision, the train is not under control until its speed is reduced to that minimum. Therefore, if the circumstances—darkness or want of a headlight on the tank—rendered it impossible to see objects on the track ahead, and to stop in time to avoid them, while running at the rate of 6 miles an hour, it was the duty of those in charge of the train to run at such reduced speed as would seem reasonably sufficient to enable them to do so, and a failure to so control the speed would be negligence.

The question as to whether or not the tail lights on 255 were burning was for the jury. McClure, the conductor of 255, testified that they were burning at Camp, less than 2 miles from North Fork. It is possible, but not at all probable, that they had all gone out in the short time that elapsed between the time McClure observed them and the time of the collision. That one of these lights might be burned or jarred out is possible, but that all three should expire simultaneously is not within the bounds of probability. It is true the testimony of the conductor of 2140 indicates that they were not burning, but it should be remembered that he is a witness having a great interest at stake. If the lights were burning, and he failed to observe them, it would indicate a negligence on his part that places the responsibility for the accident, and Fuller's death in consequence of it, upon his shoulders, and he naturally might be inclined to shield himself and color his testimony. The foregoing does not indicate the writer's view of the testimony, but it is an aspect of the case which might reasonably appeal to a trier of the facts, and a jury might reasonably weigh his testimony, in view of his connection with the accident, against the strong probabilities against its accuracy developed by Mr. McClure's testimony, and legitimately come to the conclusion that the preponderance of the evidence indicated that the lights were burning when the accident occurred.

Conceding, however, for the purposes of the discussion, that the tail lights on 255 had been extinguished, although this seems improbable, there was still some evidence introduced by the plaintiff which tended to show that there was natural light sufficient to have enabled those in charge of 2140 to have observed the caboose of 255, and stopped in time to avoid the collision, if they had observed a cautious outlook. As shown in the statement, the witness Hoskins testified that daylight was breaking, and that he was able to discern objects, such as a man or a car, at a distance of 200 or 300 feet; and this is borne out by the natural conditions shown by the almanac, and of which the court takes judicial notice without proof.

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One witness, L. F. Spoar, who testified he had had 14 years' experience as a locomotive engineer, testified that, under the track conditions existing from the east end of the bridge at North Fork to 800 feet beyond, 2140 could have been stopped within about 75 feet. Now, take this testimony in connection with the testimony of Hoskins, that it was light enough to have seen a car 200 feet, and we have evidence indicating that, with proper lookout, those in charge of 2140 had an opportunity to have seen the caboose of 255, and to have stopped their locomotive in time to have averted the accident, even if they were running 6 miles an hour.

These facts were sufficient to take the case to the jury upon the question of negligence of the defendant.

[6] It is not clear from the testimony exactly what was meant by the statement that Fuller had agreed with Chapin to flag 2140 into North Fork. It is evident there was no understanding that he would flag them in until his own train "was in the clear." He had not agreed to flag them against his own train, but against No. 4; that is to say, that when 255 had got upon the passing track, with room left for 2140, Fuller would flag against No. 4, so that 2140 could safely follow in upon the passing track. This seems the probable meaning of the agreement, as we understand the testimony.

Now, as to Fuller's duty to flag under rule 99, the rule, as quoted in the statement, does not absolutely require a flagman to go back with stop signals every time the train stops, and every one who is accustomed to railway travel knows it is not done. It is only "when a train stops or is delayed under circumstances in which it may be overtaken by another train" that the flagman is required to go back and flag. This leaves something to the judgment of the flagman and the conductor as to the conditions which may or may not involve a liability to be overtaken by another train.

On cross-examination McClure testified as follows:

"Q. Now, Mr. McClure, going into a station like North Fork, where you know you are going to head in on the passing track, it is the duty of the flagman to be there ready to go out flagging immediately? A. Well, under ordinary circumstances, we stop and head right in. I wouldn't expect it; no, sir.

"Q. Do you know where the S board is there at North Fork, or was at that time? A. I know about where it was; yes.

"Q. Where was it with reference to the hind end of this train, when you stopped your 70 cars to head in? A. Well, the caboose was outside the S board at that particular place.

"Q. Do you mean to tell this jury, when you stopped to head in, and your hind end is outside the S board, you don't have your flagman go out? A. Well, it is not customary; that is, where you stop and head right into a place. Of course, if you are delayed any length of time, they are supposed to go right back.

"Q. What do you call being delayed any length of time? A. Well, I should think a delay of 3 or 4 or 5 minutes.

"Q. Would you let the hind end of your train stick out there 3 or 4 or 5 minutes before you would send your flagman out? A. Well, that would depend.

"Q. Well, what would it depend on? A. Well, it would depend on conditions—of the track and grade and such as that.

"Q. Well, I am asking you with reference to conditions as they existed there at that time and place, and this grade and this track? A. Well, it was his duty to go out and flag there at that place.

"Q. And it was his duty to go out immediately? A. Yes.

"Q. And he should have been in a position to go out and flag immediately, under those circumstances, should he not? A. Yes.

"Q. And he understood that is where he should have been? A. Yes."

We think the above testimony clearly indicates that it was not customary for the flagman to go back at an ordinary stop made for the purpose of heading in on a switch, but that, if anything unusual occurred, such as the breaking of the train, or there was reason to expect some danger from the rear, it was his duty to go immediately. The breaking in two of the train was such a contingency; but, according to Hoskins' testimony, the collision happened almost at the same moment. Whether Fuller was in the act of starting or preparing to start with his lantern and fusees is not disclosed. His body was in an erect position when it was found, so he was probably on his feet, and as he had been prompt to go out and flag on other occasions on the same run when the train separated, it would be unfair to asume that he was not equally diligent on this occasion. Irrespective of any presumption that he was doing his duty, there is small ground for the assumption that he was neglecting it.

Most of the testimony introduced by plaintiff on this phase of the case was necessarily drawn from persons who were, at the time of the accident, in the employ of the defendant, and some of whom a verdict in favor of plaintiff would impliedly convict of negligence. Under the circumstances, it is safe to say that they were, to a certain extent, unwilling witnesses, and that nothing was volunteered that was prejudicial to defendant; but with all these drawbacks we think the plaintiff presented a case sufficient to go to the jury, and that defendant fell short of making one showing the negligence of the deceased was the sole cause of his death, if, indeed, it has shown that he was negligent in any particular.

[7] While the defense of assumption of risk is permissible in actions brought under the federal Employers' Liability Act, it is settled that it does not apply to extraordi-

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nary hazards created by negligence of a fellow servant. Stool v. S. P. Co., supra. The order permitting plaintiff to amend the reply was within the sound discretion of the court, and we are not prepared to say that such discretion was abused in the present instance.

[8] The defendant urges there was error in the following instruction:

"Now, you are instructed that the burden of proving that Fuller was guilty of contributory negligence is upon the defendant, and in this connection you are instructed that in a death case, such as this is, there is a presumption that the deceased exercised reasonable care for his own safety, and the deceased is entitled to the benefit of this presumption, unless you find under all of the facts and circumstances of the case, by a fair preponderance of the evidence, that Fuller was negligent, and such negligence contributed to cause his injuries and death."

We think the instruction was proper under the circumstances. The contention of defendant was that the negligence of the deceased was the sole cause of the accident. The case was in this position: (1) It was incumbent upon the plaintiff in the first instance to show the negligence of the defendant's servants in charge of 2140, and there was in their favor a presumption, to begin with, that they performed their duty and exercised reasonable care for their own safety and for the safety of other trains on the road. When it attempted to impute negligence, either contributory or sole, to deceased, plaintiff was entitled to invoke the same presumption in favor of his conduct. This is the doctrine sanctioned in this state in McBride v. N. P. R. R., 19 Or. 64, 23 Pac. 814. The presumption is not invoked primarily for the purpose of showing that the defendant was negligent, but for the purpose of placing upon the defendant the burden of proving the negligence of deceased. The instruction stated the law so far as it went, and there was no request for an instruction to like effect on behalf of the defendant.

In view of the fact that the court in its charge reiterated several times the statement that the burden of proof was upon the plaintiff to establish by the preponderance of evidence the negligence of defendant, so this must have been thoroughly impressed upon the mind of every juryman. We do not think it was possible for the jury to have formed any impression, prejudicial to defendant, from the failure of the court to say in direct language that defendant's servants were presumed to have done their duty, and not to have been negligent. The charge seems to be eminently fair and clear.

[9] It is urged as error that the court permitted evidence tending to show that Fuller might have been somewhere else on the train than in the caboose when the collision occurred, and that, as the complaint alleged he was in the caboose and attending to his duties, the introduction of such evidence was prejudicial. To this objection it may be answered that there was no testimony admitted tending to show that deceased was anywhere else than in the caboose at the moment of the accident. The complaint alleged this, the answer admitted it, all the evidence showed it, and nobody disputed it. Where he was a minute before the collision, or during the stop, was not pleaded. In detailing the circumstances immediately preceding the collision, it would not have been far-fetched or improper for plaintiff to have shown the general duties of deceased in connection with the train, or that he had such duties as might have required his immediate attention before he entered the caboose. The questions asked elicited nothing prejudicial to defendant, and did not tend to contradict any fact alleged in the complaint.

[10] Another assignment of error is in regard to the instruction of the court, leaving to the jury the question of negligence by reason of the failure of the defendant to have upon the westerly end of the tank an electric headlight. This objection is urged with much force and plausibility, and to discuss it properly it is necessary to consider the state of the pleadings and proof upon this branch of the complaint.

Subdivision 10 of the complaint is as follows:

"That during all the time hereinbefore mentioned and alleged, and on the day and at the time of the happening of said accident and injury to said Fuller hereinbefore alleged, it was the duty of the defendant to equip, maintain, and use its said certain locomotive engine then and there being operated and handled over the defendant's said main line track towards and in the direction of the said caboose wherein said Fuller was stationed and situated at said time, at the forward or westerly end thereof, with an electric headlight of sufficient candle power, measured with a reflector, to throw a light in clear weather that would enable the engineer, who was then and there operating, handling, and controlling said locomotive engine, to plainly discern an object the size of a man, or larger, and more particularly the caboose on which said Fuller was then and there stationed and situated, as hereinbefore alleged, at a distance of not less than 800 feet therefrom, and to maintain and use such headlight upon said westerly and forward end of said locomotive engine at the time and place where the said accident and injury to said Fuller occurred, to the end that said locomotive engineer might see and observe obstacles or obstructions upon the track, such as other engines, cars, or trains, in ample time to stop and thereby avoid same."

Having thus stated the duty of the defendant, subdivision 11 proceeds to set forth the breach of such duty as follows:

"On the morning of September 3, 1917, defendant negligently and unlawfully propelled and operated along its main line track in a west-

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erly direction the said locomotive engine hereinbefore mentioned and described, which said locomotive engine was not then and there equipped with an electric headlight at the forward and westerly end thereof of the candle power required by law, as hereinbefore alleged, and the defendant negligently, wrongfully, and unlawfully failed to equip, maintain, and use at the forward and westerly end of said locomotive engine, then and there being operated backward along over its said main line track, any headlight at all, so as to enable the engineer operating and handling said locomotive engine to see and discern upon the said track any obstacle or obstruction thereon in time to avoid accident or collision therewith."

The charge of the court, in relation to the matter thus pleaded, was as follows:

"It is likewise charged in the complaint that the defendant negligently operated extra 2140 without having a standard headlight on the front end thereof, having in mind the direction in which extra 2140 was running, or, in other words, that there was no standard headlight on the rear end of the tender. This charge of negligence is practically the equivalent of the charge that the defendant negligently operated extra 2140 backwards. The court submits to you the issue in this connection whether, if the defendant chose to operate extra 2140 backwards, it failed to exercise ordinary care by reason of not having the rear end of the tender equipped with a standard high-power headlight. If you find that the defendant was negligent in the particulars in question, and you further find that such failure so to equip with a standard high-power headlight proximately resulted in the collision of extra 2140 with the rear end of No. 255, and resulted in the fatal injuries to Walter Francis Fuller, it is your duty to find for the plaintiff."

The language of the complaint, alleging the duty of the defendant with reference to lights upon the locomotive, is substantially identical with the requirements of rule 29, promulgated by the Interstate Commerce Commission on December 26, 1916, although no reference is made in the complaint to such rule, which reads in substance as follows:

"Each locomotive used in road service between sunset and sunrise shall have a headlight, which shall afford sufficient illumination to enable a person in the cab of such locomotive * * * to see in a clear atmosphere a dark object as large as a man of average size, standing erect, at a distance of at least 800 feet ahead of such headlight. Each locomotive used in road service, which is regularly required to run backward for any portion of its trip, except to pick up a detached portion of its train, or in making terminal movements, shall have on its rear a headlight, which shall meet the foregoing requirements. * * *

"It is further ordered that said rules shall apply to all locomotives constructed after July 1, 1917, and for locomotives constructed prior to that date, the changes required by the above rules shall be made the first time locomotives are shopped for general or heavy repairs after July 1, 1917, and all locomotives shall be so equipped before July 1, 1920."

It does not appear, either from the complaint or the testimony, that the locomotive in question was regularly required to run backward, or that it was constructed after July 1, 1917, or that it had been shopped for general or heavy repairs, after the promulgation of the above order; therefore, if there was any liability for the failure of defendant to have such a headlight, as described in the complaint, upon the rear end of 2140 on the night of the accident, it would have to be found under the general clause of the Employers' Liability Act, and not under the rules of the Interstate Commerce Commission. The federal Employers' Liability Act does not undertake to define negligence, but leaves the term to stand as defined at common law, so that the question as to whether it was common-law negligence to run train 2140 backwards, on that trip, on that grade, and under the atmospheric and natural conditions then existing, and with the knowledge that there was a train close ahead and a final warning of danger at the home signal, without such light as that alleged in the complaint to have been necessary, was, we think, one which the court had a right to submit to the jury.

We do not understand that the orders of the Interstate Commerce Commission fix, or are intended to fix, the maximum of negligence in the use of lights or in the operation of trains. The trip to be made was from the summit of a high range of mountains down a steep grade and in the nighttime. Whether the circumstances justified defendant's agents in making it without waiting for daylight, or until they could get to the turntable and turn around, so as to proceed with their light in front, was a question for the jury. Whether making the trip under the circumstances without such a light on the rear, as the wisdom and experience of the Interstate Commerce Commission had found sufficient for the safe operation of a train proceeding regularly, was also a question for the jury. For the defendant's employés to go banging down that grade in the dark at the rate of 6 miles an hour, with the home signal indicating danger, and with the knowledge that there was another train less than a mile away standing upon the same track, would appear to the average layman to have been an almost reckless proceeding, and yet this is the situation shown by the testimony of defendant's employés upon train 2140.

If circumstances ever existed where the best of light or the greatest caution should have been used, they are shown by the testimony of defendant's conductor to have been present here. He is not shown to have been running under orders; neither is it shown that it was necessary that he should have made the trip in the nighttime, and it was

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proper for the judge to submit to the jury the propriety of his running an unequipped, unlighted train under the conditions.

The language used by the court in the instruction in describing the headlight might be subject to some criticism from an expert railroad man's standpoint, but we think it in no way misled the jury.

Other minor objections are urged, and have been carefully considered, but we deem them without merit. The real and vital questions upon the trial, and those chiefly argued here, were (1) the alleged sole negligence of deceased, and (2) the instruction of the court in regard to the train backing down without a headlight. These have been the subjects of long and serious consideration, with the result above indicated.

The judgment is affirmed.

(92 Or. 443)

GRANT CHROME CO. v. MARKS et al.

(Supreme Court of Oregon. June 10, 1919.)

1. CORPORATIONS ⟸29(1)—DE FACTO CORPORATIONS—RIGHTS.

As between private parties, the right of a de facto corporation to act as a corporation cannot be questioned.

2. CORPORATIONS ⟸28(2)—DE FACTO CORPORATIONS.

Where there was an attempt in good faith to organize a corporation and the corporation proceeded to exercise corporate functions and elected corporate officers and expended large sums of money in operating and developing a mine, as a corporation, it was a de facto corporation, although the articles of incorporation were not filed in the office of the county clerk as required by law.

3. APPEAL AND ERROR ⟸173(2)—ISSUES IN LOWER COURT—DEFENSES NOT PLEADED.

In an action by a lessee for a mine, defendant, who in framing his pleading stood entirely on denials of the allegations in plaintiff's complaint and on the single affirmative allegation that he was an innocent purchaser cannot on appeal take advantage of an affirmative allegation in the answer of the owner of the premises, from whom he had leased the mine, that the plaintiff had abandoned and forfeited his lease, the owner not appealing from a judgment in favor of plaintiff.

In Banc.

Appeal from Circuit Court, Grant County; Dalton Biggs, Judge.

Suit by the Grant Chrome Company against F. C. Tarnow and others. From a judgment for plaintiff, the named defendant appeals. Affirmed.

This is a suit in equity brought by the plaintiff, as a corporation, claiming to be the assignee of a certain lease and option contract, executed by the defendants, Marks and Thompson, for a chrome iron mine in Grant county, Or.

The contract in question was originally executed on the 23d day of May, 1917, by the defendants Marks and Thompson to one Gustave Pinson, and is an agreement to sell for the price of $5,000, part of which purchase price is to be paid in the way of royalty of $2 per ton for the iron ore extracted. It also contains the following leasing provisions:

"That said lessors do hereby grant, demise and let unto the said lessee, his heirs, executors, administrators and assigns, for the term of three years from the date of the execution of this instrument, the aforesaid described mining property. * * *

"To have and to hold unto the said lessee for the aforesaid term of three years, unless sooner forfeited or determined for any cause, or for any breach of any covenant herein set forth. * * *

"In consideration of such demise the said lessee doth covenant and agree with said lessors to enter immediately upon said mine or premises, and work the same mine fashion in manner necessary to good and economic mining, so as to take out the greatest amount of ore possible, and not less than —— tons annually * * * and pay the aforesaid royalty upon the delivery of the ore at the railway station at Prairie City, Oregon; all of the ore to be extracted from said premises and deliver the same, as aforesaid, with all convenient speed in lots as mined."

On the 18th day of June, 1917, Pinson executed an instrument purporting to convey the aforesaid lease and option to the plaintiff herein. After the execution of this assignment one O. C. Irwin, claiming to act as president and manager of the plaintiff company, took possession of the mine in question, and proceeded to develop and operate the same for several months, expending, as the testimony on behalf of plaintiff tends to show, about $8,000 upon this work. About the 1st of September, being unable to market the ore, the work was discontinued, and Irwin left the mine and proceeded East, to try to negotiate a market for the ore. The tools were first left at the mine, but after a short time, some of them being stolen and carried away, the portable tools were taken and stored at the place of a neighbor living somewhere in the vicinity.

The defendants Marks and Thompson seem to have become dissatisfied with the way the plaintiff was proceeding, and made another lease on the same property to the defendant Tarnow, who went into possession, and was in possession of the mine at the time of the commencement of this suit.

The defendants Marks and Thompson, after denying in their answer the incorporation of the plaintiff, and most of the other alle-

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gations of the complaint, proceeded to allege affirmatively, in substance, that Pinson and those representing him under the contract had forfeited and abandoned their right to the mine by failing to comply with the conditions of the contract and by going away and leaving the mine.

The defendant Tarnow also answered, and, after making substantially the same denials as the other defendants, alleged affirmatively that he was an innocent purchaser, leasing the property without notice of plaintiff's claim, but does not allege abandonment or forfeiture of the lease.

There was a decree in the court below in favor of plaintiff and against all of the defendants. From this decree the defendant Tarnow appeals. The defendants Marks and Thompson do not appeal.

John L. Rand, of Baker, and J. Thornburn Ross, of Portland, for appellant.

J. W. Biggs, of Burns, and Geo. H. Cattanach, of Canyon City, for respondent.

A. D. Leedy, of Canyon City, for defendants.

BENNETT, J. (after stating the facts as above). There are only two questions presented in the briefs: First, whether or not the plaintiff sufficiently established the fact that it was a corporation, authorized to accept the assignment of the lease from Pinson; and, second, whether or not there was such a forfeiture and abandonment of the lease established by the defendants, as destroyed the rights of the plaintiff thereunder.

On the 18th day of June, 1917, Irwin, Dugdale, and Pinson executed the articles of incorporation, but these articles were not acknowledged until the succeeding 11th of July, and a copy of the same was not filed with the corporation commissioner of the state until the 13th day of the same month; and a copy never was filed in the office of the county clerk of Grant county, as required by law.

Nevertheless, on the same day the articles of incorporation were executed, the stock of the corporation was subscribed for by Irwin, Dugdale, and Pinson, and they proceeded to organize the company by electing directors, president, vice president, secretary, treasurer, etc.

[1, 2] It is not now claimed by the plaintiff that the corporation was sufficiently organized to become a corporation de jure; but it is claimed that sufficient had been done to make it a corporation de facto, and that between private parties its right to act as a corporation cannot be questioned.

In 1 Thompson on Corporations, § 229, it is said that the essential elements of a corporation de facto are:

"(1) A law or charter providing for the organization of corporations of the kind attempted to be organized; (2) an attempted good-faith compliance with the statutory requirements intended as conditions precedent to corporate existence; (3) an unintentional omission of some legal requirement; (4) the exercise in good faith of corporate functions."

And, again, in section 234, it is said:

"But in the nature of the case, and under the definition given, if some step in the progress of the organization is unintentionally omitted, and the other requirements are present, there will be a corporation de facto. The accidental failure to comply with some legal requirement is one of the elements of the corporate existence de facto; otherwise it would be a corporation de jure. A very common omission of strict or substantial compliance is found in the failure either to properly execute, acknowledge, or record the certificate of incorporation or articles of association. The general rule is that the mere failure to properly execute and acknowledge the certificate, or the failure to record the certificate of articles of association, will not be fatal to the existence of a corporation de facto."

To the same effect is 1 Fletcher, Cyc. of Corporations, § 278, and our own state decisions follow this doctrine. Marsters v. Umpqua Oil Co., 49 Or. 374, 90 Pac. 151, 12 L. R. A. (N. S.) 825; Splonskofsky v. Minto, 62 Or. 560, 126 Pac. 15; Alder Slope Ditch Co. v. Moonshine Ditch Co., 176 Pac. 593.

In the case at bar the law unquestionably authorizes the creation of such a corporation; there was an attempt, apparently in good faith, to organize the corporation, and the corporation proceeded to exercise corporate functions. The evidence shows that it elected corporate officers, took over the contract for the lease of the mine, and expended large sums of money in operating and developing the mine, all ostensibly as a corporation.

Miller and Kimball, two witnesses called by the defendants, testified that they were working for the "Grant Chrome Company" and it must have been generally understood that Irwin represented that company in his operations at the mine.

Under such conditions it seems that the rule in regard to de facto corporations applies, and that the plaintiff had sufficiently established it was such a corporation.

[3] As to the question of abandonment and forfeiture by the plaintiff, the appellant Tarnow does not seem to be in a position to raise these questions.

In framing his own pleading he saw fit to stand entirely upon his denials of the allegations in plaintiff's complaint, and upon the single affirmative allegation that he was an innocent purchaser in good faith.

There was no allegation in his answer of any abandonment on the part of plaintiff, or of any failure to comply with the conditions of the contract. The defendants Marks and Thompson, who did raise this question in their answer, do not appeal; and we think

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appellant cannot take advantage here of affirmative allegations in their answer, which were not in his own. If he had desired to raise these questions, he should have pleaded the fact upon which such a claim could be based.

The instrument executed by Marks and Thompson was a lease for a definite period, as well as an option, and as it did not contain any express provision for a forfeiture, it may be doubted whether such a forfeiture could be enforced, even if Marks and Thompson were appealing. Taylor on Landlord and Tenant, vol. 2, § 489; Tiffany on Landlord and Tenant, vol. 2, § 193; 27 Cyc. 708. But this question we do not find it necessary to decide.

As to appellant's claim that he was an innocent purchaser, we think that cannot be sustained under the evidence. Both Marks and Thompson testified that he was shown the lease before he made his lease, and substantially knew all about the transaction.

Having notice and knowledge, therefore, of the fact that the lease had been executed, and not having pleaded any forfeiture or abandonment, or failure to comply with the terms of the lease, we think he has failed to sustain his only affirmative defense.

The judgment of the court below is affirmed.

(92 Or. 449)

STATE v. MOSS.

(Supreme Court of Oregon. June 10, 1919.)

1. CRIMINAL LAW ⟸576(5)—DISMISSAL OF INDICTMENT—FAILURE TO TRY CASE AT FOLLOWING TERM.

Assuming that district attorney, in an interview with defendant's attorney, made oral agreement that cases should be continued from October to April term, and should then be dismissed, and that district attorney violated the agreement, it would not be a sufficient ground for dismissal of indictments under L. O. L. § 1701, as to indictment being dismissed, where defendant is not tried at next term of court, in view of Const. art. 1, § 10, providing that justice shall be administered openly and without purchase.

2. CRIMINAL LAW ⟸1158(2)—DISMISSAL FOR DELAY—REVIEW.

Since the trial court had personal knowledge of all the proceedings, his ruling, denying motion to dismiss indictment for failure to try case at next term of court, is entitled to some weight on appeal.

3. CRIMINAL LAW ⟸576(5)—DISMISSAL OF INDICTMENT—FAILURE TO TRY CASE AT FOLLOWING TERM.

Where cases were continued from the October to April term with express consent and approval of defendant, and defendant, though present, did not demand a trial at the April term, and at the next October term withdrew motions then made to dismiss because the case was not tried at the April term, defendant's motions to dismiss, thereafter made, do not come within L. O. L. § 1701, or Const. art. 1, § 10.

4. CRIMINAL LAW ⟸576(5)—DISMISSAL OF CASE—WAIVER OF GROUNDS.

In legal effect defendant's withdrawal of motion to dismiss, with the statement in open court that he was ready for trial, and his application and consent to have the cases set for trial, constituted waiver of his right thereafter to insist upon motion to dismiss the indictments.

In banc.

Appeal from Circuit Court, Harney County; Dalton Biggs, Judge.

W. Z. Moss was indicted for larceny, and appeals from an order denying his motions to dismiss. Affirmed.

On September 27, 1917, at a continuation of the April term of the circuit court for Harney county, the grand jury returned four indictments against the defendant, the first of which charged him with the larceny of a steer, the property of Pacific Live Stock Company; the second, with the larceny of a mule, the joint property of William Hanley Company and Eastern Oregon Live Stock Company; the third, with the larceny of one steer and four cows, the property of William Hanley Company; and the fourth, with the larceny of six cows belonging to Eastern Oregon Live Stock Company. To each indictment the defendant waived time, pleaded not guilty, and announced himself ready for trial for the larceny of the cattle; but, on account of the absence of material witnesses from the state, moved for and was granted a continuance on the indictment for the larceny of the mule. The state elected to try the defendant for the larceny of the steer belonging to Pacific Live Stock Company, and after trial, on October 6, 1917, the jury returned a verdict of not guilty on that charge. By the following order of the court the remaining cases were continued for the term:

"It is ordered that the above-entitled cause and each thereof, wherein W. Z. Moss is under indictment, be continued for the term; that the defendant be permitted to go on his recognizance, and his cash bail be remitted in all cases except that of indictment for larceny of one mule; that in the last-mentioned case a personal bond for $1,000.00 may be at any time substituted for the cash bond of $500.00."

At that time the terms of the circuit court were held on the first Monday in April and the first Monday in October. On October 7, 1918, the defendant, through his attorneys, W. Lair Thompson and P. J. Gallagher, filed a motion to dismiss the charges against him, "for the reason that the said indictments were not called for trial at the next term of

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the court following the filing of the said indictments, and that the said trial thereof was not postponed on the application of the said defendant." On the same day the court made an order setting the hearing of the motion for 1:30 p. m. At that time the defendant, through his attorneys, P. J. Gallagher and George S. Sizemore, appeared, and the court then made the following order:

"Now at this time this matter coming on to be heard upon the motion of the defendant, filed this morning, asking that the indictments be dismissed, for the reason that the said indictments were not called for trial at the next term of the court following the filing of the said indictments, the said defendant appearing in person, as well as by P. J. Gallagher and Geo. S. Sizemore, his attorneys, said defendant, at this time, asks leave to withdraw the said motion to dismiss, and, leave to withdraw being granted, the said defendant, through his said attorneys, stated in open court that he was ready for trial, and asked that the said cases be set for trial.

"Whereupon, at the application of the defendant and with his consent, the said cases, and each thereof, were set for trial Monday, October 14, 1918, at the hour of 10:00 o'clock in the forenoon."

On October 15, 1918, the defendant, through W. Lair Thompson, his attorney, filed another motion with the latter's supporting affidavit to dismiss, for the reason that—

"Said indictment was found on the 27th day of September, 1917; that the trial hereof was continued upon the condition that said indictment would be dismissed in April, 1918, and there was no further continuance of said cause, and the trial thereof was not postponed at the April, 1918, term of this court with the consent of or upon the application of this defendant, nor was any order passed by the above-entitled court continuing said cause at the April, 1918, term of this court, and this defendant was not brought to trial at the April, 1918, term of this court upon said indictment.

"This motion is based upon the records and files in this cause, and upon the affidavit of W. Lair Thompson filed herein to-day."

To this motion counter affidavits were filed by M. A. Biggs, district attorney, and W. A. Goodman, sheriff of Harney county.

It appears from the affidavit of Mr. Thompson that, after the trial and acquittal on the indictment for the larceny of the steer belonging to Pacific Live Stock Company, the district attorney sought an interview at the Hotel Levens at Burns, and the following conversation took place:

"The district attorney * * * said to affiant, 'What do you want to do with the other Moss indictments?' to which affiant replied, 'I want to either try them immediately or have them dismissed, and, of course, I would rather have them dismissed.' The said district attorney then said: 'I know when I am licked, and if you insist upon trying those cases now I will have to dismiss them, but that would subject me to criticism because of the large expense the people of Harney county have been put to in these matters, and I would like to protect myself; it would let me down easier if the cases were continued until next spring, and then dismissed, when people generally were not discussing (or had forgotten) the matter. If you will agree to a continuance for the term, I will dismiss all of the Moss cases (and certain other cases not here involved) when court convenes in April, except the mule case, which I want to try.' Thereupon affiant said: 'And in the meantime how about Moss' bonds? He has a large amount of cash bail on deposit; would you be willing to release this and let Moss go on his own recognizance?' To which the district attorney answered: 'Yes; I would be willing to release all bail money except in the mule case, and in that case I would be willing to recommend either $500.00 cash bail or a $1,000.00 personal bond.'"

After further discussion, the conversation was as follows:

"'Now, let us have no misunderstanding about this matter; this is a gentlemen's agreement made off the record to protect you. The Moss bail money is to be released, and he is to go on his own recognizance in all except the mule case, and in that case he may leave on deposit $500.00 cash bail, or substitute a $1,000.00 personal bond. When court convenes next April to make up the trial docket, you will move to dismiss all indictments, except in the mule case, without the necessity of my coming to Burns. I would not consent to a continuance if it would necessitate another expensive trip out here.' Thereupon said district attorney said: 'Yes, that is the understanding, and I will dismiss the cattle indictments next spring; you can tell the judge about it in the morning.'"

The affidavit continues as follows:

"On Monday, October 8, 1917, before court convened, this affiant did relate to Hon. Dalton Biggs, judge of the above-entitled court, the substance of said agreement; and when court convened the district attorney and affiant in open court stated that an agreement had been reached to continue all of said indictments, and for the reduction of bail in certain cases which were involved in said agreement, but to which said defendant Moss was not a party, and for said defendant Moss to go on his own recognizance under all indictments except that involving the mule hereinabove mentioned, and for $500.00 cash bail or $1,000.00 personal bond in the mule case. Orders were so passed by this court, and defendant's cash bail under all of said cattle indictments was returned to him. This affiant would never have agreed to a continuance of the above-entitled case except upon condition that the same be dismissed in the spring of 1918, as agreed upon as hereinabove set forth, and did not agree to said continuance except upon said condition that the same be so dismissed."

In his counter affidavit the district attorney says:

"That on the first day of April term of the circuit court of Harney county, Oregon, for the year of 1918, the cases of the state of Oregon v. W. Z. Moss were called on the docket by the

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court, and the said Moss appearing in person and by his attorney, P. J. Gallagher, and at said time some remarks were made and some discussion had as to what disposition would be made of said indictments, and at said time the affiant herein, as the district attorney for Harney county, Oregon, stated to the court, in the presence of the defendant and his attorney, P. J. Gallagher, that attorney L. R. Webster, of Portland, Oregon, was associated with the district attorney in both of said cases, and that the said affiant herein would not care to make any disposition of said cases until the said L. R. Webster should be in court. The affiant further stated at said time that he expected said L. R. Webster to be in attendance upon the court within a day or two. That during the first week of said term of court the said L. R. Webster arrived in the city of Burns, Oregon, from Portland, Oregon, and was for several days in attendance upon court; but that, before the arrival of the said L. R. Webster, the said defendant, W. Z. Moss, absented himself from court, and left Harney county, Oregon, and, as this affiant is informed and believes, returned to Lake county, Oregon. And that said defendant did not again appear before the court, either in person or by his attorney, and that for that reason it was impossible for the district attorney to have the case set down for trial or any other disposition made of the cases, owing to the absence of said defendant.

"That the said term of court remained open from the first Monday in April, 1918, until the first Monday in October, 1918; that during the said term of court and in the first week of September, 1918, this affiant caused the sheriff of Harney county to notify the said defendant, W. Z. Moss, to appear before the circuit court on Tuesday, the 1st day of October, 1918, in order that said indictments might at said time be set for trial; that, upon the failure and refusal of the said defendant to appear in court after having been so notified by the said sheriff to appear as aforesaid, this affiant applied to the judge of the above-entitled court, and secured an order for a bench warrant requiring the sheriff of the county to produce the said defendant in court; that the sheriff was unable to apprehend the defendant at once, and did not secure the attendance of the said defendant before the said circuit court until Monday, the 7th day of October, 1918, the same being the first day of the October term of court; that on Monday, the 7th day of October, 1918, the said defendant, W. Z. Moss, appeared in open court in person and by his attorney, P. J. Gallagher, and then and there filed in the said court a motion to dismiss the indictment in both of said cases," as above set forth.

The district attorney admits a conversation with Mr. Thompson on October 7, 1917, "with regard to the continuance of the said indictments for the said term, and with regard to the dismissal of the said indictments at the spring term of 1918," and says that "at that time there was no definite agreement to dismiss the indictments or any one of them, but that the statement was made to Mr. Thompson at that time that unless for some reason known at that time the cases would be dismissed, and that affiant thought at that time that they more than likely would be dismissed at the spring term of court," but that he reserved "the right until the April term of court to make any final disposition with regard to the ultimate disposition of those cases." He declares that "at that time said W. Lair Thompson seemed as willing and as anxious to continue the said cases as I"; that the two indictments against the defendant were continued from the October term of 1917 with the consent, if not upon the request, of the defendant himself, and that the reason said cases were not disposed of during the April term of 1918 was:

"That the said W. Z. Moss absented himself from the court, and that the said W. Z. Moss and W. Lair Thompson, his attorney, at said April term, 1918, neither asked for nor demanded a trial of either of said indictments, and that both of said parties kept away from said court so that this affiant could not have said cases set for trial during said term; and that before the end of said term of court the sheriff of Harney county, Oregon, at the request of this affiant, as aforesaid, notified the said defendant, W. Z. Moss, to appear in court so that some disposition could be made of the said two indictments; and that the said W. Z. Moss having refused and failed to appear upon the receipt of said notice from the said sheriff, and the said sheriff being unable to locate the said W. Z. Moss, and to serve him with the bench warrant heretofore referred to, this affiant was unable to secure the attendance of the said W. Z. Moss, and unable to dispose of the two indictments, during the said April term of court."

It appears from the affidavit of Goodman, as sheriff of Harney county, that in September, 1918, he addressed a duly registered letter to the defendant at Lakeview, Or., his post office, in which he notified him to appear in court on Tuesday, the 1st day of October, 1918, to make some disposition of the pending indictment, and that he received the registration return card duly signed by the defendant. The affiant says that later in September, 1918, he saw the defendant at The Narrows, in Harney county, and personally notified him to appear in court on the date specified, "for the purpose of having the said indictments set for trial"; that at "said time the said W. Z. Moss stated to me that he would not appear before the said court at said time, and if the court or the officers of Harney county wanted him they knew where to find him, or words to that effect." According to the affidavit, Moss left the state within a few days thereafter, and returned about October 7, 1918, when he appeared in court in response to a bench warrant issued for him four days earlier.

No reply affidavits were filed by the defendant, and none of the new matter set up in the counter affidavits on the part of the state is denied. After argument the court overruled the motions to dismiss, from which

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the defendant appeals, assigning such ruling as error.

Wallace McCamant, of Portland (McCamant, Bronaugh & Thompson, of Portland, on the brief), for appellant.

J. O. Bailey, Asst. Atty. Gen. (George M. Brown, Atty. Gen., M. A. Biggs, Dist. Atty., of Burns, and J. W. McCulloch, of Ontario, on the brief), for the State.

JOHNS, J. (after stating the facts as above). Section 10 of article 1 of the Constitution provides:

"No court shall be secret, but justice shall be administered openly and without purchase, completely and without delay."

Section 1701, L. O. L., provides:

"If a defendant indicted for a crime, whose trial has not been postponed upon his application or by his consent, be not brought to trial at the next term of the court in which the indictment is triable, after it is found, the court must order the indictment to be dismissed, unless good cause to the contrary be shown."

The defendant was "not brought to trial at the next term of the court in which the indictment" was triable, and he now contends that for such reason the cases against him should be dismissed. It appears from the record that on October 7, 1918, such a motion was filed to dismiss, and was set for hearing at 1:30 p. m. of the same day. The journal entry shows that—

"The said defendant appearing in person, as well as by P. J. Gallagher and Geo. S. Sizemore, his attorneys, said defendant at this time asks leave to withdraw the said motion to dismiss, and, leave to withdraw being granted, the said defendant, through his said attorneys, stated in open court that he was ready for trial, and asked that the said cases be set for trial."

The order further shows that on the application of the defendant and with his consent the cases were set for trial on Monday, October 14, 1918, at 10 a. m. This record must be taken as true. On October 15, 1918, Mr. Thompson, as the sole attorney for the defendant, filed another motion to dismiss.

It appears from the affidavits of both the state and the defendant that the cases were continued from the October term, 1917, to the April term, 1918, by consent. Mr. Thompson claims that his consent was based on an agreement with the district attorney that the cases would be dismissed at the April term, 1918, and his affidavit as to the facts is clear and specific. In legal effect, the district attorney admits that it was then his purpose to dismiss the indictments at the coming April term, but claims that he reserved the right "until the April term of court to make any final disposition with regard to the ultimate disposition of those cases"; that the cases were not disposed of at the following April term for the reason that the defendant "absented himself from court, and neither asked for nor demanded a trial on either indictment, and kept away from court, so that the cases could not be set for trial"; that the term of court did open on the first Monday in April, 1918, and continued and remained open until the first Monday in October, 1918, and that in the first week of September, 1918, he directed and caused the sheriff to notify the defendant to appear in court on Tuesday, the 1st day of October, 1918, for the purpose of setting the cases for trial. The record shows that the defendant was notified by the sheriff and refused to appear; that by reason thereof the court issued a bench warrant, and that in response thereto the defendant appeared in court on October 7, 1918, at which time the first motion to dismiss was filed. It further appears from the unchallenged affidavit of the district attorney that on the first day of the April term, 1918, the cases against the defendant were called on the docket by the court; that the defendant then appeared by his attorney, P. J. Gallagher; that after some argument and discussion the district attorney stated that L. R. Webster, an attorney who had been employed by the prosecution, was then absent, but would "be in attendance upon the court within a day or two," and that Mr. Webster arrived during the first week of the term, and was in attendance upon the court for several days. Before his arrival the defendant absented himself from court, left Harney county, and did not again appear during the term, either in person or by attorney.

It further appears by the affidavit of Mr. Thompson that "on Monday, October 8, 1917, before court convened this affiant did relate to Honorable Dalton Biggs, judge of the above-entitled court, the substance of the agreement between himself and the district attorney," and that upon the convening of court the district attorney stated "that an agreement had been reached to continue all of said indictments and said reduction of bail in certain cases which were involved in said agreement."

[1] Assuming that the district attorney did make the agreement that the cases should be continued from the October term of 1917 to the April term of 1918, and should then be dismissed as set forth in Mr. Thompson's affidavit, and that the district attorney did violate the agreement, that would not be legal or sufficient ground to dismiss the indictments under either section 10 of article 1 of the Constitution or section 1701, L. O. L. While it may be true that the trial court was advised of its substance, there is no record or evidence which tends to show that the court ever ratified or approved the alleged agreement; and the fact remains that all of the proceedings were heard before the trial judge, who overruled the motions to dismiss the indictments.

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[2] As he had personal knowledge of all of the proceedings, we think his ruling is entitled to some weight.

[3, 4] The cases were continued from the October term of 1917 to the following April term, with the express consent and approval of the defendant. While it is true that he was present at the beginning of the April term, there is nothing to show that he sought or demanded a trial, and the record discloses that pending the arrival of Mr. Webster, during the early part of the first week of the term, he absented himself from court, and stayed away for the remainder of the term. When he was finally brought into court on a bench warrant he filed a motion to dismiss, because his case was not tried at the April term. Upon the hearing he asked and was granted leave to withdraw that motion, and through his attorneys he stated in open court that he was ready for trial, and asked to have the cases set for hearing. Upon his application and consent they were set for trial on October 14, 1918. On October 15, 1918, he filed another motion to dismiss, on the identical ground stated in his original motion. In legal effect his withdrawal of the motion to dismiss, with the statement in open court that he was ready for trial and his application and consent to have the cases set for trial on October 14, 1918, constituted a waiver of his right thereafter to insist upon the motions to dismiss the indictments. Under such a state of facts we do not believe that the defendant's motions to dismiss come within the terms and provisions of either section 1701, L. O. L., or section 10 of article 1 of the Constitution.

The judgment of the circuit court is affirmed.

BENSON, J., took no part in the consideration of this case.

(93 Or. 370)

LE VEE v. LE VEE et al.*

(Supreme Court of Oregon. June 10, 1919.)

1. FRAUDS, STATUTE OF ⟸129(12) — PAROL CONTRACT—PART PERFORMANCE — TENANCY IN COMMON.

Possession by tenant in common to constitute such part performance of his cotenant's agreement to sell her interest in the common property as to take the contract out of the statute of frauds must result in such a change of relation between the parties as would challenge the attention of any one seeing the change, and would indicate that some contract had been made.

2. SPECIFIC PERFORMANCE ⟸121(5) — PAROL CONTRACT—PART PERFORMANCE—SUFFICIENCY OF EVIDENCE.

In son's suit for specific performance of mother's parol contract to convey her interest in land owned by mother and son as tenants in common, evidence of son's possession of land under the agreement *held* not of that degree of clearness and certainty required to overcome the effect of the statute of frauds.

3. SPECIFIC PERFORMANCE ⟸121(2) — PAROL LAND CONTRACT—PART PERFORMANCE—EVIDENCE.

Generally a tenant in common, suing for specific performance of his cotenant's parol agreement to convey his interest in the common property, must prove the agreement, as well as his part performance of it, clearly and unequivocally by the preponderance of the evidence.

4. FRAUDS, STATUTE OF ⟸158(4) — AVOIDANCE OF CONTRACT—DEGREE OF PROOF.

The statute of frauds is stringent in its provisions, and to avoid its effect the testimony must be clear and explicit, showing a state of facts referable exclusively to the contract pleaded.

5. APPEAL AND ERROR ⟸1173(2)—REVIEW—DISPOSITION AS TO DEFENDANTS WHO DO NOT APPEAL.

Where some of the defendants against whom judgment is rendered appeal and others do not appeal, the appellate court, in holding lower court in error, will reverse judgment only as against the defendants who appealed.

Department 1.

Appeal from Circuit Court, Benton County; Skipworth, Judge.

Suit by Chauncey W. Le Vee against Jacob Le Vee and others. Decree for plaintiff, and some of the defendants appeal. Reversed as to the appealing defendants, and affirmed as to defendants not appealing.

The plaintiff and his mother during the latter years of her life were tenants in common of a 32-acre tract in Benton county. The complaint is to the effect that in 1897 the mother, in consideration of the plaintiff's promise to take care of her during the remaining years of her life, pay the expenses of her last sickness and burial, and discharge a mortgage of $500 then on the property, together with any other incumbrances existing at her death, contracted to sell to him the undivided half of the property, conveying it to him either by deed or will. It further states, in substance, that she made a deed in pursuance of that contract, and deposited it in a bank, with directions to hold the same as an escrow and deliver it to the plaintiff on the performance of his covenant. He claims to have taken possession of the property and made certain valuable improvements thereon, and otherwise to have performed the contract by taking care of his mother, paying the expenses of her last illness and funeral and burial expenses. He says that during the year 1910 his mother, without his knowledge or consent, withdrew the escrow from the bank. She died March 4, 1913.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes
*Rehearing denied 183 Pac. 773.

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The defendants, who are her other children with their several spouses, rely upon a will which she had made, and which has been admitted to probate, to the effect that the plaintiff should have a life estate in her undivided half of the land on condition that he would pay all the claims against her estate and the expenses of administration. The plaintiff avers that he has demanded of the defendants a deed to the premises, which they have refused. After a denial of any contract the defendants pleaded that the alleged contract was not in writing, and that if there was any such agreement it was rescinded by the concurrence of the plaintiff and his mother. For a third defense they state in substance, the contents of the will already referred to, and say that the plaintiff in acceptance of the terms of the will paid all the claims presented against the estate, and accepted the conditions of the testament, wherefore he is estopped from claiming anything under or by virtue of the contract. They also allege that the plaintiff presented to the executor a verified claim for the sums of money said to have been paid for the mother by the plaintiff, which are identical with those he was bound to pay under the contract upon which he relies, and that this constitutes a waiver by the plaintiff of that contract whereby he is estopped from claiming anything by virtue thereof. Lastly they aver that the fair rental value of the mother's interest in the land was about $300 per annum; that the plaintiff ever since the time of the alleged agreement has had the use of the land; that his mother acted as his housekeeper for many years, and performed valuable services in connection with the management of the place, for which she received no compensation, and that under all these circumstances the alleged agreement, if there was such a stipulation, was so grossly unequal and improvident that equity ought not to decree a specific performance.

The new matters of the answer are materially traversed by the reply. Affirmatively the plaintiff pleads ignorance of the law and facts which induced him to present to the executor his claim for moneys advanced to his mother. The circuit court heard the case, and rendered a decree substantially according to the prayer of the complaint. All but three of the surviving children, defendants, either defaulted or withdrew their appearance, but those still remaining in the case have appealed.

Arthur Clarke, of Corvallis (McFadden & Clarke, of Corvallis, on the brief), for appellants.

B. A. Kliks, of McMinnville (Hewitt & Sox, of Albany, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). Substantially the only witness for the plaintiff is himself. He narrates that he and his mother came to this state, and after an unsuccessful venture on a larger farm they bought together the tract in dispute, taking title to themselves as tenants in common; that they lived together on the land for several years, she doing the housework and otherwise assisting in the management of the place and the marketing of its products, and all went smoothly until he married. The old lady, feeling herself supplanted by the daughter-in-law, left, and the plaintiff, according to his story, provided for her sustenance at various places in Corvallis, and finally the mother took up her abode at the Patton Home in Portland. He says that he paid her expenses at the rate of $20 per month at all of these places, as well as during a trip she made to some of the Eastern States on a visit.

No effort is made to account for the contract, if it was in writing, or for the deed, beyond its withdrawal from the bank. The plaintiff does not claim to have had a copy of the agreement, if there was one, so that the question really turns upon whether there is sufficient evidence to prove a contract, and, further, whether part performance has been shown sufficiently to support a decree compelling a conveyance.

As late as March 30, 1910, the plaintiff and his mother made the following agreement:

"Whereas, Chauncey Le Vee and Mary Le Vee are the owners and tenants in common of a certain 32.5-acre tract of land one mile north of Corvallis, and the said Mary Le Vee desires to go East, and it is arranged that said Chauncey Le Vee shall pay her $20.00 a month for her support, in consideration of which he is not to be charged with rent for the use of said land:

"Now, therefore, it is agreed between said Chauncey Le Vee and Mary Le Vee as follows: Said Chauncey Le Vee agrees to pay said Mary Le Vee the sum of $20.00 per month for her support, said money to be sent to her at such place whatever she may be residing, and in consideration of such payment, said Mary Le Vee agrees that so long as payments are kept up, said Chauncey Le Vee shall not be liable for payment of any rent for the use of said premises. Said Chauncey Le Vee further agrees to pay the taxes on said land.

"This agreement may be dissolved by either party hereto, at any time hereafter.

"In witness whereof, the parties hereto have hereunto set their hands and seals, in duplicate, this March 30th, 1910.

"[Signed] Mary Le Vee. [Seal.]
"[Signed] C. W. Le Vee. [Seal.]

"In presence of:
"[Signed] E. E. Wilson."

It is admitted that within six months after the probate of the will the plaintiff presented to the executor his claim for moneys advanced to his mother for three years' interest on her half of the mortgage, for taxes on her half of the reality, for funeral expenses and claims and other demands discharged by him, amounting in all to $1,955.

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In Tonseth v. Larsen, 69 Or. 387, 138 Pac. 1080, Mr. Justice Bean quotes with approval from 36 Cyc. 659:

"Possession, in order to be an act of part performance, either alone or in connection with other acts, is subject to several requirements. First, it must have been taken in pursuance of the contract. Further, it must be exclusively referable to the contract; that is to say, it must be such a possession that an outsider, knowing all the circumstances attending it, save only the one fact, the alleged contract, would naturally and reasonably infer that some contract existed relating to the land of the same general nature as the contract alleged."

[1] In other words, there must be such a change of relation between the parties as would challenge the attention of any one seeing the change, and would indicate that some contract had been made. The rule is thus stated in the syllabus to Roberts v. Templeton, 48 Or. 65 (80 Pac. 481, 3 L. R. A. [N. S.] 790, note):

"Where a cotenant with a part owner of real property claims specific performance of an oral contract of purchase with another owner, the proof must be clear that possession was taken under the oral agreement to constitute such a part performance as to avoid the statute of frauds."

[2, 3] Everything which the plaintiff claims he did in pursuance of the alleged contract, when viewed by an observer, is referable with equal force to the tenancy in common existing between the parties. No visible change was made respecting the possession of the land. Both the plaintiff and his mother lived upon it and operated it just as such holders of the title ordinarily would do. The plaintiff probably paid out money for his mother's support, but it was apparently derived from the proceeds of the crops of the land. Besides the fact that his acts already alluded to were consistent with the tenancy in common and contained nothing referring them exclusively to a contract, his other acts are utterly inconsistent with the idea that he had an agreement with his mother to buy the land. The quoted contract of March 30, 1910, is practically a lease, which would not have been executed if he was holding the land as a purchaser. His act of presenting to the executor his claim against her estate for the items mentioned is likewise inconsistent with the theory that he had a contract to buy the land in consideration of those very payments. The evidence is not of that degree of clearness and certainty required when it is sought to overcome the effect of the statute of frauds. The general rule is that the plaintiff must prove the agreement, as well as his part performance of it, clearly and unequivocally by the preponderance of the evidence. If the testimony taken all together is equivocal in its effect, so that it is left uncertain which is the true solution of the question, the plaintiff has failed to make his case by the preponderance of the testimony. It presents a situation analogous to what was said by Mr. Justice McBride in Spain v. Oregon-Washington R. & N. Co., 78 Or. 355, 153 Pac. 470, Ann. Cas. 1917E, 1104:

"When the evidence leaves the case in such a situation that the jury will be required to speculate and guess which of several possible causes occasioned the injury, that part of the case should be withdrawn from their consideration."

In short, by reason of the fact that all the things said to have been done by the plaintiff are easily referable to the relation of tenants in common existing between himself and his mother, and that the act of his taking what was substantially a lease of the premises on March 30, 1910, and his presenting a claim to her administrator are contradictory of his theory of contract, he has failed to make a case preponderating in effect over that made by the defendants. The case presented is not like Woods v. Dunn, 81 Or. 457, 159 Pac. 1158. There the will made by the former owner of the land was itself a writing sufficient to satisfy the statute of frauds. Besides this, the agreement was otherwise amply proved, together with its unequivocal part performance by the plaintiff.

Stalker v. Stalker, 78 Or. 291, 153 Pac. 52, cited by the plaintiff, was a case where a member of the Church of Jesus Christ of Latter-Day Saints had contracted a plural marriage. When this was declared unlawful, he placed the plural wife on a piece of land which he bought for her for a home and left her in possession, going into another state. The agreement to give it to her for a home in settlement of her probable demands against him for support was clearly proved and she remained in the exclusive possession of the premises, while he never appeared upon them afterwards. Further, his writings substantially declared the true contractual relation.

Kelley v. Devin, 65 Or. 211, 132 Pac. 535, was a case where a father contracted with his son, who was long past the age of majority, to the effect that if the son would participate in the management of his father's property during the life of the latter, he would devise to him an undivided half of all his estate. This agreement was clearly proved by at least three disinterested witnesses, and there was such a change in the management of the father's affairs by the participation of the son therein that any one seeing the difference would be put upon inquiry about a contract, as that would be the only reasonable explanation of the change in management.

Sprague v. Jessup, 48 Or. 211, 83 Pac. 145, 84 Pac. 802, 4 L. R. A. (N. S.) 410, involved a contract between strangers evidenced by the purchaser's taking possession of the realty to the utter exclusion of the seller, besides which, part of the purchase price had been

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paid and a memorandum in writing signed by the seller indicated that the payment was made on account of the purchase price. In their facts and circumstances all these cases cited by the plaintiff differ widely from the one at the bar, and are not controlling here.

[4, 5] The statute of frauds is stringent in its provisions, and to avoid its effect the testimony must be clear and explicit, showing a state of facts referable exclusively to the contract pleaded. This condition has not been fulfilled in the present instance, wherefore the decree of the circuit court, so far as it affects the parties who have appealed and contested the complaint, must be reversed. The decree must stand as to the other defendants.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

(26 Wyo. 193)

GRAVES et al. v. BURCH.

(Supreme Court of Wyoming. June 3, 1919.)

1. BILLS AND NOTES ⟸137(1), 139(1)—EXTENSION—CONSIDERATION.

Where maker of note and mortgage called payee on phone and asked him if he wanted his money, that if he did she would borrow it for him, and he replied that he did not need the money and that maker should not worry herself about it, there was not a definite extension of time of payment, nor any consideration necessary to a valid and binding extension.

2. BILLS AND NOTES ⟸394—MORTGAGES ⟸414—FORECLOSURE—DEMAND.

If a debt became due and was unpaid, no previous demand was necessary to authorize a suit to recover amount due and to foreclose mortgage securing same.

3. MORTGAGES ⟸581(2)—ATTORNEY'S FEES—DEMAND.

A previous demand for payment of the debt is not generally necessary to a recovery of attorney's fees provided for in a note or mortgage, where the right to sue thereon has accrued.

4. MORTGAGES ⟸581(5)—ATTORNEY'S FEES.

A provision for attorney's fees in a note or mortgage is a contract of indemnity only, in the nature of a penalty as distinguished from liquidated damages, to compensate the payee or holder for an expense which he has necessarily incurred or become liable for through some fault of the maker or mortgagor; and such fees, even where there is a stipulation for the recovery of a certain or stated amount, are within the equitable control of the court, to allow only such sums as may be reasonable.

5. MORTGAGES ⟸581(2)—ATTORNEY'S FEES—EQUITY.

Attorney's fees provided for in note and mortgage may be disallowed altogether under circumstances rendering their recovery inequitable or unconscionable.

6. MORTGAGES ⟸581(2)—ATTORNEY'S FEES—DISALLOWANCE.

Where maker of a note secured by a mortgage was lulled into a sense of security by the payee stating to her, when she proposed to borrow money to pay the debt, that he was not needing the money and that she need not worry about it at all, it would be inequitable to allow the recovery of attorney's fees provided for in the note, where a proceeding to foreclose was brought without further notice giving an opportunity for payment; mortgagee, upon suit being brought, tendering the amount due.

7. MORTGAGES ⟸256—ATTORNEY'S FEES.

Where a payee in a note secured by a mortgage was not equitably entitled to attorney's fees, having lulled the maker into a sense of security by leading her to believe that there would be no immediate foreclosure, an assignee of the mortgage and note, after the note was overdue, took them subject to the equities existing at the time of the assignment, and was not entitled to attorney's fees, where he immediately brought suit to foreclose without notice.

8. MORTGAGES ⟸302 — TENDER — SUFFICIENCY.

In an action to foreclose a mortgage, principal of which was payable in monthly installments, some of which were not made promptly, thus making computation of interest a complicated matter, a tender of the amount demanded in a petition for foreclosure, with interest to date and court costs, will not be held ineffective, although more money was actually due, the difference being deposited in court upon amendment of the petition by the plaintiff; and a tender and deposit in court will not be held insufficient, although lacking a few cents to cover the exact amount, where the only controversy in the case was as to whether plaintiff was entitled to attorney's fees.

9. MORTGAGES ⟸302—TENDER—INTEREST.

In a mortgage foreclosure, where mortgagor made a tender and deposit in court of the amount demanded in the petition, together with interest and costs to date of deposit, but it was found that plaintiff had erred in computing the interest, leaving a difference which the defendant at once deposited, the defendant should not be required to pay interest upon the amount originally tendered and deposited.

Error to District Court, Fremont County; Chas E. Winter, Judge.

Action by I. L. Burch against Cora V. Graves and Karl De F. Graves. Judgment for plaintiff, and defendants bring error. Remanded, with directions to modify judgment.

E. H. Fourt, of Lander, for plaintiffs in error.

John J. Spriggs, of Lander, for defendant in error.

POTTER, J This is an action upon a promissory note and real estate mortgage

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securing the same, executed by the plaintiffs in error, Cora V. Graves and Karl De F. Graves to one John Findlay, and assigned to the defendant in error, I. L. Burch, to recover judgment upon the note for an unpaid balance due thereon and for the foreclosure of the mortgage. The note and mortgage were assigned to Burch on March 10, 1916, and the action was commenced on the following day, March 11, 1916, and there was indorsed on the summons, as demanded by the præcipe, the following:

"Civil action for the recovery of money only. Amount claimed, $314.46, and mortgage foreclosure, for which plaintiff will take judgment if defendant fails to answer."

As set out in the petition and shown by the evidence, the note was dated October 4, 1910, and was given for the sum of $800, with interest at the rate of 10 per cent. per annum from date until paid, payable by monthly installments of $20 each until the principal sum and interest shall be fully paid. It expressly provides that the monthly payments shall be applied, first to payment of accrued interest, and the balance upon the principal. It contains, also, the following provisions:

"In case payment shall not be made at the times and as herein provided, we further promise and agree to pay costs of collection, including the further and additional amount of $100 on said principal sum of this note for attorney's fee, and if any suit or foreclosure proceedings be commenced for the collection of any amount unpaid on this note, said fees shall be added to and included in any judgment hereon. And the makers of this note hereby waive presentation for payment, notice of nonpayment, and jointly and severally consent that time of payment may be extended without notice thereof."

The mortgage also contains a provision for $100 attorney, solicitor, and counsel fees to be retained out of money arising from the sale of the property authorized thereby upon default in payment of principal or interest or any part thereof, and that in any proceeding in equity to foreclose the mortgage said solicitor fees shall be taxed as costs in said action.

The petition alleges a large number of payments indorsed on the note, and the dates thereof, respectively, commencing with October 31, 1910, as the date of the first payment of $20, and ending with the payment of a like sum on October 12, 1915; said last payment being indorsed as the payment due for February, 1914. Judgment was prayed for $174.21, the balance due upon the principal of the note, $37 interest due at the date of commencing the action, $3.25 for insurance premium paid, and the further sum of $100 for attorney fees, and for the sale of the mortgaged premises to satisfy the same. It will be noticed that the total of the sums stated is $314.46, the amount indorsed upon the summons, and that, omitting the attorney fee and insurance premium, the amount claimed would be $211.21.

The answer, filed April 7, 1916, admits the execution of the note and mortgage, and alleges that after the note became due, and before it was assigned to plaintiff, the defendants obtained an extension of time for the payment of the balance due; that the payee, Findlay, told them that no advantage would be taken of them, or expense incurred, and that they might have additional time to pay the balance, and that, relying on that promise and in consideration thereof, the defendants "made additional payments as they could"; that defendants were not notified of the assignment, and no demand for payment was made upon either of them, prior to commencing the action; that the plaintiff knew the note was past due when assigned to him; that the assignment was a breach of faith and a fraud upon defendants; that on March 28, 1916, the defendants tendered to plaintiff the sum of $225, being the amount due upon the note, with court costs to that date, which tender was refused by the plaintiff, and that the defendants tender said sum into court, being all that is due at the time of filing the answer; that the commencement of suit without demand or notice is "vexatious, unconscionable, and inequitable, and the defendant [plaintiff] ought not to be permitted to obtain any judgment for costs or attorney's fees against the defendant." We do not find any reply to the answer in the record.

The evidence shows that on the same day that the answer was filed the sum of $225 was deposited with the clerk of court by counsel for defendants, "as tender to I. L. Burch by Cora V. Graves, to remain in court for claim on note, interest, and costs to March 28, 1916." On the trial the plaintiff testified that there had been an error in the calculation of the interest due on the note, and that the amount actually due for interest when suit was commenced was $72, instead of $37, as alleged in the petition; but he also testified that the amount of principal and interest then due was $237.42. The court found that the amount then due was $237.21, and the record shows that during the trial, "plaintiff having testified * * * that the sum of $12 was due in addition to the amount claimed in his petition, the defendants thereupon tendered and paid to the clerk said sum of $12."

Judgment was rendered for the sum of $351.38, the total of the following items: $237.20, principal and interest due at the commencement of the action, $14.18, interest on said sum to December 16, 1916, the date of the judgment, and $100 attorney's fees, together with the costs of the action, taxed at $7.65—and a sale of the mortgaged premises was ordered to satisfy the judg

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ment debt, with interest, costs, and expenses and costs of sale. On the date of the judgment also an order staying execution pending appeal was entered, providing "that if defendants leave the money which is now in the hands of the clerk of this court, to be tendered and paid upon any judgment which may be rendered or sustained in said cause," and shall give a bond, as provided by law, in the sum of $250, execution shall be stayed pending the appeal: and it appears that a bond was given and approved, as provided in said order, on December 23, 1916.

When it appeared by the evidence that an error had been made in alleging the amount of interest due, plaintiff's counsel moved to amend the petition accordingly, and a motion to amend so as to correctly allege the amount of the interest had been filed on May 6, 1916. There does not appear to have been any order made upon either of these motions; but the court, no doubt, considered the petition as amended, without formal order to that effect, since the judgment included a greater amount of interest than the sum alleged, and when the motion was renewed before the close of the testimony the court stated:

"We will proceed. It can be done any time before judgment, or even after judgment."

The fact that $225 was tendered to plaintiff on March 28, 1916, seems to be admitted, by the failure to file a reply denying the amount of such tender in the answer. But we think the evidence as to the tender is sufficient to show that said amount was tendered, and that it was intended to fully cover the amount claimed by the petition and summons, with costs up to that time, except the attorney's fee claimed; and the fact that it was so intended was explained at the time and understood by the plaintiff, the defendant in error here. The latter testified as to the tender, in substance, that all that he claimed at the time, except for attorney's fees, was tendered; but he could not recall the amount, and that he refused it for the reason that it did not include attorney's fees. There was no evidence of the amount of the court costs at the time of the tender, probably for the reason that no contention was made that the tender was insufficient to cover the same in addition to principal, interest, and insurance then claimed, and that the parties understood it to be sufficient for that purpose. But it appears to have been sufficient, excluding the amount claimed for attorney's fees, for the judgment shows that up to the conclusion of the trial the costs were only $7.65. Thus the sum of $225 tendered exceeded the amount claimed by the petition and summons for principal, interest, insurance, and the court costs up to the time of the judgment, and it was also sufficient to include the interest to the time of the tender, though nothing seems to have been said about that at the time. But it was not sufficient, and was not intended, to cover any claim or allowance for an attorney's fee.

When the parties entered upon the trial, therefore, the only matter in controversy was the right to recover attorney's fees, and the only contention by plaintiffs in error here is that it was error to allow such fees; that contention being based upon the fact that the debtors were not notified of the assignment, and no demand was made upon them before suit was brought, and the fact testified to by Mrs. Graves that after the debt was due, and a short time before the assignment of the note and mortgage, Mr. Findlay told her that he did not need the money and that she need not worry about it at all. Mrs. Graves' testimony as to that matter, after stating that she had a conversation with Mr. Findlay after the note was due and shortly before suit was brought, is as follows:

"I called him up on the phone and asked him if I should get this money for him. I told him I would borrow it for him. I told him Mr. Graves was out of work; payments were behind. * * * He said that he didn't need the money, and that I needn't worry myself in the least about it. Q. Did he tell you you could have all the time you needed to pay it? A. Yes. Q. Did he say he wouldn't urge you, or bring suit against you—give you to understand that? A. Yes; he just said I needn't worry in the least about it, he wasn't needing money. Q. Did you rely on that? A. I certainly did. Q. For that reason you didn't borrow money and pay it? A. No; but I did go and see about borrowing money. They told me, if I needed money, Mr. Findlay pressed me, I could have it."

[1-3] This evidence does not show a definite extension of the time of payment, nor any consideration necessary to a valid and binding extension suspending the right to maintain an action upon the note or mortgage. 2 Jones on Mort. (7th Ed.) § 1190; 1 Wiltsie on Mort. Foreel. § 467. And, the debt being due and unpaid, no previous demand was necessary to authorize a suit to recover the principal and interest due and to foreclose the mortgage to satisfy the same. 3 Jones on Mort. § 1471; 1 Wiltsie on Mort. Foreel. § 49; Henry v. Hodge, 171 Ill. App. 10; Walter v. Dickson, 175 Pa. 204, 34 Atl. 646. Nor, as a general rule, is a previous demand necessary to a recovery of attorney's fees provided for in the note or mortgage, where the right to sue thereon has accrued. Walter v. Dickson, supra; Warwick Iron Co. v. Morton, 148 Pa. 72, 23 Atl. 1065; Wienke v. Smith (Cal.) 176 Pac. 42.

[4] But, by the great weight of authority, a provision for attorney's fees in a note or mortgage is a contract of indemnity only—in the nature of a penalty, as distinguished

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from liquidated damages—to compensate the payee or holder for an expense which he has necessarily incurred or become liable for, through some default of the maker or mortgagor; and such fees, even where there is a stipulation for the recovery of a certain or stated amount, are within the equitable control of the court, to allow only such sum as may be reasonable. 3 R. C. L. 896; 8 C. J. 1101; 27 Cyc. 1785, 1786; 3 Jones on Mort. (7th Ed.) § 1606; Florence Oil & Ref. Co. v. Hiawatha Oil, G. & Ref. Co., 55 Colo. 378, 135 Pac. 454; Bank v. Coleman, 204 Fed. 24, 122 C. C. A. 338; Daly v. Maitland, 88 Pa. 384, 32 Am. Rep. 457; Coley v. Coley, 94 S. C. 386, 77 S. E. 49; Colley v. Summers P. Hdw. Co., 119 Va. 439, 89 S. E. 906, Ann. Cas. 1917D, 375; Triplett v. Sec. Nat. Bank, 121 Va. 189, 92 S. E. 897; Jarvis v. Stoffal, 54 Pa. Super. Ct. 362; Reed v. Catlin, 49 Wis. 686, 6 N. W. 326. The general principle, under a provision for a certain amount, is well stated by Judge Gabbert in the Colorado case cited, as follows:

"We think the correct construction of such a stipulation, which has been announced in many cases, is that a provision for a fixed amount for attorney's fees is an agreement to indemnify the holder against the expenses incurred in the employing of an attorney for the enforcement of collection when the maker fails to keep his agreement, and that when the question is properly raised, regarding the reasonableness of a stipulated amount, the holder can only recover such part thereof as will reimburse him for the reasonable and necessary attorney's fees he has been compelled to pay, or has become liable for, in enforcing collection of the note."

[5] And in the exercise of such control and a sound discretion such fees may be disallowed altogether, under circumstances rendering their recovery inequitable or unconscionable. 8 C. J. 1100, § 1434; Reed v. Catlin, supra; Williams v. Williams, 117 Wis. 125, 94 N. W. 25; Castle v. Castle, 78 Mich. 298, 44 N. W. 378; Lewis v. Germania Sav. Bank, 96 Pa. 86; Moore's Appeal, 110 Pa. 433, 1 Atl. 593; Lindley v. Ross, 137 Pa. 629, 20 Atl. 944; Nat. S. F. & B. Ass'n v. Waters, 141 Pa. 498, 21 Atl. 666; Taylor v. King, 97 S. C. 477, 81 S. E. 172; Barron v. Thompson (S. C.) 97 S. E. 840; Scott v. Carl, 24 Pa. Super. Ct. 460; Haynes v. Halverton, 51 Tex. Civ. App. 228, 111 S. W. 166; Bank v. Coleman, supra; Fourth Nat. Bank v. Stahlman, 132 Tenn. 367, 178 S. W. 942, L. R. A. 1916A, 568; Enid C. Inv. Co. v. Porter, 45 Okl. 406, 145 Pac. 805.

In Lewis v. Germania Savings Bank, supra, a defense was interposed that there had been an agreement extending the time for payment, and it was also claimed that because of the agreement to give further time the plaintiff was not entitled to recover attorney's fees. After stating that there was nothing substantial in the alleged agreement to give further time, for the reason that no sufficient consideration for such agreement was disclosed, the court referred to the objection to the recovery of attorney's fees as the only matter about which there could be any doubt, and stated the fact upon which the objection was based and the principle to be applied as follows:

"It is alleged by the plaintiff in error that prior to June 4th he called at the bank and offered to pay the interest falling due on that day, and also the principal debt, but was informed by the proper officer of the bank, that 'they did not need the money, and to let it stand until the Butler county matter was disposed of,' etc., and that shortly afterwards, without making any request or demand for payment of principal or interest, suit was brought on the mortgage. It is contended that under the circumstances detailed in the affidavits of defense, as to the agreement to give further time, the plaintiff below was not entitled to recover attorney's commissions. We think this would be so if the defendant, even after suit was brought, had been reasonably prompt in paying or tendering payment of the debt and interest secured by the mortgage. In Daly v. Maitland, 7 Norris (88 Pa. St.) 384 [32 Am. Rep. 457], it is held that, while stipulations for the payment of attorney's commissions in mortgages and other securities are valid, they are, nevertheless, subject to the equitable control of the court, and will be enforced only to the extent of compensating the plaintiff for reasonable and necessary expenses of collection. Applying this doctrine to the case of a debtor who has been misled by his creditor and thrown off his guard in the manner the plaintiff in error alleges he was, it would not be an unreasonable exercise of the equitable power of the court to refuse any allowance for attorney's commissions; but, to justify such action on the part of the court, the defendant should attest his sincerity and good faith by promptly paying or tendering the amount of debt and interest, exclusive of commissions."

And because there had not been a tender in that case of the amount of the debt and interest, but the defendant undertook to defend against a part of the plaintiff's claim, and failed to pay or tender the residue, it was held that he was not entitled to equitable relief from the stipulation for attorney's commissions. In Moore's Appeal, supra, judgment had been entered upon a judgment note before it fell due, and the plaintiff, upon the maturity of the note, refused a tender of the full amount due, excluding attorney's commissions. While the case is not in point on the facts, it is important because of a reference in the opinion to a former case, apparently not published in the official reports. The court said:

"To permit such a practice as this, where the defendant offers to pay all that is due at the maturity of the obligation, would be sanctioning an intolerable and unreasonable oppression. * * * We said in Imler v. Imler, 13 Norris [94 Pa.] on page 375: 'It was never intended, nor can we permit such a clause to be used, to

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compel a debtor to pay attorney's commissions where the latter does not dispute the claim and pays at maturity.' In Johnson v. Marsh, 42 Leg. Int. 92, we refused to allow commissions even after execution issued, because there was no satisfactory evidence of a demand for payment before entering judgment, although the debt had passed maturity."

It was explained in Imler v. Imler that the intention of stipulations for attorney's fees in instruments for the payment of money is that the creditor shall be indemnified for his reasonable counsel fees, where it becomes necessary to employ counsel to collect the money. In a later case in the same court (Lindley v. Ross, supra), where the fees were disallowed, it appeared that there had been some negotiation between the parties for making a partial payment before the entry of judgment authorized by the note, and the defendants claimed that the plaintiff had agreed when the money was borrowed that judgment should not be entered until they had notice and an opportunity to pay, if payment was required. Whether the fact of such agreement was established or not does not clearly appear; but the trial court held that demand was necessary before entry of judgment to authorize a recovery of the commissions, and that conclusion, upon the facts of the case, was sustained by the Supreme Court; that court saying:

"We think the learned judge below was right in holding, under the facts in this case, that there must be a demand, and refusal to pay, before the defendants in the judgment can be subjected to the payment of attorney's commissions. This was the rule laid down in Johnson v. Marsh, 21 Wkly. Notes Cas. 570, where it was said: 'In the absence of satisfactory evidence of a demand for payment before entering the judgment and issuing the execution, we think the necessity of resorting to the services of an attorney for collecting the money does not appear, and, without proof of such necessity, the defendants ought not to be subjected to the payment of the commissions.' "

In National S. F. & B. Ass'n v. Waters, supra, it appeared that the mortgage debtor, upon receiving information that the mortgage was due, and that payment had been demanded, requested a statement of the amount due, and was given such a statement, concluding with the words, "Good only until September 11, 1890," and that, relying upon said words, the debtor, on the date stated, paid the amount of the debt, with interest, taking a receipt therefor, reciting that the costs were to be adjudicated between the parties. It was held that the trial court properly entered judgment for the office costs only, excluding attorney's commission; the court saying:

"The services of the latter were not needed for the collection of the money. Indeed, no object is apparent for issuing the scire facias upon the mortgage, except to create a plausible pretext for a charge of attorney's commissions. Under the statement furnished by the plaintiff company to the defendants, on August 30th, the latter were entitled, under any fair and reasonable construction thereof, to pay the money at any time on or before September 11th. The issuing of a scire facias between those dates, so far as we can gather from the record, was unnecessary, as well as a breach of faith. It certainly does not entitle the plaintiff to claim an attorney's commission."

The facts in the Wisconsin case of Williams v. Williams, supra, were that the action to foreclose a mortgage was commenced on January 29, 1902, and on the following day the defendant deposited in court an amount sufficient to pay the amount demanded, excluding costs and solicitor's fee, and moved to dismiss without costs, alleging that on January 28th the mortgage was recorded in the name of and belonged to the plaintiff's attorney, on which day defendant's attorney offered to pay the same to said holder, and, upon it appearing that the latter was attempting to evade a payment, defendant tendered the full amount of the mortgage, with interest, which the said holder absolutely refused to receive, or to receive any sum whatever in payment, and that said holder then immediately transferred the mortgage to plaintiff and brought suit upon it. It was asserted, also, in support of the motion to dismiss, that the refusal of payment when tendered, and the immediate commencement of the suit, was intended to harass and distress the defendant, and impose unnecessary costs and expenses. The amount deposited in court was ordered to be paid to plaintiff in full of the amount due on the mortgage, and the cause was dismissed, without costs to either party. That action of the trial court was affirmed on appeal; the Supreme Court saying:

"The record, however, presents no attempt to set up the previous tender of the mortgage debt as a defense to the action, but merely an appeal to the court to dismiss the action because continuance of the litigation would be wholly needless; the defendants having performed all that plaintiff sought to enforce by her suit, namely, paid the full amount demanded by the complaint. That courts have inherent power to protect themselves against fictitious and futile litigation is unquestionable [citing cases]. * * * Appellant further urges, however, that she was entitled to the costs already incurred; and, since the deposit of money and motion to dismiss were predicated upon assumption that she was within her strict right in commencing action, that contention might be unanswerable in action at law, where costs are matter of strict statutory right. This, however, is a suit in equity, wherein allowance of costs is discretionary, at least upon dismissal. * * * In the present case we are satisfied that the conduct of plaintiff and her attorney was such as to fully justify the withholding of costs from her. Confessedly the amount due upon the mortgage was offered her attorney before suit,

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when he apparently owned it; and he was notified that pay was ready at any time, whether a legal tender was made or not. His only excuse for nonacceptance was that he was engaged in preparing a lengthy bill of exceptions and could not spare the time to look up the mortgage; yet he did take time immediately, not only to find it, but to formally transfer it to plaintiff, and to prepare the voluminous complaint and other papers necessary for commencing this foreclosure action, which he caused to be served with all haste, instead of notifying defendants' attorney that he would accept payment. The only motive conceivable for such conduct is not one which commends itself to courts of equity or invites their favors."

It appeared in the Texas case cited (Haynes v. Halverton), which was a suit upon vendor's lien notes, that the defendant had gone to plaintiff's office to pay before suit was brought, but found that the latter was out of the state; that he then went to the office of another party, understanding that the latter was collecting money for the plaintiff, who told the defendant that he did not have the notes for collection, or in his possession, and knew nothing about them; and defendant testified that he had been ready and willing to pay the notes when presented, but did not learn of the plaintiff's return until the suit was commenced, and that on the next day he went to the plaintiff, offering to pay the notes and interest, but the same was refused, unless attorney's fees were also paid; the plaintiff also telling the defendant that he had sued him without giving him notice for the reason that the defendant had testified against him in a certain suit. On appearance day the defendant again tendered the principal and interest. It was held that the recovery of the stipulated attorney's fees was properly denied.

In the South Carolina Case of Barron v. Thompson, supra, it appeared that a second note and mortgage had been executed and delivered, to take the place of a note and mortgage previously executed, but the receivers of the payee corporation, finding the first note and mortgage among the papers of the corporation, brought suit to foreclose that mortgage, and, upon being apprised of the fact that a second note and mortgage had been given to take it up, agreed to and did deliver up the first for cancellation, so as to permit another loan to be made to pay off the second, according to an arrangement made with the bank to which said second note and mortgage had been assigned. But shortly after that the receivers and their attorney paid said note and mortgage off at the bank with receivership funds, and then refused to accept payment from the defendant, unless he would pay attorney's fees. Defendant, refusing to pay such fees, tendered the amount due in full settlement, which was refused, and foreclosure proceedings were brought on the note and mortgage so acquired by the receivers. The amount of the tender was then paid into court. It was held upon such facts that there was no necessity for the suit and that plaintiffs were not entitled to attorney's fees.

[8-9] Now, in the case at bar, it is clear that Mrs. Graves was lulled into a sense of security by Mr. Findlay's stating to her, when she was proposing to borrow the money to pay the debt, that he was not needing the money and she need not worry about it at all, and that her inaction in the matter, beyond ascertaining that she could obtain the money, if needed, was caused thereby; and we think she had a right to believe from what Findlay said, that no suit would be brought, or legal proceedings taken to collect the note or foreclose the mortgage, without further notice giving an opportunity for payment. Had Findlay remained the owner of the note and mortgage, and brought the suit when it was brought, without previous demand or notice, it would certainly have been a breach of faith on his part; and as the mortgage is not a negotiable instrument, and the note was overdue when purchased by the plaintiff, the latter took them subject to all equities existing at the time of the assignment, if not, indeed, at the time the defendants thereafter learned of the assignment. Castle v. Castle, 78 Mich. 298, 44 N. W. 378.

But it further appears that the recovery of this debt was not the sole object of the suit, for, as shown by the plaintiff's testimony, it was brought to compel a settlement, also, of another matter between the plaintiff and Mr. Graves. Explaining his purpose in buying the note and mortgage and bringing suit, the plaintiff testified that he had a note against Mr. Graves upon which he had secured a judgment; that Graves had filed a petition in bankruptcy to evade that note; that on the basis of certain statements of Graves to the referee in bankruptcy "we claimed an interest on this property, and so I, in order to eliminate any one else having an interest in the property, except me and the people that own it, I bought that note and mortgage, so that when it came to any proceedings in the matter there would be no one else it would be necessary to call upon at all"; that it was done so that he might be in a position to know the interest of Mr. Graves in this property, and how he acquired that interest; and he testified directly that the note was bought to compel a settlement of the other matter, and that the suit was brought to compel a settlement of both matters. He testified, also, that after the suit was brought he had a conversation with defendants, in which he proposed a settlement of both matters, and on his own responsibility,

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but without authority of his attorney, told them that, if both matters were settled as proposed, the total attorney's fees would be only $50.

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The note and mortgage are signed by both Mr. and Mrs. Graves, but the latter's name is first signed to both, and the parties executing the mortgage are described therein as follows: "Cora V. Graves, and Karl De F. Graves, her husband"—seeming to indicate that Mrs. Graves is the principal debtor, and at least the record owner of the property. A sufficient amount having been promptly tendered after suit was brought to cover all that was claimed by the petition and summons and the costs and interest up to the time of the tender, excluding attorney's fees, and the tender having been kept good by a deposit of the amount with the clerk of the court, we are of the opinion that the allowance of any amount for attorney's fees is inequitable, and that it was error to include any amount therefor in the judgment. The defendants did not then know of the mistake in the amount of the interest due, but relied upon the averment of the petition as to the amount. The computation of interest because of the many monthly payments, some of which were not made promptly, was a complicated matter, and the mistake shown by the evidence was not chargeable to the defendants. Mrs. Graves testified that she had been informed before suit, at or about the time of her conversation with Mr. Findlay, that the balance of principal due was $171, or $174, but that she did not know the amount of the interest. When it appeared that a mistake had been made, an additional amount, supposed to be sufficient to cover the difference, was tendered, and also deposited with the clerk. That tender and deposit seems to have lacked 21 cents to make it cover the exact amount of the difference, for the amount shown to have been due of principal and interest, upon curing the mistake in interest, was $237.21, but that it was not sufficient does not appear to have been suggested upon the trial. By the judgment interest was allowed upon the entire amount due at the commencement of the action to the date of judgment. The defendants should not be required to pay interest upon the amount originally tendered and deposited in court, viz. $225.

The cause will be remanded, with directions to modify the judgment, by excluding the amount of the attorney's fees allowed thereby, and that portion of the interest allowed from the commencement of the action equaling the interest upon the sum of $225, the amount of the original tender.

BEARD, C. J., concurs.

BLYDENBURGH, J., being ill, did not participate in the decision.

(26 Wyo. 138)

CHAPMAN v. FIRST NAT. BANK OF CODY et al.*

(Supreme Court of Wyoming. June 2, 1919.)

1. CONTINUANCE ⟸26(13) — ABSENCE OF WITNESS—FAILURE TO SUBPŒNA—PROMISE TO APPEAR.

It was not error to refuse a continuance, under Comp. St. 1910, § 5139, applied for on the ground of the absence of a witness residing in another state, where defendant had relied on his promise to attend and made no effort to secure his testimony by deposition or his attendance by legal process.

2. TROVER AND CONVERSION ⟸40(3)—OWNERSHIP—NOTE.

In an action by a partnership, the payee of a note, for its conversion, the mere fact that it had been indorsed to one of the partners was not sufficient to overcome testimony of such partner and the cashier of the partnership that the note belonged to the partnership at the time of the conversion, in view of Comp. St. 1910, §§ 3349, 3188; there being no showing of delivery.

3. EVIDENCE ⟸471(26) — CONCLUSION OR FACT—OWNERSHIP OF NOTE.

Testimony of a partner and a cashier of the partnership that a note indorsed to the testifying partner by the partnership belonged to the partnership was not a mere legal conclusion at variance with the note itself and the indorsement thereon, being a fact within the personal knowledge of the witnesses.

4. BANKS AND BANKING ⟸262—AUTHORITY OF CASHIER—NOTICE TO THIRD PERSON.

In an action by owner of note and mortgage against a national bank for conversion of the note and mortgage by its cashier, the owner having been induced to send the note and mortgage to the cashier by his letter indicating that they would be paid from the proceeds of a loan he was negotiating for the mortgagor, a statement in the letter by the cashier, "We are negotiating a real estate loan" for the mortgagor, did not necessarily mean or imply that the bank was intending or expecting to make the loan direct or with money under its control, a loan prohibited by the National Banking Law, so as to give notice to the owner that an illegal loan was contemplated, and thus charge him with knowledge of want of authority of the cashier to act for the bank in requesting him to send the papers to the bank.

5. BANKS AND BANKING ⟸262—AUTHORITY OF CASHIER—DUTY OF THIRD PERSON TO INQUIRE.

The owner of a note and mortgage is not bound to inquire concerning the security to be taken by a national bank desiring to advance money to take up the note and mortgage, and hence is not required to inquire concerning authority of the cashier to request sending of note and mortgage to bank.

6. BANKS AND BANKING ⟸157, 171(1) — COMMERCIAL PAPER—COLLECTIONS.

The acceptance of commercial paper for collection by banking corporation is a well-settled

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

* Rehearing denied 182 Pac. 91.

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incident of the banking business, and a bank is liable in case it fails to perform its duties in making collections.

7. BANKS AND BANKING ⟸262—AUTHORITY OF CASHIER.

A cashier of a national bank has authority to accept for the bank notes and mortgages for collection.

8. BANKS AND BANKING ⟸102—AUTHORITY OF CASHIER.

The cashier of a bank is generally its chief executive officer and its general agent in transaction of its legitimate business, and bank is bound by his acts in absence of notice to person dealing with bank of any restriction upon cashier.

Appeal from District Court, Park County; E. C. Raymond, Judge.

Action by John W. Chapman, as surviving partner of the copartnership of Meyer & Chapman, against the First National Bank of Cody and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Collins, Campbell & Wood, of Billings, Mont., and James H. Van Horn, of Cody, for appellants.

W. L. Walls, of Cody, and E. E. Enterline, of Billings, Mont., for respondent.

POTTER, J. This action was brought by John W. Chapman, as surviving partner of the copartnership of Meyer & Chapman, against the First National Bank of Cody and the Park Loan & Trust Company, for the recovery of damages for the alleged conversion of a certain promissory note and a release of a mortgage securing the same. There was a trial to the court without a jury, a general finding for the plaintiff and assessing his damages in the sum of $5,080.67, and a judgment in his favor for that amount and costs. The case is here on appeal.

1. As shown by the time of filing the pleadings which appear in the record, the case was at issue on January 16, 1916, and the trial was commenced on May 22, 1917. This was during the May term of the court. On May 21, 1917, the court overruled a motion of the defendants for a continuance to the next term, filed and presented on that day on the ground of the absence of a witness. That ruling is specified as error, and the question is whether the motion was improperly denied upon the showing made as to the diligence used to obtain the evidence. The statute provides that a motion to postpone a trial on account of the absence of evidence can be made only upon affidavit showing the materiality of the evidence and that due diligence has been used to obtain it, and, if for an absent witness, the probability of procuring his testimony within a reasonable time. Comp. Stat. 1910, § 5139.

The affidavit in support of the motion states:

That upon the 12th day of May, 1917, and immediately subsequent to the date when, by agreement of counsel, the cause was set down for trial on May 22, 1917, the affiant, one of defendants' attorneys, had a telephone conversation with W. J. Deegan, who resides at Roundup, Mont., wherein said Deegan assured affiant that he would go to Cody, where the trial was to occur, not later than Monday morning, May 21, 1917, to testify in behalf of defendants on the trial of the cause on May 22d, and that it would be wholly unnecessary to take his deposition, or to resort to any method to compel his attendance for said trial on that day. That said Deegan then also informed affiant that business matters were taking him to Idaho, but that he would return in ample time to be at Cody at the time set. That on the morning of May 20, 1917, affiant received a telegram from said Deegan sent from Roundup and dated May 19, 1917, reading as follows:

"Was called back from Butte because of case of pneumonia in family. Balance of party gone on and I will join them as soon as I can get away so will absolutely impossible to keep my promise to you to go to Cody Tuesday."

That affiant thereupon immediately endeavored to get into telephone communication with said Deegan, to persuade him to keep his promise to be present at the trial at the time set, but failed to reach him by reason of the fact that the telephone line was out of order, and that, "although due and proper diligence was used by your deponent to obtain said W. J. Deegan as a witness for the trial, * * * nothing was accomplished by reason of the facts" aforesaid. That affiant believes that, if a continuance for the term be granted, the testimony of said Deegan can be procured either upon deposition or in person at the next term.

[1] We think that on this question the case is ruled against the appellants by the decision in Keffer v. State, 12 Wyo. 49, 73 Pac. 556. That was a criminal case, and the fact was stated in the opinion that our statute for postponing a trial on account of the absence of evidence applies alike to civil and criminal causes. It was held not to be error to refuse a continuance applied for on the ground of the absence of witnesses residing in another state, where the defendant had relied on their promise to attend, and made no effort to secure their testimony by deposition, nor to secure their attendance by legal process, other than by sending them subpœnas having no extraterritorial effect. It is true that in that case there had been one continuance on the ground that defendant had not had time to prepare for trial, and the second application was presented

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nearly six months afterwards, and that the record here does not disclose a previous continuance or motion therefor. But in this case a year and several months had elapsed after the case was at issue and before the application was made, with two terms of court intervening, if held as provided by law. And while the fact of one continuance was recited in the opinion in the Keffer Case, the principle stated was not made dependent upon such fact. The court said:

"The defendant chose to rely upon their promise to attend, and he took the risk that they would be present."

And supplementing this a statement was quoted from the opinion of Judge Brewer in a Kansas Case (Campbell v. Blanke, 13 Kan. 62) to the effect that as a general rule, when the attendance of a witness cannot be compelled, a party relies upon his voluntary appearance at his peril. Then the following was quoted from the opinion in an Indiana Case (Marks v. State, 101 Ind. 353) as stating the rule supported by the great weight of authority:

"Where a party desires the testimony of a witness not within the jurisdiction of the court, he must take the deposition of the witness, for he cannot have compulsory process to compel attendance, and he has no right to have a continuance upon the ground that the witness has promised to attend, and will attend at a future term."

2. The note alleged to have been converted was a note of one Russell Kimball payable to Meyer & Chapman, secured by a duly executed mortgage upon certain land in Park county, in this state, and dated at Red Lodge, Mont., February 5, 1906. It is alleged that the note was sent by the payees to the defendant bank, at its request, for collection, together with a duly executed release of the mortgage securing the same, and that the said note and mortgage at that time were owned and in the lawful possession of said Meyer & Chapman, a copartnership engaged in the banking business at Red Lodge, Mont., where both of the partners, W. F. Meyer and John W. Chapman, resided; that said request for the note and release was made by the defendant bank on January 5, 1912, and thereupon the said copartnership sent and delivered the note to the said bank, together with the release duly executed and acknowledged, with instructions to the defendant bank to surrender said note and deliver said release upon the payment of the sum due thereon.

The evidence shows that the request for said note and release was by letter dated at Cody January 5, 1912, written upon the letter head of the defendant bank, addressed to "Meyer & Chapman, Bankers, Red Lodge, Mont.," signed, "W. J. Deegan, Ass't Cashier," and reading, following the address, so far as material here, as follows:

"My Dear Alden: We are negotiating a real estate loan for the Kimballs here, and find that you have a mortgage on a portion of the ground in question. If agreeable to you, I will be pleased to have you execute the release of this mortgage, which I am herewith inclosing, and send the same, together with the notes secured, to the First National Bank here, with the understanding that the release is to be used when the money is turned over to you. I would also appreciate it if you would return this to us at the earliest possible date, as we might have use for it any day, or the matter might be delayed for some little time, but in any event, we would have it here when we were in a position to use it. The signature to this instrument must be witnessed by at least one person, and the acknowledgment should be taken before some other notary than yourself, as under our laws you would be incapable of taking the acknowledgment of either Meyer or Chapman to an instrument affecting the bank, as you are an officer of the copartnership. As soon as the deal is completed we will remit you the proceeds of your note to that date."

The "Alden" personally addressed in the letter was F. H. Alden, the cashier of the Meyer & Chapman Bank. Pursuant to that letter, the said Alden, as cashier, transmitted an executed release of the mortgage by letter written on the letter head of the banking house of Meyer & Chapman, dated "Red Lodge, Mont., Jan. 11, 1912," and reading, so far as material, as follows:

"W. J. Deegan, Esq., Cody, Wyo.—Dear Bill: Replying to your favor of the 5th inst., I inclose herewith release of the Kimball Mtg. as per your request. Our note, up to Jan. 15th, amounts to $3,916.00. * * *

"Yours truly, F. H. Alden, Cashier."

On January 13, 1912, by letter on the letter head of said defendant bank, the receipt of said release was acknowledged as follows:

"Mr. F. H. Alden, Cashier, Red Lodge, Mont. —My Dear Alden: I am just in receipt of your letter of January 11th inclosing a release of mortgage duly executed and I shall be pleased to hold the same until the payment is ready, when I will return you the amount named and use the release. Very truly yours,

"W. J. Deegan, Asst. Cashier."

On April 15, 1912, the note was transmitted from the banking house of Meyer & Chapman, by letter of that date, reading as follows:

"W. J. Deegan, Esq., Cody, Wyo.—Dear Deegan: I inclose herewith the Kimball note amounting to $4,028.59 to this date. Trusting you will be able to relieve us of this old sore in the near future, I am

"Yours truly, J. W. Chapman,
"Alden."

The receipt of the note was acknowledged by letter dated at Cody April 19, 1912, and, like the others signed by Deegan, upon the stationery of the bank, reading as follows:

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"F. H. Alden, Esq., Cashier Meyer & Chapman Bank, Red Lodge, Mont.—My Dear Alden: I am in receipt of your letter of the 15th inst. inclosing Kimball note. There has been another trifling delay in regard to the title to some of this ground, which will be cleaned up within a few days, when we will remit you the amount in question. * * *

"Very truly yours, W. J. Deegan."

Although signing as assistant cashier all but one of the above letters bearing his signature, the evidence shows that Deegan became at least the acting cashier and the managing officer of the defendant bank in January, 1911, and it is conceded by the brief of appellants that "at the times mentioned in the petition," which includes the time of the correspondence aforesaid, "the evidence establishes" that said Deegan was cashier of the defendant bank and manager of the defendant loan and trust company.

It appears that the release was filed for record in the office of the county clerk of Park county, of which county Cody is the county seat, on April 9, 1912; the receiving book of that office showing that it was received for record from W. J. Deegan. Said release was signed, "Meyer & Chapman, a Copartnership, by W. F. Meyer, One of the Copartners," and acknowledged by said Meyer as the voluntary act and deed of himself and of Meyer & Chapman, and was dated January 10, 1912. Prior to the trial the plaintiff had not been able upon inquiry and search at the bank to find the note or obtain any satisfactory account of it, but upon the trial it was produced by an officer of the bank upon a subpœna duces tecum, who, as the testimony shows, had found it in a drawer of a desk which had been used by Mr. Deegan during his connection with the bank, and at the time in question in 1912 was in a room of the bank occupied by him and formerly by the cashier who immediately preceded him as the cashier and managing officer of the bank.

When the note was produced at the trial it had upon its back the following indorsement:

"Pay John Chapman or order, sans recourse.
"Meyer & Chapman, by F. H. Alden."

Upon the fact of that indorsement it is contended by the appellants that the partnership was shown thereby not to have been in possession of the note when it was transmitted for collection, but that it was the individual property of Chapman, and that therefore the plaintiff cannot recover in this action brought by him as surviving partner. There is no testimony directly explaining the indorsement. F. H. Alden, the cashier of the Meyer & Chapman bank when the note left that bank, and the one who transmitted it, was asked as a witness by plaintiff's counsel if he could state how the indorsement got on the paper, but the question was withdrawn upon its being objected to, although the objection was overruled. That witness, however, testified that when he transmitted the note it was one of the bills receivable belonging to and in the possession of Meyer & Chapman. And Mr. Chapman testified that until the death of his partner, Meyer, the note and mortgage belonged to the partnership, and that it constituted part of the partnership assets at the time of Meyer's death, for which he, the plaintiff, was bound to account as surviving partner. It is admitted by the pleadings that, pursuant to the law of Montana and an order of the proper court in that state, said Chapman had given bond as surviving partner to close up and settle the partnership business.

[2] Upon this evidence it cannot be held that, when the note was transmitted for collection, it was the individual property of Chapman or in his possession independent of the partnership of Meyer & Chapman. If it might be inferred from the indorsement that at some time before sending the note to Cody there had been a transfer of the possession or ownership thereof to Chapman individually, the inference from the evidence would be equally strong that the partnership had again acquired the possession and become the holder thereof, and the indorsement might have been stricken out under the provision of the statute authorizing the holder of a negotiable instrument to strike out any indorsement not necessary to his title. Comp. Stat. 1910, § 3206. But the mere fact of the indorsement, the original payees having possession of the instrument, would not show either title or possession in the indorsee; for there is nothing in the case to show that the indorsement was completed by delivery.

The Negotiable Instruments Law provides that an instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof; if payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder, completed by delivery. Comp. Stat. 1910, § 3188. And in defining the meaning of words used in the law it is further provided that "indorsement" means an indorsement completed by delivery, and "holder" means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof. Id. § 3349. The note in question was payable to order.

[3] The testimony of Alden and Chapman as to the fact that the note was in the possession of, and one of the bills receivable belonging to, the partnership, is not to be regarded as stating a mere legal conclusion at variance with the note itself and the indorsement thereon, nor as an opinion or conclusion upon facts appearing in the case, but rather as stating a fact within the personal knowledge of the witness. Pichler v.

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Reese, 171 N. Y. 577, 64 N. E. 441; Olson v. O'Connor, 9 N. D. 304, 84 N. W. 359, 81 Am. St. Rep. 595. Chapman's testimony on the subject was not objected to, and although objections were interposed to the statement by Alden of the fact of possession and ownership, and overruled, and the court's ruling thereon was specified as error, the point as to the admissibility of the testimony is not discussed in the brief of appellants. But such testimony seems to come within the principle stated in Pichler v. Reese, supra, that witnesses may testify to facts which are within their own knowledge, even though the facts are such as the jury is eventually to determine, there being a distinction between asking a witness to testify to a fact the existence of which depends upon a collection of facts, or upon the construction of a written instrument, and asking him to testify to a fact which is necessarily within his own knowledge.

3. The further contentions of counsel for appellants relate to the sufficiency of the evidence to sustain the judgment as against the defendant bank. The additional facts to be considered in disposing of these contentions, including testimony uncontradicted unless by the correspondence aforesaid or other documentary evidence, may be stated as follows: The directors and stockholders of the two defendant corporations of which Deegan was the managing officer as aforesaid were practically the same, and their business was transacted in the same building and rooms, and at least one other of the employés was in the employ of both institutions. In the front or main room were two windows—so called in the testimony—supposedly in the framework or fixture separating the private from the public part of the room, one being used generally by the bank, and the other by the trust company, and the vault and working space were used in common by the two institutions. Back of that was a private room used by Mr. Deegan, and in the rear of that a room described in the testimony as the abstract room of the defendant loan and trust company. The desk in which the note in question and certain other papers to be mentioned were found was, in 1912, in the priviate room used by Deegan. In that room Deegan transacted general banking business and also the business of the loan and trust company. The note was found with other papers in an envelope upon which was written, when found, "Kimball & Kimball," and underneath that, "Russell Kimball to Meyer & Chapman." Among the other papers was a bill or account of the Cody Trading Company for $1,498.96 against Kimball Bros., including a note to that company for $880.31, signed by Farley Kimball and Russell Kimball, attached to the bill, a note of the same parties to E. E. Lonabaugh for a small amount, three notes to the Park Loan & Trust Company signed by Russell Kimball and James P. Kimball, one for $500 and the other two for $475 each, one note for $785 to the same company signed by Russell Kimball, and two slips of paper containing figures, one of them being evidently a computation of interest and the amount due on the Meyer & Chapman note on April 15, 1912, and the other, without date, a computation of the total amount due upon the several obligations aforesaid, including $4,028.59, the computed amount due on the Meyer & Chapman note, showing a total of $7,719.60, and underneath that, but without adding them, the figures "188," indicating that amount in dollars.

It further appears that on January 17, 1912, a mortgage release was filed for record releasing a mortgage of James P. Kimball to the defendant trust company, executed January 1, 1911, which release was delivered for filing by said W. J. Deegan; that on January 15, 1912, a mortgage was filed for record, which purported to have been executed on January 8, 1912, and acknowledged on the 13th of that month, by James P., Russell, Ina M., Farley, and Mina Kimball to the said Park Loan & Trust Company, covering with other lands the lands included in the Meyer & Chapman mortgage as described in the release of that mortgage. The Meyer & Chapman mortgage was the only lien on the land covered thereby until the last above mentioned mortgage to the trust company was executed and delivered. On January 19, 1912, the amount of $7,000 was deposited or placed to the credit of Kimball & Kimball in the Park Loan & Trust Company. The amount due the Cody Trading Company was placed to its credit in the defendant bank on April 23, 1912; the release of the mortgage to that company having been previously delivered to the bank, at its request.

Russell Kimball testified that Deegan had informed him that the trust company desired a readjustment of the business of the Kimballs, so as to secure all their obligations by one mortgage, pursuant to which the mortgage for $7,000 was executed in January, 1912, and that by the agreement the Meyer & Chapman mortgage was to be taken care of by the trust company, as well as all the other notes above mentioned found in the envelope aforesaid with the Meyer & Chapman note, except the one to Lonabaugh, which, Mr. Kimball stated, he did not know had been sold to the trust company, and its inclusion in the new mortgage was a surprise to him; and the Meyer & Chapman mortgage was to be canceled by the execution of the new mortgage. He also testified that the transaction was not with Deegan individually, but with the trust company; that neither the Meyer & Chapman note nor the release of

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the mortgage securing it had been delivered or surrendered to him or his brother by either of the defendants, although he had demanded them several times of Deegan as an officer of the trust company and his assistants.

Mr. Alden testified that he had been acquainted with Mr. Deegan for 16 or 17 years, and before the time of the latter's residence at Cody, and that at one time they had worked together in the Meyer & Chapman bank at Red Lodge, Mont.; that the Meyer & Chapman bank had no personal dealings with Deegan after he became connected with the defendant bank, but when he was acting as cashier of that bank any transaction of the former bank with the latter would go through Deegan as cashier; that the note and release in question were sent to the bank, although the letter transmitting them may have been addressed to Deegan; and that all the financial transactions and correspondence between the two banks had been conducted in that way.

Plaintiff's first inquiries at the bank concerning the disposition of the note and release were made while Deegan remained with the bank as cashier, and his explanation was that the papers had become misplaced in some way, and later he made the same statement to plaintiff's attorney, who called at the bank to ascertain what had become of the papers, and invited and assisted in a search for them in the bank vault; all of which occurred after the recording of the release, but before the plaintiff or his attorney had ascertained that it had been recorded.

The specific contentions upon all the evidence are: That to establish a liability against the bank it was necessary to show "ostensible authority" in Deegan as its agent to make the representations in his letter of January 12, 1912, respecting a real estate loan to the Kimballs, and that the evidence fails to show such authority; that, the bank being prohibited by the National Banking Law from making loans on real estate, Meyer & Chapman were charged with knowledge that its agent was without authority to solicit the mortgage release for the purpose of consummating a real estate loan; that Deegan's letters signed either "Assistant Cashier" or without official description had no effect except to bind him personally; and, finally, that if he acted at all in a representative capacity, his representations were made as the agent of the trust company, and not as agent of the bank.

[4, 5] The right to recover against the bank does not depend upon the statement or representation with reference to the negotiation of a real estate loan for the debtor, but upon the fact of its receiving and accepting the note for collection together with the release, and wrongfully disposing of the same. What was said with reference to a real estate loan in the letter requesting that the note and release be sent to the bank was evidently to explain the probability or expectation of payment through negotiations then pending, and it is immaterial whether the bank was or was not a party to such negotiations, or whether its cashier was authorized in his capacity as such officer to negotiate the loan or to represent that it was being negotiated by the bank. But the statement in the letter that "we are negotiating a real estate loan for the Kimballs here" does not necessarily mean or imply that the bank was intending or expecting to make the loan direct or with money under its control, and therefore was not notice to Meyer & Chapman that an illegal loan was contemplated, charging them with knowledge of want of authority in the cashier to act for the bank in requesting the sending of the papers to the bank. Nor would the situation be affected by any intention of the bank to make a real estate loan. The owner of the note and mortgage would not be bound to inquire concerning the security to be taken by the bank if it advanced the money.

[6-8] The acceptance of commercial paper for collection by banking corporations "is a well-settled incident of the banking business, and they will be liable in case they fail to perform their duties in making the collection." 3 R. C. L. 424; 7 C. J. 597, 619, 620. And see Porter v. Packers' Nat. Bank, 95 Neb. 223, 145 N. W. 255; Knapp v. Saunders, 15 S. D. 464, 90 N. W. 137. And the cashier clearly had authority to accept for the bank the papers in question here, and his letter requesting that they be sent to the bank serves, with the other correspondence, to show the conditions or understanding upon which the bank received them. The cashier of a bank is generally its chief executive officer and its general agent in the transaction of its legitimate business. 1 Morse on Banks and Banking (5th Ed.) § 152; 3 R. C. L. 444; First Nat. Bank v. Seass, 158 Ill. App. 122. He has charge of the bank's correspondence, "and letters on corporate business are properly addressed to him, and whatever statements or information are contained in them will, in law, affect the bank with notice." 1 Morse on Banks & Banking (5th Ed.) § 162. "Those acts which constitute the ordinary and customary functions of cashiers, and which he has inherent power to do, bind the bank as its own acts in favor of any person dealing with the bank and having no notice of any restriction upon the cashier." Id. § 171.

The conclusion cannot be avoided that the note and release were sent to and received by the bank. Deegan's request, over his signature as assistant cashier, was that they be sent to the bank and the letter inclosing the release stated that it was in reply to

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his letter, and that the release was inclosed "as per" that request. The failure to send the note at the same time is not explained in the evidence, but Alden testified as his recollection that it was inclosed with the letter of April 15, 1912, signed "J. W. Chapman —Alden," upon Chapman receiving a communication by telephone, who then dictated the letter. As stated above, the reply to that letter was written upon a letter head of the bank, and stated the expectation that the amount due would be remitted within a few days. It is probably true that in negotiating or making the loan to take up the several Kimball obligations Deegan was acting for the trust company, but we regard the evidence as clearly showing that he assumed to represent the bank in requesting and receiving the papers from Meyer & Chapman, and that the latter understood, as they had a right to do, that he was representing the bank in that matter. The trust company was not mentioned in any of the correspondence, and the evidence shows that Meyer & Chapman had no dealings with that company.

Another action brought in the United States District Court for Wyoming by the Meyer & Chapman State Bank was one brought against the defendant bank as for money loaned, and involved correspondence on the part of the bank signed by Deegan as its cashier, written on letter heads of the bank, and also a telephone communication between Deegan and Chapman. At the conclusion of the evidence in that case the trial court announced that the plaintiff had not established its case, and that, taking it altogether, it showed that there was no guaranty by the bank, but the remedy, if any, was against Deegan, and judgment was rendered for the defendant. The cause was taken on error to the Circuit Court of Appeals for the Eighth Circuit, where the judgment was reversed, and the court said:

"The evidence clearly shows that he [Deegan] represented the paper as a part of the assets of defendant's bank, and that he offered it as collateral for a loan to his bank. Defendant cannot escape the repayment of money, which it received and used, upon a showing that the note which it offered as collateral to the loan in fact did not belong to it. Whether that was so or not, the loan was certainly made to it." Meyer & Chapman State Bank v. First Nat. Bank of Cody, 248 Fed. 679, 160 C. C. A. 579.

We conclude that the judgment must be affirmed, and it will be so ordered.

Affirmed.

BEARD, C. J., concurs.

BLYDENBURGH, J., being ill, did not participate in the decision.

(20 Ariz. 431)

HOPKINS et al. v. SCHOOL DIST. NO. 11 OF YUMA COUNTY et al. (No. 1682.)

(Supreme Court of Arizona. June 4, 1919.)

1. SCHOOLS AND SCHOOL DISTRICTS ⟸37(3)—SUBDIVISION—PROCEEDINGS—NECESSITY OF PETITION.

Despite Civ. Code 1913, par. 2418, subd. 2, the board of supervisors of a county, under paragraph 2722, have no jurisdiction to form two districts out of a school district by subdividing it, ignoring the requirements of paragraph 2720, requiring a petition to be filed with the board.

2. SCHOOLS AND SCHOOL DISTRICTS ⟸111—DIVISION OF SCHOOL DISTRICTS — REMEDY OF TAXPAYERS—INJUNCTION.

A school district and its trustees in their official capacity and as taxpayers and residents *held* entitled to enjoin enforcement of a void division of the district into two districts by the board of supervisors of the county, because enforcement of the order would deprive complainants of their property rights, and cause them injury not to be compensated by damages.

Appeal from Superior Court, Yuma County; S. L. Pattee, Judge.

Action by School District No. 11 of Yuma County, State of Arizona, and others, against B. F. Hopkins and others, as the Board of Supervisors of Yuma County, and another. From an order granting temporary injunction, defendants appeal. Judgment affirmed.

Thomas D. Molloy, of Yuma, for appellants.

W. F. Timmons, of Yuma, for appellees.

ROSS, J. This is an action of injunction by the trustees of school district No. 11 and W. V. Wright in their official capacity and as taxpayers and residents of said school district, asking that the board of supervisors and the superintendent of schools of Yuma county be restrained and enjoined from dividing said school district into two school districts.

The case was tried upon the pleadings, which fully set forth all the facts, as well as a great deal of extraneous matter. The material facts are as follows: School district No. 11, on April 22, 1918, and for some time prior thereto, was a duly organized and existing school district of Yuma county, carrying on and maintaining a public school. The area of the district was a compact rectangular body of about 18 sections of land. On April 22d, 79 persons, representing themselves as qualified electors of said school district, presented to the board of supervisors of Yuma county a petition, praying that the boundaries of the school district be changed by cutting about six sections off of the south por-

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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tion thereof. The petition is silent as to the disposition to be made of this portion of territory sliced from district No. 11. There is, however, a recital in the petition to the effect that school district 11 contains too much territory; that the town of Somerton, situated in the lopped-off portion of school district No. 11 is about to be incorporated, and needs a school district of its own within its boundaries; that the trustees of No. 11, in fact, had moved the building from without to within the limits of Somerton, thereby endangering the district's title to two acres of land from which the building was removed, the same being granted the district on condition it be used for school purposes. It further mentions the existence of a bitter rivalry between the people of the northern portion and the people of the southern portion of the district as to the location of the schoolhouse, and asserts that "unless there is a division of district" this rivalry will continue, to the disadvantage of the pupils attending the school of said district.

It is shown by the petition and by the pleadings that the school building of the district is in what is hereinafter known as Somerton school district No. 9, and that two of the trustees reside therein.

This petition was, before it was presented to the board of supervisors, presented to the superintendent of schools for her action thereon, and was by her disapproved.

On the 22d of April, 1918, being the day of the filing of said petition, the board of supervisors, acting thereon, passed a resolution, granting the prayer of said petition, and by said resolution formed, or attempted to form, two school districts out of school district No. 11, giving the north portion thereof the name of school district No. 11, and the south portion thereof the name of Somerton school district No. 9, two-thirds of the area of the original district comprising school district No. 11 and one-third comprising the Somerton district.

The defendants, board of supervisors and superintendent of schools of Yuma county, were proceeding or threatening to proceed to the organization of said school districts by the appointment of trustees, etc. The lower court, upon this showing, ordered the issuance of a temporary injunction against the appellants, from which order this appeal is taken.

It is the contention of appellees that the resolution of the board of supervisors was null and void, as being made and entered without power or jurisdiction, and that view was adopted by the trial court. The contention of appellants is that the resolution of the board of supervisors was one—not to divide the old district—but to "change the boundaries" thereof, and that the board possessed the power and authority, under the law, upon the filing of said petition with them, to make the order or pass the resolution here attacked. These contentions involve the construction of chapter 7, entitled "School Districts," being paragraphs 2719 to 2725, inclusive, Civil Code 1913.

In this chapter provision is made for the formation of school districts, for the consolidation of two or more districts, and also for the "changing of boundaries" of districts. Paragraph 2720 authorizes the creation of a new district when the parents or guardians of at least 10 school census children petition therefor, setting forth the boundaries of the proposed new district, if the petitioners reside a greater distance than four miles from a district schoolhouse; or, if a district contains 250 school census children according to the next preceding school census, upon a petition of 15 per cent. of the parents or guardians residing in the district to be formed, giving its boundary, a new district may be formed by the subdivision of the old one.

Changes of boundaries of school districts may be made by the board of supervisors according to paragraph 2722, when 10 or more qualified electors manifest their desire by petition to the county superintendent of schools, setting forth the proposed changes and the reasons for the same, the superintendent to approve or disapprove, and transmit the same to the board of supervisors whose action thereon shall be final. This paragraph contains a proviso to the effect that if a subdivision of a city or incorporated town lies outside of the school district, including the city or town, such subdivision may be annexed to the city or town school district by the board of trustees thereof, upon petition of a majority of the school electors of the subdivision, in which case the trustees shall indorse on the petition favorable action and transmit the same to the superintendent, but the same shall not be effective until the 1st day of July following. That is, where the annexation of territory to a municipal school district is sought, no action by the board of supervisors is required. Changes of boundaries in all other cases must be accomplished, if at all, through the superintendent of schools and the board of supervisors acting together.

[1] There is one expression in paragraph 2722 indicating what the words "change of boundaries" mean or may mean, and that is contained in the proviso by which a subdivision of a city or town may annex itself to the municipal school district by appropriate action. It is evident that this paragraph has no reference to the subdividing of an existing district into two or more districts. That is provided for by paragraph 2720. The appellants attempted to form two districts out of district No. 11 by subdividing it, ignoring the requirements of paragraph 2720, and claiming the right to act under the terms of paragraph 2722. The only provision for

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forming a new district by the division of an old one is found in paragraph 2720, and before that may be done, it must be made to appear in the manner therein provided that the old district contains more than 250 school census children, or that the petitioners reside more than four miles from the schoolhouse of such district. The petition presented to the appellant board of supervisors does not set forth this jurisdictional fact, nor does it otherwise appear that school district No. 11 contained more than 250 school children according to the next preceding school census, nor that the petitioners reside more than four miles from a schoolhouse. We conclude that the order of the board of supervisors subdividing the district was made without jurisdiction, and is null and void. The proceeding was not one to change the boundaries of school district No. 11, but distinctly one conceived and carried out to divide the old district so as to form a new district from the portion lopped off of the old one. There appears no effort to evade or cover up this purpose, for at the same sitting and, so far as we know, as a part of the resolution dividing district No. 11, a new district, Somerton No. 9, was formed, or attempted to be formed. This new district was created by the board on its own motion. No petition praying for its formation, as required by paragraph 2720, was filed with the board.

Appellants point us to subdivision 2, par. 2418, Civil Code, as authority for their action in this regard. By this statute boards of supervisors are given jurisdiction and power, under such limitations and restrictions as are prescribed by law, "* * * (2) to divide the counties into districts or precincts as may be required by law. * * *"

The jurisdiction to form districts here vested in the board, if they be school districts, must be exercised in the manner and under the limitations and restrictions as are set forth in chapter 7, supra. The requisite petition, asking for the formation of the new district, whether it be because of the distance of petitioners from a schoolhouse already in use, or because of an excessive population, must first be presented to the board before action taken. Such petition is jurisdictional, and action without it is null and void.

Paragraph 2723 provides for the consolidation of two or more districts into one. While the effect would be to "change" or obliterate the boundaries of the consolidated districts, no one would contend that the board of supervisors could assume to act, in effecting the consolidation, under paragraph 2722. The change of boundaries arising by reason of consolidation must be accomplished by petition and election, as provided in paragraph 2723. "The change of boundaries" does not mean changes caused by the division of old districts into two or more districts, nor the consolidation of districts. Just what it may mean is not involved in this case, and it will be time enough to search out its meaning when a case requiring it is before us. It will suffice to say to give it the construction contended for by appellants would be to disregard a well-known canon of construction, requiring that every word, phrase, and sentence used in a law should be given some meaning, if possible. If it be given the meaning claimed by appellants, paragraph 2720 might just as well have been left out.

[2] It is contended by appellants that the wrong remedy was adopted. We think the rule stated in 22 Cyc. 891G, applicable here. It is there said:

"A municipality and its officials will be enjoined from acting under and enforcing a void ordinance, when the proposed enforcement would deprive the complainant of his property or property rights, and will cause him injury which cannot be compensated by damages, or where the illegal action will give rise to a multiplicity of actions at law if it is not prevented."

It is apparent that if we should hold the action of appellants legal and as authorized under paragraph 2722, concerning changes of boundaries, the district of Somerton No. 9 could lay no claim to any of the moneys belonging to the old district, for the reason the statute nowhere authorizes any credit be given the lopped-off portion of a district caused by a change of boundary. Mere change of boundaries of a district does not disturb the public moneys belonging to the district at the time of change. And if the view be taken that Somerton school district No. 9 is a new district entitled to a division of the funds of the old district as soon as school is actually commenced therein, as provided in paragraph 2724, we have this anomalous situation: The old district No. 11, with all the public moneys in its treasury, but no school building, and the new district No. 9 with the school building, but no funds to carry on school. The parents and guardians of school children and the taxpayers of school district No. 11 had a real and substantial right to have the schools of district No. 11 open and maintained in the manner and for the purposes provided by law. If appellants were allowed to consummate what was undertaken by them, the taxpayers and parents and guardians of children would certainly be deprived of property rights and caused injury which could not be compensated in damages.

We think a case was made calling for the exercise of the equitable powers of the court.

The judgment is affirmed.

CUNNINGHAM, C. J., and BAKER, J., concur.

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(20 Ariz. 427)

SHEA et al. v. WOOD. (No. 1683.)

(Supreme Court of Arizona. June 4, 1919.)

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1. LANDLORD AND TENANT ⟸323—IMPLIED CROPPER'S CONTRACT—CREATION.

Under pleading and answer in a suit showing, among other things, that defendant entered on land of plaintiff under contract to put in milo maize crop with division of crop, and that defendant, with knowledge of plaintiff's foreman, contrary to expectation of plaintiff, planted maize between rows of cotton left standing on the land, that defendant did not claim the cotton, but did claim services and money spent in caring for cotton, *held* to authorize the court to presume that as to the cotton defendant was impliedly a cropper and not a tenant.

2. LANDLORD AND TENANT ⟸329—IMPLIED CROPPER'S CONTRACT—TERMINATION.

An implied cropper's contract in relation to cotton cared for by having contract with owner of land to put in milo maize crop may be terminated by owner at any time.

3. LANDLORD AND TENANT ⟸329—IMPLIED CROPPER'S CONTRACT—RIGHTS OF PARTIES.

On termination by owner of an implied cropper's contract in relation to cotton cared for by one having contract with owner of land, to put in milo maize crop, owner by implication promised to pay cropper reasonable value of services rendered and charges paid for water not furnished by owner.

4. SET-OFF AND COUNTERCLAIM ⟸13—IN INJUNCTION SUIT—COUNTERCLAIM FOR SERVICES—IMPLIED CROPPER'S CONTRACT.

In suit to enjoin harvesting of cotton by cropper under contract to put in maize crop, facts showing an implied cropper's contract as to the cotton, defendant cropper could counterclaim for services rendered in caring for cotton and charges paid for water which owner should have paid.

5. APPEAL AND ERROR ⟸1177(6)—DETERMINATION OF CAUSE — FAILURE TO SUBMIT REAL ISSUES—NEW TRIAL.

Where pleading and answer in suit to enjoin harvesting of cotton established an implied cropper's contract as to cotton based on facts that defendant entered plaintiff's land under contract to put in milo maize crop, and he planted maize between rows of cotton which had been left standing on the land, but the real issue between the parties, namely, whether defendant cultivated the cotton at all, or, if he did, amount of compensation therefor and adjustment of account for water charges paid by defendant, were not submitted, cause will be remanded for trial of those issues; answers to the interrogatories being conflicting and verdict not responsive.

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

Injunction suit by R. J. Shea and M. P. Shea, doing business as the T. J. Shea's Sons Company, against S. B. Wood. From the decree rendered, plaintiff appeals. Reversed, and cause remanded for new trial of designated issues.

The appellants and appellee entered into a contract on the 18th day of July, 1917, in words and figures following:

"Glendale, Ariz. July 18, 1917. It is hereby understood and agreed upon between T. J. Shea's Sons Company, herein known as the party of the first part, and S. B. Wood, herein known as the party of the second part, that said parties of the first part shall furnish to said party of the second part 40 acres, more or less, of land on K avenue, between laterals 17 and 18, to raise a crop of milo maize. Said parties of the first part to furnish seed and water required to bring crop to maturity and to bear one-half of threshing expense. Said parties of the first part are to receive one-half of grain produced under this contract.

"The said party of the second part agrees to plant, irrigate and cultivate this crop and to give same personal care and effort to bring said crop into full production and maturity and to bear one-half of the threshing expense. Said party of the second part to receive one-half of grain produced under this contract."

Duly signed by the parties.

The possession of the land was delivered to Wood about the date of the said agreement. At the time Wood took possession, an inferior crop of cotton was growing on the land. The plaintiffs expected that the crop of cotton would be plowed out and a crop of milo maize planted instead of the cotton. The cotton was not plowed up, but the milo maize was planted between the rows of cotton. So planted, Wood paid for water and cultivated the land with two crops growing in alternative rows, a row for cotton and a row for milo maize.

The Shea's foreman saw the two crops growing; and they knew that the cotton was not plowed up, but left to grow as planted.

On November 5, 1917, this action was commenced, praying an order against Wood, enjoining and restraining him from gathering any part of said cotton, alleging that he had commenced to gather such crop and appropriate the same to his own use. The plaintiffs praying for a recovery of the value of the cotton thus harvested by Wood, and for general relief. The temporary injunction was granted.

The defendant demurred on the ground that the facts stated do not entitle the plaintiffs to the relief demanded. He answered by admitting the contract of July 18, 1917; the planting of the milo maize and the cultivation of both crops; the purchase of water for the irrigation of the crops. And he "further alleges that he has managed and cultivated said premises at all times in a good and husbandlike manner, and that he has managed the cultivation of all crops growing on said

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land for the purpose of conserving the same and for the benefit of plaintiffs and defendant herein." The defendant prays the dismissal of the complaint and injunction, and a judgment declaring his ownership in the cotton crop, and damages for plaintiffs' interference with his progress of the work.

The court overruled defendant's demurrer, and the action was tried before the court with a jury. Special interrogatories were submitted to the jury, and upon the answers returned to a portion of said interrogatories and further finding of fact, the judgment was entered for the defendant for $500 and costs. The plaintiffs appeal from the order refusing a new trial and from the judgment.

Cox & Moore, of Phœnix, for appellants.
Gandy & Cunningham, of Phœnix, for appellee.

CUNNINGHAM, C. J. (after stating the facts as above). The plaintiffs assert their possession of the cotton in question as it stands on the ground, for the reasons that the cotton was cultivated and irrigated from July 18, 1917, when the land was delivered to the defendant under a cropper's contract. The written contract between the parties concerns only a milo maize crop to be planted on the same ground on which the cotton was then growing. The plaintiffs allege:

"Par. 5. That defendant did not plant and cultivate said crop of milo maize in a husbandlike manner, nor did he cultivate said crop of maize as provided and contemplated by said agreement, but allowed said cotton to stand and continue to grow, and without cultivation thereof a large part of said cotton which had been planted and cultivated by plaintiffs grew to maturity, and that there is now on said land a large and valuable crop of cotton which belongs to the plaintiffs, and in which defendant has no right, title, or interest."

Paragraph 6, briefly referred to, sets forth that the defendant has commenced harvesting the said cotton, and that the plaintiffs have "forbidden defendant to go on said premises for said purpose of picking said cotton, and has notified him not to interfere with plaintiffs' cotton crop." Paragraph 7 admits:

"That defendant has a lease on said lands for the purpose of raising, cultivating, and gathering said crop of milo maize, * * * and that although plaintiffs notified defendant not to molest or interfere with said cotton, defendant has thereafter in disregard of said notice, and of plaintiffs' rights in said property, continued to gather said cotton and appropriate same to his use, and threatens to continue gathering same * * * unless restrained by this court. * * *"

The plaintiffs demand relief: First, an accounting for the cotton defendant has converted by harvesting; a restraining order preventing defendant from harvesting other of the cotton; for costs; and for general relief. The milo maize contract is annexed to the complaint.

The defendant admits the making of the milo maize agreement; admits his possession under the agreement; denies its breach as alleged by plaintiffs; alleges that he planted the milo maize crop as agreed; alleges that plaintiffs failed to furnish irrigating water as they agreed, and the defendant was compelled, by such failure to, and he did, purchase and pay for the water; admits "that at the time of the entry of this defendant into and upon the said premises there was standing on said premises cotton which this defendant did not disturb, and which plaintiffs had expressly abandoned, and that the milo maize was planted along and between the rows of said cotton."

The defendant alleges that he has cultivated said milo maize crop in a husbandlike manner, "according to the course and practice followed by the ranchers in the community, and that there is now growing upon said premises a crop of milo maize not yet matured; and defendant therefore alleges that by reason of the failure of the said plaintiffs to carry out and perform their part of the contract hereinabove referred to, which were on their part to be performed, this defendant has and does claim the right, title, and interest in and to the said cotton now upon said premises by reason of irrigating and cultivating the same."

The defendant alleges that he expects to account for the cotton harvested by him "at the outcome of this suit," and he "further alleges that he has managed and cultivated said premises at all times in a good and husbandlike manner, and that he has managed the cultivation of all crops growing on said lands for the purpose of conserving the same and for the benefit of plaintiffs and defendant herein."

The defendant claims damages by reason of plaintiffs' interference with the cultivation of said land and the crops growing thereupon, and by reason of the stopping of said work on account of said injunction heretofore issued, in the sum of $500. He prays that the injunction be dissolved; that he be decreed to be the owner of said crop of cotton; that he recover judgment for said $500, together with costs.

The plaintiffs, in brief, contend in their pleadings that, because the defendant did not plow out the cotton he found growing on the land and plant the land exclusively to milo maize, the cotton growing on the land, having been planted by the plaintiffs and cultivated by them to the time the land was delivered to the defendant, said cotton remained the property of plaintiffs, and was cultivated and irrigated on the implied promise of compensation.

The defendant, on the identical state of facts, contends that he continued the cultivation of the cotton to preserve the crop for

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the benefit of plaintiffs and of the defendant, expecting to account for the same. The defendant makes no claim to a specific share of the cotton grown, nor does he claim a specific interest in the cotton grown, either as compensation for his services and money expended by him for water, or as a portion of the crop. He certainly does not admit his liability to pay the plaintiffs' rent out of the cotton, nor does he claim the right to the cotcotton by reason of a lease of the land and payment of rent under such lease. A careful study of the pleadings discloses that the defendant does not deny that the plaintiffs have some just claim against the cotton crop. The defendant, in the eighth paragraph of his answer, says:

"* * * That he has managed the cultivation of all crops growing on said land for the purpose of conserving the same for the benefit of plaintiffs and defendant herein."

This is not inconsistent with the plaintiffs' claim that the defendant managed the cotton crop as a "cropper" of the plaintiffs.

Mr. Freeman, in his note to Putnam v. Wise, in 37 Am. Dec. 309, p. 320, quotes the definition of "croppers" found in Fry v. Jones, 2 Rawle (Pa.) 11 as follows:

"If one hires a man to work his farm, and gives him a share of the produce, he is a cropper. He has no interest in the land, and receives his share as the price of his labor." Fry v. Jones, 2 Rawle (Pa.) 11.

Commenting on this statement, Mr. Freeman says:

"That is to say, if the general possession of the land remains in the owner, and the occupant cultivates it for a share of the produce as compensation, he is a cropper. The question then, in every case, of cultivation of land on shares is, Does the contract give the owner his share as rent, or the occupant his share as compensation? If the former, according to the cases above cited, the occupant is a tenant; if the latter, he is a cropper"—citing cases.

[1, 2] The defendant does not allege that he is obligated to pay rent for the cotton; in fact, he, in effect, denies that he is liable to plaintiffs for rent for the cotton, yet he admits that whatever he did to conserve the cotton was done by him for the benefit of both parties. From this and from the plaintiffs' claim, we must presume, as to the cotton crop, that the defendant was a cropper because he does not deny the relation, and as an incident to that relation, the plaintiffs had the legal possession of the cotton crop and retained the right to bring the "cropper's contract" relation to an end at any time they desired. They did bring said contract to an end on the 2d day of November, 1917, when they notified the defendant to cease gathering cotton. Defendant's further services were dispensed with by such notice.

[3] The cropper's contract in the circumstances of this case arose by implication and by implication the plaintiffs promised to pay the defendant the reasonable value of his services rendered between July 18, 1917, and November 2, 1917, in conserving the cotton crop, if the alleged services were rendered. Likewise, the plaintiffs are chargeable with the sum paid by the defendant for water for irrigating the said crop and the reasonable value of the labor necessary to irrigate said chop, if, as a fact, the defendant paid for the water and irrigated the cotton crop. These matters are the only matters presented that required a decision by the court. The verdicts and judgment are not responsive to the issues here presented for determination.

[4] It is contended that the defendant has set up a counterclaim, and the judgment in his favor allows his counterclaim. Certainly, the defendant could properly set forth, and did attempt to set forth, this claim for compensation and return of the money paid by him for the plaintiffs; and it seems, but is not decided, that by proper pleadings the matters of damages relating to the milo maize contract may be determined in the same equitable action. But the record before us in this case is in such a state of confusion, the confusion arising from the pleadings, or want of pleadings, and from the failure to take into consideration many seemingly important facts, that we are uncertain as to the equities of the parties. It is clear that, under no view of the facts in the case which can be deducted from the record, can the defendant justly retain $82, which he received for cotton, and not account for the net value of the same. Neither does it appear from any theory of the case why the defendant is entitled to $400, allowed him in the judgment, one-half of the value of the cotton crop, when it is conceded that the plaintiffs have paid the expenses of harvesting the entire crop coming to their possession as a result of this suit. The total cotton crop, which includes both the portion harvested by plaintiffs and the portion harvested by Wood, is found to be of a value of $800. An accounting is necessary on any theory of the case presented by the evidence, even conceding that the parties are entitled to equal shares of all crops grown on the land.

The relation of the parties in every case where the evidence rests in parol must be determined from facts proven and a contract implied therefrom. Wherever such contract is fully established either by parol or by written evidence of its terms, a great deal yet depends upon the intention of the parties as to the relation between them. That is, whether the relation is that of master and servant, landlord and tenant, or partners. Of course, the contract must be enforced, and the rights of the parties thereunder must be determined in accordance with the kind of contract the parties have intended

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to make, and which is relied upon as defining their rights. The plaintiffs have set forth an implied cropper's contract, and the defendant has not controverted the existence of such contract, and has set forth his claim for compensation in the amount of one-half of the value of cotton produced. The plaintiffs claim all of the cotton, denying that defendant has contributed anything of value to its production, and hence the issue of facts is joined and presents the inquiry for determination whether the defendant cultivated the crop of cotton and purchased water and irrigated said crop; also the compensation due for cultivating the cotton crop and for purchasing water to irrigate such crop. Was his compensation reasonably worth one-half of the yield of cotton? Such are the questions for determination with regard to the cotton crop.

The interrogatories submitted to the jury inquired, first, if the defendant found on the land a cotton crop abandoned by the plaintiffs; second, whether the plaintiffs intended to abandon the said cotton crop; third, whether the defendant properly cared for the maize crop; fourth, the value of the cotton crop; fifth, the value of the milo maize crop. The first, second, and third interrogatories were answered by "yes"; the answer to the fourth stated that the cotton crop was of the value of $800, and the fifth, that the maize crop was of the value of $200.

Then follows interrogatory No. 6: "Is plaintiff entitled to the crop of cotton raised on the land?" answered, "Yes." Interrogatory No. 7: "Is defendant entitled to the crop of cotton raised on the said land?" answered, "Yes."

The appellants complain of these interrogatories, and while their complaint with regard to the five interrogatories first in order is rather indefinite, it is clear that the first, second, and third presented no controverted question; that the fourth and fifth, finding the gross value of the two crops, were pertinent, but not decisive, of the case, and that the sixth and seventh submitted a question of law to the jury, and would have been reversible error if the court had not expressly declined to be influenced by the answers returned. As a fact, the answers returned nullified themselves, as evidently appears.

[5] The principal complaint is that the controverted questions were not submitted to the jury, and from what we have said above, the objection is well taken. The vital inquiry was as to the reasonable value of the defendant's compensation for his said services rendered from July 18, 1917, to November 2, 1917, including the purchase price of the water, and irrigating the cotton crop. The plaintiffs seem to contend that defendant is entitled to no compensation because no services were rendered, and the defendant contends that he is entitled to at least one-half of the crop of cotton raised on the ground, as his just compensation. That controversy has not been settled; and, when it has been determined, the next question to follow will be an accounting for the other matters, including the cotton gathered and sold by defendant, together with other proper claims, to the end that complete justice be done and a multiplicity of lawsuits be avoided.

Justice requires that the judgment rendered be vacated, and the cause remanded, with instructions to the lower court to grant the plaintiffs a new trial of the questions of the amount of defendant's compensation, if any, in the premises, and to determine the state of accounts between the parties, as justice and equity require.

A consideration and discussion of the other questions raised by appellants becomes unnecessary, as we presume the errors, if any, will not be repeated on another trial.

Reversed and remanded.

ROSS and BAKER, JJ., concur.

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(20 Ariz. 446)

ARIZONA PUB. CO. v. HARRIS. (No. 1666.)

(Supreme Court of Arizona. June 4, 1919.)

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1. PLEADING ⟸214(2) — DEMURRER—ADMISSION.

A demurrer admits all matters well pleaded.

2. LIBEL AND SLANDER ⟸10(1)—PUBLIC OFFICER.

Defamatory publications of an officer with respect to his office are actionable per se if untrue.

3. LIBEL AND SLANDER ⟸19—LIBEL—CONSTRUCTION.

Words in a defamatory publication are to be construed according to their meaning and as it is believed they would be understood by those who read them, considered in the light of the connection in which they were used.

4. LIBEL AND SLANDER ⟸22—DEFAMATORY PUBLICATIONS—DIRECT CHARGE.

It is not necessary for a defamatory publication to be actionable that the charge should be made in direct or express terms, and insinuations may be as defamatory as direct assertions.

5. INSURRECTION ⟸2—LIBEL AND SLANDER ⟸10(3)—LIBEL CONCERNING STATE ADJUTANT—"SEDITION."

A newspaper article stating that the Governor would demand the resignation of plaintiff, the adjutant general, and that the demand was made by reason of reports of the adjutant general concerning strikes which had been characterized as seditious, is libelous per se, as imputing a crime; for "sedition" is the raising of commotions and disturbances in the state or a revolt against legitimate authority.

[Ed. Note.—For other definitions, see Words and Phrases, Sedition.]

6. LIBEL AND SLANDER ⟸86(2)—INNUENDO—NECESSITY.

When a libel is couched in language having a covert meaning not apparent on its face, it is necessary for a plaintiff to allege the libelous sense in which the words were used, but, where the language of a libelous article is not obscure and does not need an explanation, an innuendo is unnecessary and may be disregarded as surplusage.

7. LIBEL AND SLANDER ⟸48(2)—PRIVILEGE—ACTS OF PUBLIC OFFICERS.

The official acts of public officers may lawfully be made the subject of fair comment and criticism, not only by the press, but by members of the public, but charges importing a criminal offense or moral delinquency to a public officer cannot, if false, be privileged, though made in good faith.

8. LIBEL AND SLANDER ⟸49—PRIVILEGE—NEWSPAPERS.

Publishers of newspapers have no peculiar right or privilege to attack public officers, and a false and defamatory charge is no more privileged when published by a newspaper than when published by a private individual.

9. LIBEL AND SLANDER ⟸48(3)—PRIVILEGE—CANDIDATES FOR OFFICE.

Publication of false statements about a candidate for public office is not privileged, and a newspaper which printed a false and defamatory charge concerning an officer cannot escape liability on the ground that the officer stood in the same position as a candidate, and that a publication, however false, was privileged if made in good faith and without malice.

10. LIBEL AND SLANDER ⟸51(5)—PRIVILEGE—MALICE.

Proof of actual malice on the part of the publisher of a libelous article prevents the publication from being privileged; this being so both as to public officers and to candidates for such office.

11. LIBEL AND SLANDER ⟸112(2)—ACTIONS—EVIDENCE—MALICE.

In an action by the adjutant general of a state for a libel which characterized his utterances as seditious, evidence *held* to warrant finding that the defendant newspaper in printing the charge was actuated by malice.

12. LIBEL AND SLANDER ⟸124(4)—ACTIONS—INSTRUCTIONS.

Where it was alleged that a newspaper article stated that a public officer had been guilty of utterances which might be characterized as seditious, and the article was libelous per se, it was the duty of the court to instruct the jury that, if they believed the evidence, plaintiff should recover.

13. TRIAL ⟸253(3) — INSTRUCTIONS—IGNORING ISSUES.

Where the publication complained of was libelous per se, an instruction that, if the jury believed the alleged libel was published as charged in the complaint, plaintiff was entitled to recover, is not erroneous as withdrawing from the jury the consideration whether the publication was false; the complaint having alleged its falsity.

14. TRIAL ⟸296(2)—INSTRUCTIONS—CURE OF INSTRUCTIONS BY OTHERS.

Though an instruction in a libel case charging the jury as to the effect of the libelous publication did not clearly show that it was a jury question, whether the article complained of was false, the error was cured by another instruction expressly stating that truth was a defense.

15. TRIAL ⟸256(1) — INSTRUCTIONS — REQUEST.

Where defendant is not satisfied with instructions on a defense, it is his duty to request more specific, definite, and certain instructions.

16. APPEAL AND ERROR ⟸1033(5)—REVIEW—PERSONS ENTITLED TO ALLEGE ERROR.

Where a publication was libelous per se, and the judge properly instructed the jury to that effect, a further instruction submitting to them the question of the meaning of the publication, though conflicting with the first, was not prejudicial to defendant, and defendant, hav-

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ing been unsuccessful, cannot predicate error thereon.

17. LIBEL AND SLANDER ⟸120(2)—DAMAGES—PUNITIVE DAMAGES.

Where the publisher of a newspaper recklessly printed an article defaming a public officer, and there was no legal justification or excuse therefor, the publication being made in wanton disregard of the rights of the officer, the jury may infer malice and assess punitive damages.

18. LIBEL AND SLANDER ⟸123(9)—DAMAGES—AMOUNT—JURY QUESTION.

In a libel case the amount of damages is peculiarly within the province of the jury.

19. LIBEL AND SLANDER ⟸121(1)—EXCESSIVE DAMAGES.

Where the publisher of a newspaper printed a false article imputing to plaintiff, the adjutant general of the state, seditious utterances, and at that time the United States was engaged in war with Germany, an award of $6,000 in favor of the adjutant general cannot be deemed excessive or from its size to be the result of passion and prejudice on the part of the jury.

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

Action by Charles W. Harris against the Arizona Publishing Company. From judgment for plaintiff, defendant appeals. Affirmed.

The plaintiff (appellee) recovered a judgment for damages in the sum of $6,000 against the defendant (appellant) in an action for libel. The defendant appeals from the judgment and the order overruling a motion for a new trial. The defendant owns and publishes a newspaper in the city of Phœnix of wide circulation in the state of Arizona, and other states in the Union, known as the Arizona Republican. The charge made in the complaint is that the defendant maliciously published in the Arizona Republican of and concerning the plaintiff the following article:

"Resignation of Colonel Harris as Adjutant General Demanded in Letter by Governor Campbell.

"Thomas E. Campbell yesterday demanded the resignation of Adjutant General Charles W. Harris of the state of Arizona. The demand is that he tender his resignation to go into effect on August 1.

"Adjutant General Harris verbally stated to Malcolm Frazier, secretary of the Governor, that he would not resign.

"Governor Campbell states that on August 1, when the First Arizona goes into federal service, there will be no need of an adjutant general, but it is reported that the demand for the resignation was precipitated by certain reports made by Colonel Harris regarding strike situations, which reports have been characterized as 'seditious.'"

It is further alleged in the complaint that the plaintiff, at the time of the publication of said article, and for several years prior thereto, was the duly appointed and acting adjutant general of the state of Arizona, and that by the use and publication of the said words the defendant intended to assert and intended to be understood as charging and asserting, and by the readers of said newspaper was understood as charging and asserting, that plaintiff, as such adjutant general, had made certain seditious reports regarding the strike situation at various points in the state of Arizona. It is further alleged in the complaint that the article so published was false, malicious, and scandalous, and was published through malicious motives, without probable cause, and for the purpose of vexing, harassing, injuring, and degrading the plaintiff personally, officially, and politically. Actual damages in the sum of $5,000 and exemplary damages in the sum of $5,000 are demanded in the complaint.

The defendant demurred to the complaint, which demurrer was overruled. By its amended answer the defendant admits the publication of the alleged libelous article, but—

"denies that the defendant intended to and did charge and assert, and intended to be understood as charging and asserting, that plaintiff, as such adjutant general, or otherwise, had made certain or any seditious reports regarding the strike situation, or in relation to any other matter. It denies that said publication of said news item set out as aforesaid by the plaintiff in his complaint was printed, published, and circulated by the defendant through malicious motives, or without probable cause, or for the purpose of vexing, harassing, injuring, or degrading the plaintiff personally, officially, or politically, or otherwise.

"Defendant further says that it was at the date of said publication, and for some time prior thereto, known by the public generally that the Governor of Arizona desired the vacation by plaintiff of the office of adjutant general, and had requested, or was about to request, the plaintiff to resign the same; that there was a controversy between the Governor of the state and the plaintiff as to the legal tenure of the office of adjutant general, and as to the power of the Governor to remove the plaintiff from that office with or without cause, and to appoint a successor to the plaintiff therein, all of which was involved in and constituted a public official proceeding, in which the public was concerned, and of which the public generally had the right and desire to be promptly, impartially, and accurately informed; that the defendant engaged in its business of publishing, among other matter, the news and accounts of public business by and through its agents and reporters in good faith, made inquiry at the proper official sources thereof for information concerning said public proceedings, and with a view of publishing the same for the information of the public; that upon such inquiry it was communicated to a reporter of defendant's said

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newspaper that the Governor had officially demanded of the plaintiff his resignation of the office of adjutant general to take effect on the 1st day of August; that the plaintiff had stated verbally to the private secretary of the Governor that he would not resign; that it was reported that such demand for the plaintiff's resignation of said office was precipitated by certain official reports and statements made by the plaintiff regarding strike and other situations, and that such reports and statements were by those who reported said statements characterized as 'seditious'; that said information was obtained and communicated to the defendant's reporter as public official transactions relating to public official proceedings; that in entire good faith, and with no knowledge that any part of said information was false, if in fact it were false, and without any malice whatsoever toward the plaintiff, in his official or private capacity, and without any purpose to injure, annoy, or harass the plaintiff, but actuated solely by a desire to give impartially and accurately the news of the public official proceedings relating to the matter, defendant did publish the news item of which a copy is set out in the complaint, in its issue of the Arizona Republican bearing date of July 29, 1917, of the publication of which plaintiff complains."

Kibbey, Bennett & Jenckes, of Phœnix, for appellant.

A. S. Hawkins and James P. Lavin, both of Phœnix, for appellee.

BAKER, J. (after stating the facts as above). [1] The defendant contends that the complaint does not state facts sufficient to constitute a cause of action, and therefore it was error to overrule the demurrer. This claim is predicated upon the proposition that the publication was not libelous per se. For the purpose of determining the question, all matters well pleaded must be taken as admitted, and hence in this case it must be held that the demurrer admits that the plaintiff was the adjutant general of the state, and that the statements contained in the published article with respect to him were false and were published maliciously.

[2] Defamatory publications of an officer with respect to his office are actionable per se, if untrue. 13 Amer. & Eng. Enc. Law, pp. 355, 356, and notes on same at pages 357–360; Townshend on Slander and Libel, pp. 221, 223, 232, et seq.; Newell on Slander and Libel, pp. 176–178; Belo v. Fuller, 84 Tex. 450, 19 S. W. 616, 31 Am. St. Rep. 75; Houston Printing Co. v. Moulden, 15 Tex. Civ. App. 574, 41 S. W. 381; Jarman v. Rea, 137 Cal. 339, 70 Pac. 216.

[3-5] "Sedition" has been defined to be:

"The raising of commotions and disturbances in the state; it is a revolt against legitimate authority." 3 Bouvier's Law Dictionary, p. 3033 (Sedition).

The rule is well settled that the words in the publication are to be construed according to their ordinary meaning, and as it is believed they would be understood by those who read them, considered in the light of the connection in which they are used, and the subject-matter of the article. 25 Cyc. p. 355; 13 Amer. & Eng. Enc. Law, pp. 347–353.

It is not necessary that the publication, to be actionable, should make a charge in direct or express terms:

"To maintain an action for libel or slander it is not necessary that the charge should be direct and positive; the imputation may be inferred from an indirect communication, as where defendant 'expresses a suspicion, or institutes a comparison, or delivers the words as matter of hearsay * * * or answer, or exclamation, or uses disjunctive or adjective words, or speaks ironically.' Insinuations may be as defamatory as direct assertions, since the effect and tendency of the language used, and not the form, is the criterion." 25 Cyc. p. 360.

Having regard to these general principles of the law of libel, we are of the opinion that the language used in the publication is fairly susceptible of a construction which renders it libelous per se, and that it would be so understood by readers generally. The last sentence of the publication, "* * * but it is reported that the demand for the resignation was precipitated by certain reports made by Colonel Harris regarding strike situations, which reports have been characterized as 'seditious,'" is to our minds equivalent to the assertion that Col. Harris had made reports which were seditious, and was, in effect, a charge against him of sedition. The imputation of crime is unmistakable in the language, and it seems altogether unreasonable to say that the expression conveys only an innocent meaning. There can be no doubt but that, had the charge been presented in a direct form, the article would have been libelous, and it is none the less libelous because the charge is stated in a form indirect or oblique.

"* * * A defamatory article which would be libelous per se if its matter was directly stated does not lose its quality in this regard because it is couched in the form of an interview with another person, or because it seeks to avoid its otherwise obvious character as a libel per se by the statement that it is reported or asserted or believed to be true." Waite v. San Fernando Pub. Co. (Cal.) 173 Pac. 591.

See Gilman v. McClatchy, 111 Cal. 606, 44 Pac. 241; Edwards v. San Jose Printing & Pub. Soc. et al., 99 Cal. 431, 34 Pac. 128, 37 Am. St. Rep. 70; Wilson v. Fitch, 41 Cal. 363.

In Edwards v. San Jose Printing & Pub. Soc. et al., supra, the following language was held libelous per se:

"It is also reported that Edwards is to have charge of the sack."

In Lundin v. Post Publishing Co., 217 Mass. 213, 104 N. E. 480, 52 L. R. A. (N. S.) 207, the Supreme Court of Massachusetts said:

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"The mere fact that the charge against the plaintiff was not made by direct averment, but only by saying that such an allegation had been made, was not material; for the statement of unfounded charges is none the less actionable that it is made only by way of repeating them as having been made by others."

In Houston Chronicle Pub. Co. v. Wegner (Tex. Civ. App.) 182 S. W. 45, the Court of Civil Appeals of Texas said:

"Nor does the fact that the false charge or statement made in said Chronicle simply purports to be a statement or charge made by another or other person, and that the Chronicle only so gave it, and that it neither itself asserted such charge to be true nor vouched for the truth thereof, relieve such statement of its libelous character. * * *"

To say that the adjutant general of the state had made seditious reports is to charge him with the raising of commotions and disturbances in the state, and with being a destroyer of public tranquility—guilty of acts tending to the breach of public order and safety. The natural tendency of such a charge is to hold such officer up to hatred, scorn, and contempt, and to beget an evil opinion of him in the minds of all right-thinking persons. An Adjutant General who makes seditious reports can neither be a loyal citizen nor a fit person to hold any office of trust or responsibility.

A copy of the libelous matter is set out in the complaint, and it is alleged that such matter was false and was maliciously published, and that the publication injured and damaged the character and reputation of the plaintiff. The complaint therefore states a cause of action, and the demurrer was properly overruled.

[6] The innuendo set forth in the complaint was unnecessary, and may be disregarded, as surplusage. There can be no doubt that, when a slander or libel is couched in language having a covert meaning not apparent upon its face, it is necessary for a plaintiff not only to allege and prove the slanderous or libelous sense in which the words were used, but also that they were understood in the same sense by those to whom they were addressed. Maynard v. Insurance Co., 34 Cal. 48, 91 Am. Dec. 672; Andrews v. Woodmansee, 15 Wend. (N. Y.) 232. But we are of the opinion that the present case does not fall within this rule. The language of the article is not obscure, and does not stand in need of an explanation. The common understanding of mankind will take hold of the published words, and at once, without difficulty or doubt, apply a libelous meaning to them. In such a case an innuendo is not needed: 25 Cyc. p. 436; Johnston v. Morrison, 3 Ariz. 109, 21 Pac. 465.

[7-9] For this publication the plaintiff had a right of action against the defendant for damages, unless it was true, or unless it was privileged. The undisputed evidence in the case establishes that the charge of sedition was absolutely false. Indeed, as we understand the record, the defendant makes no claim that Col. Harris did in fact make any seditious reports to the Governor, but it is contended that the public at large was interested in the subject-matter of the publication, and that the publication was made in good faith, without malice and from laudable motives, and was therefore qualifiedly privileged. This contention cannot be sustained. It appears from the evidence that at the time of the publication, and for some time prior thereto, it was generally known and understood by the public at large that the Governor of the state desired the vacation by the plaintiff of the office of adjutant general, and had requested, or was about to request, the plaintiff to resign the same. There appears to have been a controversy between the Governor and the plaintiff as to the legal tenure of the office of adjutant general, and as to the power of the Governor to remove the plaintiff from that office with or without cause, and to appoint a successor to the plaintiff, all of which it is claimed was involved in and constituted a public official proceeding, in which the public was concerned and of which the public generally had the right and desire to be promptly, impartially, and accurately informed. The immediate occasion for the publication of the article in question arose out of an interview between the Governor's secretary and the editor of the defendant newspaper. The account of this interview, as given by the editor of the paper, is as follows:

"Q. From whom did you get your information? A. Mr. Malcolm Frazier, Gov. Campbell's secretary.

"Q. You knew that Mr. Frazier was secretary of the Governor? A. Yes.

"Q. And there was a statement made to you? A. Mr. Frazier brought the letter to the Republican office one Saturday evening.

"Q. What letter was that? A. The letter requesting the resignation of the adjutant general.

"Q. Then you may state what was said about it. A. The letter, I believe, gives his reasons for asking the resignation, the fact that the National Guard was about to be merged into the federal army, and that there would then be no need for the services of an adjutant general. I asked Mr. Frazier what was back of it; that didn't seem to be a sufficient reason for vacating the office; and he told me that the request had been precipitated by certain statements and reports that Col. Harris had made regarding the strike situation, and, I think, on account of a letter with reference to the police reserves, and Mr. Frazier said that those reports and statements were seditious. He didn't quote me the nature of the reports and statements."

It is unquestionably the right of the press to freely discuss, criticize, or comment fairly upon the acts or omissions of a public officer

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of the county, state, or nation, but it is not permitted, under the guise of criticizing official acts, to maliciously defame the character of the officer. The general rule relating to public criticism of public officers is briefly stated as follows:

"The official acts of public officers may lawfully be made the subject of fair comment and criticism, not only by the press, but by members of the public, but the prevailing rule is that charges importing a criminal offense or moral delinquency to a public officer, cannot, if false, be privileged, though made in good faith, and this though the charge relates to acts of the officer in the discharge of his official duties." 18 Amer. & Eng. Enc. Law (2d Ed.) p. 1041; Bee Publishing Co. v. Shields, 68 Neb. 750, 94 N. W. 1029, 99 N. W. 822.

The Supreme Court of Pennsylvania, in the case of Neeb v. Hope, 111 Pa. 145, 2 Atl. 568, says:

"An occasion of privilege does not justify false and groundless imputations of wicked motives or of crime. The conduct of public officers is open to public criticism, and it is for the interest of society that their acts may be freely published with fitting comments or strictures, but a line must be drawn between hostile criticism upon public conduct and the imputation of bad motives or of criminal offenses, where such motives or offenses cannot be justly and reasonably inferred from the conduct."

It is the truth when published, and not falsehood, that is privileged. In the case of Belknap v. Ball, 83 Mich. 583, 47 N. W. 674, 11 L. R. A. 72, 21 Am. St. Rep. 622, it is said:

"Publications of falsehoods are never privileged. No public interest can be subserved by their publication and circulation. If statements, though false, are published in good faith, and with an honest belief of their truth, the damages may be reduced to a minimum. No other rule will properly protect the freedom of the press and the rights of individuals."

Publishers of newspapers have no more right to give currency to false charges than other persons. They have no peculiar rights or privileges in this respect. Shickell v. Jackson, 10 Cush. (Mass.) 25, 26; Burt v. Advertiser Newspaper Co., 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97.

But it is argued that a public officer stands in the same position as a candidate for public office, and that no recovery can be had by a candidate for a public office for a publication however false, if such publication be made honestly, in good faith, and without express malice. It must be conceded that there are two radically diverging views of the law of privilege or criticism as applied to a candidate for office. In some jurisdictions it is held that all matters, true or false, having a bearing on the fitness of a candidate, may be published without liability, if it be shown that they were published without malice, in good faith, and in the honest belief that the facts were true. The case cited by counsel for the defendant (Briggs v. Garrett, 111 Pa. 404, 2 Atl. 513, 56 Am. Rep. 274) is sometimes quoted to sustain this doctrine. See, also, Coleman v. McLennan, 78 Kan. 711, 98 Pac. 281, 20 L. R. A. (N. S.) 361, 130 Am. St. Rep. 390. But it seems to us that the better view, supported by the better reasons, and the greater weight of authority, is that published false statements about a candidate for public office are not privileged. 25 Cyc. pp. 402, 405, and notes; Newell on Slander and Libel (3d Ed.) pars. 633, 636; Post Publishing Co. v. Hallam, 59 Fed. 530, 8 C. C. A. 201; Donahue v. Star Publishing Co., 4 Pennewill (Del.) 166, 55 Atl. 337; Jones v. Townsend's Adm'x, 21 Fla. 431, 58 Am. Rep. 676; Bronson v. Bruce, 59 Mich. 467, 26 N. W. 671, 60 Am. Rep. 307; Upton v. Hume, 24 Or. 420, 33 Pac. 810, 21 L. R. A. 493, 41 Am. St. Rep. 863; Forke v. Homann, 14 Tex. Civ. App. 670, 39 S. W. 210.

[10, 11] The plea of privilege publication cannot prevail in this case for another reason. The authorities all agree that proof of actual malice on the part of the publisher of a libelous article prevents the publication from being privileged. This rule of law applies equally to one occupying a public office as well as to a candidate for such office. 17 R. C. L. p. 342, and cases cited; 25 Cyc. p. 411, and note; Sweeney v. Baker, 13 W. Va. 158, 31 Am. Rep. 757; San Antonio Light Publishing Co. v. Lewy, 52 Tex. Civ. App. 35, 113 S. W. 574; Hamilton v. Eno, 81 N. Y. 116; Martin v. Paine, 69 Minn. 482, 72 N. W. 450; Atwater v. Morning News Co., 67 Conn. 504, 34 Atl. 865; Myers v. Longstaff, 14 S. D. 98, 84 N. W. 233.

There is evidence in the record tending to prove that the defendant newspaper upon another occasion charged the plaintiff in its columns with having made seditious reports. The editor of the newspaper testified substantially that he knew that the Governor's secretary, with whom he held the interview, was unfriendly to the plaintiff, and that he realized that the publication of the article would injure and damage the plaintiff. He further testified that he endeavored to communicate with the plaintiff over the phone for the purpose of getting a statement from him before publishing the article, and failed, but that any statement that the plaintiff might have made would not have changed the article, and that he was determined to print it the next morning as a matter of news, and that the newspaper would not have retracted the article if the plaintiff had requested that it be done. These facts afforded a sufficient basis from which the jury was authorized to draw an inference of malice.

[12] The court charged the jury to the effect:

"* * * If the jury believe from the evidence that the alleged libel was published by

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the defendant, as charged in the complaint, then the plaintiff is entitled to recover."

[13-15] It is claimed that this instruction was error, because it withdrew from the jury any consideration of whether the article was or was not libelous and whether the statements in the article were true, or not. We have held, and do hold, that the language of the publication was of itself defamatory, and therefore it was the province and duty of the trial judge to so instruct the jury. 25 Cyc. p. 542; Tonini v. Cevasco, 114 Cal. 266, 46 Pac. 103; Van Vactor v. Walkup, 46 Cal. 124. Nor do we think that the charge withdrew from the jury the consideration whether or not the matter contained in the publication was false. The complaint alleged that the defamatory matter published was false and untrue, and we think the words "as charged in the complaint," contained in the instruction, fairly conveyed to the minds of the jury that they were to pass upon the question whether the matter published was true or false. Furthermore, in another instruction the judge informed the jury that in any action for libel it is always a good and sufficient defense to show that the statements alleged to be libelous are true, and in yet another instruction the jury were told that, "if the defendant falsely charged the plaintiff," etc. If the defendant desired a fuller or more specific instruction upon the issue, it should have requested the court to give one more specific, definite, and certain. 38 Cyc. pp. 1694, 1695.

[16] A further complaint is made that the instruction just quoted conflicts with another instruction whereby the court submitted to the jury the determination of the meaning of the publication. It was error to give the last instruction, but such error was not prejudicial to the defendant. If the verdict had been for the defendant. The plaintiff might have complained of the instruction, but, the verdict being for the plaintiff, the defendant cannot complain, unless it is true that the language of the publication is not defamatory, a proposition that cannot be sustained, as we have already held. 25 Cyc. p. 543, and note; Tonini v. Cevasco, supra.

[17] It is argued by the defendant that the verdict of the jury was contrary to the law, in so far as it undertook to assess punitive damages against the defendant for being actuated by express malice in making the publication complained of. We have already pointed out evidence in the record from which the jury might reasonably have concluded that the publication was prompted by actual malice. From that evidence alone the jury was authorized to find punitive damages against the defendant. In addition to this evidence, it appears from the testimony that the publication was made without any reasonable inquiry as to its truth, and that, had such inquiry been made, the falsity of the same would have been disclosed. The jury might well have concluded that the publication was recklessly made, without legal justification or excuse, and in a spirit of wanton disregard to the rights of plaintiff. Under the circumstances the jury was authorized to infer malice from the publication. Cotulla v. Kerr, 74 Tex. 89, 11 S. W. 1058, 15 Am. St. Rep. 819; Forke v. Homann, supra; Mayo v. Goldman, 57 Tex. Civ. App. 475, 122 S. W. 449; Ellis v. Garrison (Tex. Civ. App.) 174 S. W. 962; Houston Chronicle Pub. Co. v. McDavid (Tex. Civ. App.) 157 S. W. 224; Reid v. Sun Publishing Co., 158 Ky. 727, 166 S. W. 245.

In Courier-Journal Co. v. Sallee, 104 Ky. 335, 47 S. W. 226, the court said:

"If, as a matter of fact, the words published were false, and tended to the injury of the plaintiff, and were published recklessly, even without special ill will, the defendant is equally guilty, and punitive damages may be recovered."

[18, 19] The defendant insists that the verdict is plainly the result of prejudice and passion, and is excessive. So many considerations enter into the awarding of damages by a jury in a libel case that the courts approach the question of the excessiveness of a verdict in such cases with great reluctance. The question of damages for a tort, especially in a case of libel or slander, is peculiarly within the province of the jury; and unless the damages are so unconscionable as to impress the court with its injustice, and thereby induce the court to believe that the jury were actuated by passion, prejudice, or partiality, it rarely interferes with the verdict. It is not for us to say that, had we been assessing the damages, we would have given a less amount. It is the judgment of the jury, and not the judgment of the court, which is to assess the damages in actions for personal torts and injuries. In our opinion, this is a case in which the jury were clearly justified in giving both compensatory and punitive damages, under well-settled principles of law, and, considering the character of the plaintiff, the office which he held, the large circulation of the defendant's paper, and the treasonable nature of the charge, and considering also the fact that at the time of the publication the United States government was at war with the Imperial Government of Germany, and that a charge of sedition at such a time would probably result in greater damage to the plaintiff than if made in time of peace, we do not feel that we would be justified in setting aside the verdict on the ground of its being excessive.

No serious or reversible error appearing in the record, the judgment is affirmed.

CUNNINGHAM, C. J., and ROSS, J., concur.

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(20 Ariz. 386)

PHŒNIX RY. CO. OF ARIZONA v. BEALS.
(No. 1639.)

(Supreme Court of Arizona. May 21, 1919.)

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1. PLEADING ⟸369(3) — PERSONAL INJURY ACTIONS—ELECTION BETWEEN COUNTS.

In an action by a passenger against a street railroad company for personal injuries, it was permissible for plaintiff to allege that the injury was due to the negligent starting of the car while plaintiff was alighting, in one count, and in another count to allege that plaintiff's skirt was caught on a protruding bolt, and no election between the two counts was required.

2. CARRIERS ⟸318(3)—PASSENGERS—PERSONAL INJURY—EVIDENCE—SUFFICIENCY.

In a street car passenger's action for personal injuries while alighting, the mere fact that her skirt caught on something on the car does not justify a finding of negligence on defendant's part; it appearing that it performed its duty in furnishing a car of the kind in ordinary use and in good repair.

3. CARRIERS ⟸320(26) — PERSONAL INJURY ACTIONS—EVIDENCE—QUESTION OF FACT.

In street railroad passenger's action for personal injuries while alighting from a car, due to the catching of her skirt on something and the starting of the car before she had time to alight, evidence of negligence *held* sufficient to make the question one for the jury.

4. CARRIERS ⟸305(5) — PASSENGERS — PERSONAL INJURY—PROXIMATE CAUSE.

If a street car passenger was injured from the concurrence of the catching of her skirt on something on the car and the starting of the car before she had time to alight, that defendant was not responsible for her skirt catching does not relieve it from responsibility for the accident if it negligently started its car while plaintiff was thus embarrassed.

5. CARRIERS ⟸305(5) — PASSENGERS — PERSONAL INJURY—CAUSE.

Where a street railroad passenger was injured while alighting, due to her skirt catching on something on the car, and defendant negligently started the car while plaintiff was thus impeded, the fact of plaintiff's clothes being caught, and not the cause thereof, was proper for the jury to consider in determining whether defendant exercised due care.

6. APPEAL AND ERROR ⟸1062(5)—HARMLESS ERROR—SUBMISSION OF ISSUES.

Where passenger on street car, injured when alighting, based negligence of defendant on starting of street car while her clothing was caught, submission of issue of defects in car, not sustained by evidence, by instruction placing burden of proof on plaintiff to show defects, was harmless error.

7. PLEADING ⟸375 — PLEADING AND PROOF —ALLEGATIONS NOT ESSENTIAL.

Plaintiff must prove all the material allegations of the complaint before he is entitled to relief, although he need not establish allegations not essential to the cause of action.

8. NEGLIGENCE ⟸119(1) — PLEADING—CONCURRING CAUSES OF ACCIDENT.

The plaintiff must prove the specific act of negligence assigned as cause of injury, but, if the accident resulted from concurring causes, the proof need not show that both occurred through defendant's negligence, even if it be so alleged.

9. TRIAL ⟸295(1) — INSTRUCTIONS — CONSTRUCTION AS WHOLE.

Instructions must be taken and construed as a whole.

10. TRIAL ⟸253(4) — INSTRUCTIONS—IGNORING DEFENSES.

In a street car passenger's action for injuries incurred while alighting, an instruction that the conductor started the car prematurely *held* not erroneous as ignoring the defenses of unavoidable accident or contributory negligence in view of the pleading and proof.

11. TRIAL ⟸253(9) — INSTRUCTIONS—IGNORING EVIDENCE.

In a street car passenger's action for injuries incurred when alighting from a car, instruction that defendant was liable if it started its car prematurely was not erroneous as ignoring knowledge or want of knowledge that plaintiff was alighting when the car was started; it being defendant's duty to know whether plaintiff had alighted before starting the car.

12. CARRIERS ⟸303(5)—ACTIONS FOR NEGLIGENCE—ALIGHTING FROM CAR.

A street railroad company is under the duty of observing whether a passenger has actually alighted before starting the car.

13. NEW TRIAL ⟸102(1)—GROUNDS—NEWLY DISCOVERED EVIDENCE.

It was not error to refuse a new trial for newly discovered evidence in an action for injuries to a street car passenger, where it appeared that defendant might have discovered such evidence by the exercise of due diligence.

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

Action by Anna L. Beals against the Phœnix Railway Company of Arizona. Judgment for plaintiff, and defendant appeals. Affirmed.

Chalmers, Stahl, Fennemore & Longan and Will E. Ryan, all of Phœnix, for appellant.
Barnett E. Marks, of Phœnix, for appellee.

ROSS, J. Plaintiff, suing defendant for damages for personal injuries received while she was a passenger on one of its street cars, set forth her cause of action in two counts. In the first count it was alleged that the street car on which she was riding stopped at the intersection of Washington street and Central avenue, Phœnix, and that, "while plaintiff was in the act of alighting from said car, and before plaintiff had time to alight and reach the pavement in safety, the defendant's servants carelessly, recklessly,

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and negligently started said car in motion, causing plaintiff to fall to the pavement with great force and violence."

The negligence charged in the second count is neglect and failure "to keep its car in good condition and free from protruding bolts or other obstacles or parts of said car which could or would catch plaintiff's skirts," and by reason thereof "this plaintiff's skirt caught in a bolt or some other obstacle or part of said car, and while plaintiff was about to alight, this defendant, through its servants then in charge of said car, carelessly, negligently, and recklessly started said car in motion, and, because of plaintiff's skirt being caught on some obstacle as aforesaid, and because of defendant starting said car before plaintiff had reached the pavement in safety, plaintiff was thrown on the pavement with great force and violence."

The issues tendered were met by a general demurrer and general denial, and an affirmative defense that plaintiff was injured, if at all, through her own carelessness or omission or negligence or inadvertence by falling "upon the pavement at or near the intersection of Washington and Central streets * * * at a place entirely removed from and apart from the car of this defendant."

From a verdict and judgment in favor of plaintiff, this appeal is prosecuted.

The errors assigned as occurring at the trial prejudicial to the rights of defendant may, we think, be designated under five headings: First, the refusal of the court to require the appellee to elect upon which count of her complaint she would ask a verdict; second, the refusal of the court to instruct a verdict for defendant as requested because of insufficient evidence to support the allegations of the complaint; third, in not taking from the jury all consideration of the alleged unsafe condition of the car by reason of the protruding bolts, etc., upon which plaintiff's skirt was said to have caught for the reason that there was no evidence of any protruding bolts or other obstacles, or that defendant's car was defective; fourth, in erroneously instructing the jury and in failing to instruct as requested and in modifying certain instructions requested by defendant; and, fifth, in refusing to grant a new trial upon the showing of newly discovered evidence.

[1] The first assignment is without merit. It is permissible under the law for a party to state his cause of action in one or more counts as the facts of his case may seem to him to demand or require. The pleader cannot always know or anticipate what the proof may develop so as confidently to rely upon a single statement of his cause of action. The privilege of stating his cause in different counts is granted so that a party whose cause is just may not be nonsuited or dismissed because of a variance in the pleadings and proof, or because of a failure to sustain one count when the evidence is sufficient to support another. And the case may be submitted on all the issues finding support in the evidence. Willard v. Carrigan, 8 Ariz. 70, 68 Pac. 538; Paducah Traction Co. v. Baker, 130 Ky. 360, 113 S. W. 449, 18 L. R. A. (N. S.) 1185.

The second and third points above stated are so closely related we will consider them together. The contention of appellant is that the undisputed evidence shows that the cause of the accident in which appellee was injured was the catching of her skirt on something as she was alighting, that the car did not start until after she was falling, and that it was the catching of her skirt on something for which appellant was not responsible, and not the starting of the car, that caused her to fall. In other words, it is claimed plaintiff would have fallen if the car had not started as it did, or at least that it may not be definitely determined to which cause, the catching of her clothes or the starting of the car, the jury credited the accident.

The appellee's explanation as to how the accident happened was:

"I proceeded to get off the car and my dress caught on a bolt or something in the car which held me, and I just had one foot from the car, and they started the car and threw me to the pavement and tore my dress."

On cross-examination:

"Q. What did you do after it stopped? A. I started to get off the car. Q. Then the car started again? A. Yes, sir; it did. Q. Where were you when it started? A. I was falling to the pavement. Q. When it started? A. Yes, sir. Q. What was it that threw you to the pavement, Mrs. Beals, the starting of the car or the catching of your dress? A. Well, the starting of the car would have thrown me to the pavement. Q. I want to know just what it was, the starting of the car or the catching of your dress? A. The starting of the car, I suppose. I don't quite understand you. Q. Explain what occurred, Mrs. Beals, when you fell, in the best language you can and as you remember it. A. When I went to step down from the car, my dress caught on a bolt in the car, as well as I remember, and I well remember the bell rung for the car to start, and then I didn't remember anything about it until after I had gotten upon my feet after I was hurt. No; I had just started to make one step when my dress had caught, one foot was just inside the car. Q. One foot was out, just making the step, and the other part of your body was in the car? A. Yes, sir. Q. Then in this case you were stepping just out of the car, and your right foot was out? A. Yes, sir. Q. And the car gave a lurch forward and you were thrown forward on your face? A. Yes, sir. Q. Do you recall what your dress caught on? A. As to that, I cannot say, but my dress caught on something. Q. Did you disengage your dress yourself? A. Why no; when I was thrown from the car, I guess it must have torn loose some way. Q. Your dress was caught

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on the car and holding you back, and would it not be natural for you to lean around and disengage your dress? A. I don't think so unless I had had my foot on the car. If I had had my foot on the car, I might have loosened the dress. Q. Where were your feet? A. I was just stepping off the car. Q. Then he stopped, and you immediately went to get off, and your dress caught, and the car immediately started across the street. Is that true? A. Yes, sir."

Witnesses Toller and Gregg in their testimony corroborated the appellee to some extent, the latter stating:

"I noticed her skirt was caught, and just at that time he started the car, and of course he didn't have to move very far; the pull of the skirt could have throwed her off—pull her feet out from under her. I know her skirt was caught on something on the car."

This testimony, if believed, showed that just as plaintiff was in the act of alighting her skirt caught on something and before she could disengage herself, and before she had alighted, the car suddenly started, throwing her to the pavement.

[2] If it be true that the sole cause of the accident was due to plaintiff's skirt catching on something, it seems from the law that the existence of that "something" must be the result of the nonperformance of a duty owed by defendant to plaintiff before a recovery could be had. No faulty impairment or construction of the car being shown, the implication of negligence on the part of defendant from the mere fact that plaintiff's skirt caught on something is not justified. Whatever may have been the cause of her skirt catching that fact alone is not sufficient evidence of negligence; it appearing that defendant performed its duty in furnishing a car of the kind in ordinary use and in good repair.

The defendant is not an insurer, and is not liable for all accidents that may happen to a passenger, but only those that occur through its negligence. If it furnished the plaintiff a reasonably safe car on which to ride, notwithstanding she became entangled in her skirts, or her skirts caught on something, which "something" she is unable to point out as existing because of the defendant's negligence, no presumption of negligence may be indulged. Negligence may not be based on a conjecture or a guess, nor may negligence in such circumstances be inferred from an accident only, as all accidents are not caused by negligence. Powers v. Pere Marquette R. R. Co., 143 Mich. 379, 106 N. W. 1117; Gulf, C. & S. F. Ry. Co. v. Davis (Tex. Civ. App.) 161 S. W. 933.

[3, 4] But, assuming an entire absence of evidence showing protruding bolts or other defects in the car, we think the request for an instructed verdict was properly denied for the reason the complaint did not assign the catching of her garment thereon as the cause, or at least the sole cause of the accident; the allegation being that the two causes concurred in effecting her fall, to wit, the catching of her skirt on something and the starting of the car before she had time to alight. Whether this allegation of negligence was sustained by the evidence or not was a question of fact for the jury, and, in view of their verdict, we must conclude that they resolved it in favor of the plaintiff's contention. If the accident happened from the concurrence of the two causes assigned, the fact that defendant was not responsible for her skirt catching would not relieve it from responsibility for the accident if it was negligent in starting its car while plaintiff was thus embarrassed. We take the statement of the law in that regard as made by the Supreme Court of Washington in Goe v. Northern Pac. Ry. Co., 30 Wash. 654, 71 Pac. 182, as follows:

"* * * It is well established that, where the primary cause of an injury is a pure accident, occasioned without fault of the injured party, if the negligent act of the defendant is a co-operating or culminating cause of the injury, or if the accident would not have resulted in the injury excepting for the negligent act, the negligence is the proximate cause of injury for which damages may be recovered."

See, also, Rice v. Puget Sound Traction, etc., Co., 80 Wash. 47, 141 Pac. 191, L. R. A. 1915A, 797; Hendrickson v. Gray Harbor Ry. & Light Co., 88 Wash. 145, 152 Pac. 992; St. Louis & S. F. Ry. Co. v. Bell (Okl.) 159 Pac. 336; L. R. A. 1917A, 543; Miller v. Northern Pac. Ry. Co., 24 Idaho, 567, 135 Pac. 845, 48 L. R. A. (N. S.) 700, Ann. Cas. 1915C, 1214; Carlock v. Denver & R. G. Co., 55 Colo. 146, 133 Pac. 1103; 29 Cyc. 496.

[5, 6] It is claimed the court should never have submitted in its instructions the question made by the complaint as to the defects in the car, as none was shown by the evidence. There was evidence to the effect that plaintiff's skirt caught on something, and, regardless of how it was caused, whether from defects in the car or from some unaccountable reason, it cannot affect the responsibility of the defendant for the accident if, while she was thus embarrassed or impeded, the defendant negligently started the car, and in that manner caused her to fall to the pavement. It was the fact of the plaintiff's clothes being caught, and not the cause thereof, that was proper for the jury to consider in determining whether the defendant exercised that high degree of care, under the circumstances, imposed on a carrier of passengers. If that be true, as a proposition of law, and we have no doubt it is, both the allegations and the evidence as to the defective condition of the car were immaterial, and the instructions thereon placing the burden of proving the defect upon

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the plaintiff could not have militated against the defendant to its injury.

In Kirby v. St. Louis & S. F. Ry. Co., 146 Mo. App. 304, 130 S. W. 69, the question arose as to whether there was a failure of proof, it being contended that because one of the causes of the accident assigned was not sustained by the evidence, there could be no recovery. The court, in disposing of the contention, said (146 Mo. App. page 310, 130 S. W. page 71):

"The first question necessary to be determined is: What was the ground of negligence charged against the defendant? It seems to us that a fair interpretation of this charge fixes the gravamen of the charge as the failure to hold the train a sufficient length of time to permit plaintiff to alight therefrom. It clearly does make this charge, and this was all that was necessary for plaintiff to charge and prove in order to make a prima facie case against defendant. Hurt v. Railroad, 94 Mo. 255, 262, 7 S. W. 1, 4 Am. St. Rep. 374; Straus v. Railroad, 75 Mo. 185; Fillingham v. Transit Co., 102 Mo. App. 573–582, 77 S. W. 314; Shareman v. Transit Co., 103 Mo. App. 515, 525, 78 S. W. 846. The other allegations of the petition charging that the train was caused to move forward with a violent and sudden jerk, lurch, and bound were unnecessary allegations, and we can see no reason why plaintiff, by reason of having made these allegations when they were entirely unnecessary, should be required to prove them before making a case sufficient to go to the jury when to prove the other allegation was of itself sufficient. Nelson v. Railroad Co., 113 Mo. App. 702, 88 S. W. 1119; Green v. Railroad Co., 122 Mo. App. 647, 99 S. W. 28. The demurrer to the testimony was properly refused."

The defendant's contention on this point is not entitled to as favorable consideration as it would be had it raised the question in some manner at the trial. It asked no instruction to exclude the question from the jury. In its request for an instructed verdict, it did not raise the point. No contention on the point was made until after the verdict. The instruction, as a matter of law, was more favorable to defendant than to plaintiff. It required the jury to find that plaintiff's skirt caught on something, the existence of which was due to a nonperformance of a duty by defendant, whereas, as we have seen, it was the fact of her skirt being caught, and not the cause thereof, together with the starting of the car while she was in the act of alighting, that fixed or tended to fix liability upon defendant.

[7, 8] It is a rule of pleading that plaintiff must prove all the material allegations of her complaint before she is entitled to relief, but that does not mean that she is required to establish allegations not essential to her cause of action. In personal injury cases the plaintiff must prove the specific act of negligence assigned as the cause of her injury (Scalpino v. Smith, 154 Mo. App. 524, 135 S. W. 1000), but, if the accident resulted from concurring causes, it is not necessary that the proof show both occurred through the negligence of defendant, even though it be so alleged, for the reason the law will hold the defendant liable if one of the concurring acts of negligence is directly chargeable to defendant and is the proximate cause of the accident.

Before taking up for consideration the assignments based upon the giving and refusing of instructions, we will state defendant's theory of the case. It was that plaintiff, at the time of her injury, had ceased to be a passenger, had alighted safely on the pavement, and progressed from six to eight feet across the street towards the sidewalk when she stumbled and fell. This theory was set forth in its answer and found support in the defendant's evidence. In addition, defendant denied all the allegations of the complaint except that it was a corporation operating a street railway in the city of Phœnix. It was abundantly shown that plaintiff boarded defendant's car at Washington and Seventh streets; that she paid her fare; that the car stopped at Central avenue and Washington street, and that here she got off of the car, according to the defendant's theory, safely, suffering a misadventure after she had alighted; the plaintiff's theory being that, while she was in the act of alighting, her skirt became attached to something, and before she had time to alight the car started and threw her to the pavement.

Complaint is made that the theory of the defendant was not stated correctly in the first instruction given by the court. This instruction reads:

"The plaintiff asks for damages in this case for a sum not to exceed $10,000 on the two counts, one of them being falling from the car while in motion, and the other her skirt being caught on some obstruction in the car while leaving the car. Defendant denies these things, and maintains that there is no liability whatever, and these are the matters for you to decide from the evidence having been heard by you."

It may be admitted that this is a rather lean and imperfect statement of the issues, and if it stood alone, unaided by other instructions, would be subject to most severe criticism.

In another instruction plaintiff's theory of the case as contained in her complaint and presented at the trial was fully and completely submitted to the jury. They were required to find:

"That, while she was in the act of alighting from said car, her skirt caught on some portion of said car, or on some obstacle protruding from said car because said car was not in a reasonably safe condition and repair, and that the employés of the defendant company started said car forward in motion as she was alighting from said car, all of which caused the plaintiff

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to be thrown to the ground and injured, * * *" and that, if the "act in so causing the said car to be started in motion as aforesaid amounted to a want of such care as devolves on a carrier of passengers as defined in the previous instructions I have given you, and that, as a direct consequence of such omission of such care by said employés of the defendant, Anna L. Beals, received injuries, then your verdict should be for her."

As heretofore indicated, this instruction in placing the burden of proving the cause of her clothes catching on something to be due to the negligence of defendant was in defendant's favor, as it was the fact of her embarrassed situation, and not the cause thereof, unless traceable to some fault of hers, together with the starting of the car, that was assigned in her complaint as the proximate cause of the accident. The defendant's theory was stated to the jury, not once, but several times, in such language as:

"If you believe from the evidence that the injuries sustained by her were not due to negligence on the part of the defendant's servants, but were due to mere accident or misadventure, then and in that case your verdict shall be for the defendant;" and "if * * * such injury occurred by reason of her falling immediately after she had alighted from the car, and that her fall was not caused by the starting of the defendant's car in a negligent manner by defendant's servants, nor by the catching of plaintiff's skirt on some obstacle on said car, then she cannot recover in this action"; and "if the railroad company on its part is properly discharging its duties, and a passenger is hurt from a cause disconnected, over which the railroad has not control, or if the passenger is hurt by reason of his or her own conduct or misconduct amounting to contributory negligence, and the act or doing of the railroad company in no way contributed towards it, or if the passenger's conduct was the primary or real reason of his or her injury, the railroad company would not be responsible, and your verdict will be for the defendant."

[9] Thus it is seen that, though the first instruction inadequately and meagerly stated the issues and theories of the respective parties, the deficiencies were supplied by subsequent instructions. It is a rule in this jurisdiction—and we believe of universal application—that the instructions must be taken and construed as a whole, and, when the ones given in this case are so considered, the appellant's complaint is without merit.

Complaint is made of instruction No. 4, which is as follows:

"If you find in this case that, while the plaintiff was attempting to alight from the car and the conductor rang the bell, and the car started up, and the accident occurred in that manner, then the plaintiff would be entitled to recover because it would amount to actionable negligence on the part of the conductor to ring the bell and the car to start while the plaintiff was in the act of alighting. There can be no question about that."

[10] It is contended this instruction is bad because it ignores "complete defenses or elements of defense such as unavoidable accident or negligence of the plaintiff herself amounting to contributory negligence or failure of plaintiff to use ordinary care for her own safety."

Defendant forgets that there was no plea of contributory negligence, and that there was absolutely no evidence introduced in its behalf showing or tending to show plaintiff was injured until after she had ceased to be a passenger. The conductor testified he saw plaintiff alight, and that she was clear of the car before he rang the bell for the car to start, and this was the contention throughout.

The instruction would be objectionable in this form if defendant had pleaded the accident happened while plaintiff was alighting through her negligence, and supported it by some evidence, but no such issue was before the jury. The proof, under the general denial of the defendant, was limited to the affirmative defense of the misadventure after plaintiff was no longer a passenger.

[11] It is also contended the instruction overlooks and ignores knowledge or want of knowledge of defendant's servants that plaintiff was alighting at the time the car was started. It is undisputed that the intersection of Washington street and Central avenue was a safety stop; that all cars stopped there to let off and take on passengers, and, while defendant's conductor disputes it, plaintiff testified she told him when she paid her fare that she wanted to get off at Central avenue. In view of these facts, we think it was the duty of defendant to know whether plaintiff had alighted before starting the car. The rule in that regard is stated in 10 C. J. 948, § 1367, as follows:

"Regardless of the length of time for which the car is stopped, and although it is stopped for a length of time which would be reasonable under ordinary conditions, if the conductor or the motorman in charge of the car knows or has reason to know that a passenger is in the act of boarding or alighting, it is negligence suddenly or recklessly to start or otherwise to move the car, whereby the passenger is injured."

The identical instruction was approved in Kirchner v. Detroit City Ry. Co., 91 Mich. 400, 51 N. W. 1059.

[12] It is contended that instruction No. 5 was erroneous. This instruction was approved in Crump v. Davis, 33 Ind. App. 88, 70 N. E. 886, as a correct statement of the law. The duty of a street car company to deliver its passengers is stated by Mr. Chief Justice Fuller in Washington, etc., R. R. Co. v. Harmon's Adm'r, 147 U. S. 571, reading at page 583, 13 Sup. Ct. 557, at page 561 (37 L. Ed. 284), as follows:

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"The duty resting upon the defendant was to deliver its passenger, and that involved the duty of observing whether he had actually alighted before the car was started again. If the conductor failed to attend to that duty, and did not give the passenger time enough to get off before the car started, it was necessarily this neglect of duty that did the mischief. It was not a duty due to a person solely because he was in danger of being hurt, but a duty owed to a person whom the defendant had undertaken to deliver, and who was entitled to be delivered safely by being allowed to alight without danger."

The other complaints of instructions given—and they go to practically all of the instructions—have either been covered by what has already been said or are not of enough importance to deserve special notice. The refusal to give certain instructions requested by defendant, and the modification of others, is made the basis of assigned error, but we have come to the conclusion that those that were refused were fully covered or were properly refused, and that the modifications complained of were not error.

It is earnestly urged that the showing of newly discovered evidence was amply sufficient to require the trial court to grant a new trial, and that his refusal to do so was an abuse of discretion and was error. The showing made on motion for a new trial was that one E. P. Fuller would testify upon a retrial that on the day plaintiff was injured he was standing at the corner of Washington street and Central avenue at the time she got off of defendant's car; that he saw a lady "alight from said car and traverse a distance of several feet from said car, and then apparently stumble and fall upon the pavement; that at the time said lady fell, she was entirely clear of said car, and her fall was not caused by being caught upon the car in any manner or by any sudden starting of said car. * * *"

The date of the accident was October 25, 1916, and the case was tried the early part of December, 1917. Fuller did not tell defendant or any one representing it what he saw until after the trial in December, 1917; and it is also made to appear that none of the agents or servants of defendant knew that he would testify as stated until about December 8, 1917. The defendant's claim agent made affidavit of diligence, in which he shows that on October 25, 1916, the accident was reported to him, and thereafter until the trial he continually endeavored to locate any and all persons who might have seen what occurred at the time and place plaintiff claims to have been injured; that he found two persons to wit, R. P. Serrana and J. A. Rose, who stated to him they saw plaintiff fall on the pavement after she had left the car, but they did not see her get off the car; that these two witnesses remained in the jurisdiction of the court until just before the trial, when they disappeared, and were not to be had for the trial; that he tried to find others who saw or might have seen what happened at the time of the accident, but was unsuccessful; that he only learned of Fuller's seeing it after the trial.

In passing upon this assignment, we are met with this rule:

"While newly discovered evidence material to the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial, is ground for a new trial, applications on this ground are not favored by the courts. * * * Such applications should always be subjected to the closest scrutiny by the court, and the burden is upon the applicant to rebut the presumption that the verdict is correct, and that there has been a lack of due diligence. The matter is largely discretionary with the trial court, and the exercise of its discretion will not be disturbed except in a case of manifest abuse." 20 R. C. L. § 72, p. 289.

The proposed evidence of Serrana and Rose was not newly discovered. It was known to the defendant before the trial, and if it considered the evidence of these two witnesses material, it should have asked for a postponement of the trial until their attendance could be had. Chenoweth v. Prewett, 17 Ariz. 400, 153 Pac. 420. No such request was made.

[13] Fuller's testimony was cumulative. The defendant's conductor had testified to the same things Fuller claims took place. His added weight to defendant's testimony, the trial court evidently concluded, would not change the result if a new trial were granted. Then it does seem that defendant, if its version of what happened is true, could have found, with its facilities, other witnesses who would have testified to it. It developed in the course of the trial that after plaintiff got off of the car one man, an elderly gentleman, was on the car going to the fair grounds. Two other men boarded the car at the place she got off, and it appears that other persons were present at the time it is claimed the accident happened. Indeed, it is not unreasonable to assume that at the time of the accident—the middle of the afternoon—there were many people in the vicinity of the intersection of Washington street and Central avenue. It is possible of course, that none of them saw the occurrence, and it is also possible defendant could not locate them, or any others than the three mentioned in its motion for a new trial, but it seems to us the passengers at the time, and bystanders, might have been found with proper diligence. We conclude it was not error, under the circumstances, to refuse the new trial for newly discovered evidence.

The judgment is affirmed.

CUNNINGHAM, C. J., and BAKER, J., concur.

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(180 Cal. 376)

HARTFIELD v. HOWARD et al.
(L. A. 4949.)

(Supreme Court of California. May 14, 1919. Rehearing Denied June 12, 1919.)

MECHANICS' LIENS ⟸279—PRIORITIES—BURDEN OF PROOF.

Where plaintiff alleged upon information and belief that defendants' claims are subject to and subservient to plaintiff's, and defendants' answer alleged that their interest is prior and superior to that of plaintiff, defendants had the burden of establishing prior claim; and, where they introduced no evidence as to their interest or title, the court erred in adjudging plaintiff's mechanic's lien subject to interest of a defendant.

Department 2.

Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by A. J. Hartfield against Charles W. Howard and others. From the judgment rendered, plaintiff appeals. Judgment modified, and as modified, affirmed.

S. C. Schaefer, of San Pedro, and A. R. Holston, of Los Angeles, for appellant.

Milton K. Young, of Los Angeles, and Byron Coleman, of San Francisco, for respondents.

WILBUR, J. Judgment was rendered in favor of the plaintiff foreclosing his mechanic's lien. He appeals from that portion of the decree adjudicating his lien to be subsequent to the interest of the defendant Title Guarantee & Trust Company. The complaint contained the allegation:

"That all of the defendants claim to have some interest or estate in said property and parcel of land, but this plaintiff is informed and believes, and therefore alleges on information and belief, that said claims are subject to and subservient to plaintiff's claim."

The defendants Title Guarantee & Trust Company and Fidelity Savings & Loan Association joined in an answer containing the following allegation:

"Said defendants Title Guarantee & Trust Company and Fidelity Savings & Loan Association, admit that they have and claim to have some interest in the real property described in plaintiff's complaint, and allege that the interest of said defendants therein is prior and superior to that of said plaintiff."

Findings were waived. No evidence was introduced upon the subject of the interest or title of the Title Guarantee & Trust Company in the premises. Appellant claims that, as the burden of proof was upon this defendant to establish its prior claim, the portion of the judgment appealed from is erroneous. This conclusion is sustained by the opinion in Harmon v. Ashmead, 68 Cal. 321, 9 Pac. 183, wherein, under similar circumstances, it was said:

"Conceding that the denial of the defendants raised an issue, we think it was one of which they had the affirmative, and as they introduced no evidence to support it, the court was justified in finding that their lien was subordinate and subject to the plaintiffs'."

It was in that case conceded, for the purposes of the case, that the denial of the allegation that the claims of the defendants were subordinate to the plaintiff's lien raised a material issue. That matter has since frequently been considered by this court, and it has been held that the denial of such a general allegation does not raise an issue. Beronio v. Ventura County Lumber Co., 129 Cal. 232, 61 Pac. 958, 79 Am. St. Rep. 118, was a suit to quiet title, in which the defendant claimed that as the plaintiffs had been made parties defendant in a previous foreclosure suit, and the court had decreed in that action that their rights and interests in the mortgaged premises were subsequent to the mortgage, they were thereby estopped from asserting any claim therein adverse to the title derived by defendants by the foreclosure sale. The court there said with reference to such a general averment in the complaint:

"Such averment is not material to the plaintiff's cause of action, nor is it an issuable fact, and whether the court rendered judgment upon the default of the defendant, or upon an issue created by his denial of this averment, without setting forth the character of his interest, any prior interest held by him is not affected by such judgment"—citing Lewis v. Smith, 9 N. Y. 502, 61 Am. Dec. 706; Frost v. Koon, 30 N. Y. 428; Smith v. Roberts, 91 N. Y. 470; Payn v. Grant, 23 Hun, 134; Elder v. Spinks, 53 Cal. 293; Sichler v. Look, 93 Cal. 600, 29 Pac. 220.

In applying that principle to the case, it was further said:

"It does not appear that in the foreclosure suit there was any adjudication upon the title of the plaintiffs which is set forth in the complaint herein, or that their claim that their interest in the mortgaged premises is superior to that derived under the mortgage was submitted to that court for determination, or was determined by it. The allegation in the complaint therein that they claimed an interest in the mortgaged premises, and that this claim was subsequent and subordinate to said mortgage, did not present this issue for determination. The averment that their claim was 'subordinate' to the mortgage was but a legal conclusion, and the allegation of fact upon which that conclusion depended—that the claim was subsequent to the mortgage—negatived any claim that it was prior thereto. The answer of these plaintiffs was but a denial of these allegations, and their admission that they had an interest in said premises as purchasers was not only consistent

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with the allegations of the complaint and the object of the foreclosure suit, but failed to present any issue upon a claim of title superior to that covered by the mortgage, or upon the validity of such title. No facts were alleged, either in the complaint or in their answer, by which an issue upon their title or claim was presented to the court or made a subject for its determination, * * * and its finding and decree thereon that their claim and interest were subsequent and subordinate to said mortgage is of no higher force than if made upon their default."

Later, in an appeal from a decree of foreclosure, in the case of Wardlow v. Middleton, 156 Cal. 585, 105 Pac. 738, the court had under consideration the findings and judgment wherein it was declared that the interest of the two Tuckers, defendants and appellants, was acquired after the giving of the mortgage to the plaintiff. The complaint contained the usual allegation in regard to the interest of the Tuckers being subsequent to the mortgage lien. They answered, denying the nonpayment of the mortgage, but not traversing the allegation that their interest was subsequent to the mortgage. The court disposed of the appellants' claims on appeal by saying:

"It is objected that his finding and recital is not sustained by any evidence. There is no evidence on the subject. None was necessary, the allegation of the complaint thereon being admitted by the pleadings. The finding could neither add to nor detract from its force. The effect of such an admission, where the party by cross-complaint or otherwise does not present any prior claim, is that the foreclosure judgment and sale will bar all liens, rights, and interests acquired from the mortgagor after the execution of the mortgage, but will not bar rights or claims prior and superior to the mortgage. McComb v. Spangler, 71 Cal. 424, 12 Pac. 347; Ord v. Bartlett, 83 Cal. 431, 23 Pac. 705; Sichler v. Look, 93 Cal. 608, 29 Pac. 220. The finding and recital, being outside the issues, are surplusage, and are not only not conclusive upon the appellants, but are not competent evidence against them in any other action. Collins v. Gray, 154 Cal. 135, 97 Pac. 142; Bank of Visalia v. Smith, 146 Cal. 402, 81 Pac. 542."

Where it appears from the answer of the defendants that they claim an interest prior and adverse to the plaintiff's lien, as it did in this case, the proper course for the trial court is indicated in Beronio v. Ventura Lumber Co., supra, as follows:

"Whenever it is made to appear that the interest of a defendant is adverse or superior to that covered by the mortgage, the proper action of the court is to dismiss him from the suit. Ord v. Bartlett, 83 Cal. 428 [23 Pac. 705]; Code v. Bean, 93 Cal. 578 [29 Pac. 223]; Hoppe v. Fountain, 104 Cal. 94 [37 Pac. 894]."

Or the court could specify in its decree that it is made without prejudice to the adverse rights of the defendant. Ord v. Bartlett, 83 Cal. 428, 431, 432, 23 Pac. 705.

A decree adjudicating the priority of defendant's lien or interest without evidence or pleading justifying such decree was erroneous.

It is stated in respondents' brief that the only interest of the Title Guarantee & Trust Company was as trustee in the trust deed securing the indebtedness due to the defendant Fidelity Savings & Loan Association, which lien was by the decree declared to be prior to plaintiff's claim, and from which adjudication no appeal was taken. It appears from the bill of exceptions that the defendants introduced in evidence a contract signed by appellant, recognizing the prior existence of the trust deed, in favor of the defendant Fidelity Savings & Loan Association, and expressly agreeing that the claims of the lien claimants, including the lien of appellant, should be subject to and subordinate to the claim of the Fidelity Savings & Loan Association, but this agreement fails to disclose the name of the trustee in the trust deed. Strangely enough, appellant denies knowledge of the fact stated by respondents. We cannot therefore consider such statement in determining this appeal. For the same reason it is unnecessary to consider the argument of the respondent based upon the hypothesis that even if the Title Guarantee & Trust Company were the trustees in a trust deed securing the payment of money, such deed was nevertheless subordinate to respondents' lien. In order to correct the judgment so that there will be no adjudication upon the claim of the Title Guarantee & Trust Company, the court is directed to modify the judgment by striking out the fifth paragraph thereof and to insert in lieu thereof the following to wit:

"And it is further ordered, adjudged, and decreed that the said claim of the plaintiff was at the time of the commencement of this action and this judgment and decree in that behalf were and are prior and superior to any right, title, interest, or estate of the defendants Charles W. Howard, Hunziker & Berger (a copartnership), E. P. Hunziker, E. C. A. Berger, Mary W. Crutsinger, Josephine Hunziker, and W. W. Paden, and each of them, in or to said premises and the whole thereof, but that said claim of the plaintiff herein and this judgment and decree in that behalf was and is subsequent and subservient to the interest of the defendant Fidelity Savings & Loan Association, a corporation, which said last-named defendant's interests are superior to said claim of the plaintiff herein; provided that nothing in this judgment shall be construed or held to prejudice or affect the rights of the Title Guarantee & Trust Company accruing prior to the date when the plaintiff's lien attached to the property."

As so modified the judgment is affirmed.

We concur: MELVIN, J.; LENNON, J.

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(180 Cal. 359)

HASSON v. KOEBERLE et al. (L. A. 4828.)

(Supreme Court of California. May 12, 1919.)

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1. CORPORATIONS ⟸244(4) — DONATION OF SHARES OF STOCK—COLLATERAL ATTACK.

Where stockholders intended to donate, and corporation intended to receive, certain number of shares of stock, and the original certificates issued were canceled and new certificates issued for the number of shares represented by the original certificates less the number of shares donated, the transfer effectively placed shares donated under the control of the corporation, and the donation must be held valid against collateral attack.

2. CORPORATIONS ⟸232(1) — STOCKHOLDERS' LIABILITY—AMOUNT OF UNPAID SUBSCRIPTION.

Where stock is sold for money, and the purchase price is less than the par value, the difference between the par value and the amount actually paid is the measure of the stockholders' liability to creditors.

3. CORPORATIONS ⟸232(3) — ISSUANCE OF STOCK—EXCHANGE FOR PROPERTY—LIABILITY OF STOCKHOLDERS.

Where stock is issued for property having no generally defined value, the rule is that where the corporation and stockholders have agreed upon a given valuation for the property such valuation is binding and conclusive, unless it is fraudulent in purpose or effect.

4. CORPORATIONS ⟸232(3)—STOCKHOLDERS' LIABILITY—STOCK ISSUED ON EXCESSIVE VALUE OF PROPERTY.

If the parties have put upon the property a valuation in excess of what they knew or believed to be its true value, it is a constructive fraud upon the creditors of the corporation, and stock will be deemed paid only to the extent of the actual value of the property received in exchange for it.

5. CORPORATIONS ⟸232(3)—STOCKHOLDERS' LIABILITY — MINING CORPORATIONS — RULE APPLICABLE.

The rule that, where stock of corporation is issued as fully paid in exchange for property at a known overvaluation, the creditors of the corporation, in case of its insolvency, may recover from each stockholder a sum equal to the amount unpaid upon his subscription, applies to all classes of corporations, including mining corporations, regardless of custom to fix mining shares at a purely arbitrary value.

6. CORPORATIONS ⟸232(3)—STOCK ISSUED ON EXCESSIVE VALUATION OF PROPERTY.

Unless the corporators knew or believed that mining claims given by them to the corporation in exchange for shares of stock were worth the par value of the stock received by them, or if their belief was reached without intelligent examination into the value by including items not really property, or by the influence of self-interest, the issuance of stock would be a violation of constitutional and statutory provision authorizing issuance to the amount of value of property.

Department 2.

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Separate actions by Mrs. C. N. Hasson against J. E. Koeberle, Ludwig Gossman, and the Ord Mountain Gold Company. Actions against the two defendants first mentioned were tried together, and from a single judgment in their favor plaintiff appeals. Reversed and remanded.

Samuel H. Pardue, of Los Angeles, for appellant.

Jones & Evans and Mattison B. Jones, all of Los Angeles, for respondents.

LENNON, J. On March 7, 1907, the Ord Mountain Gold Company was an Arizona corporation, with a capital stock of 1,000,000 shares of the par value of $1 each. On that date, the directors held a meeting for the purpose of organization, and issued 450,000 shares each to T. N. Hasson and George L. Hasson, respectively, and the remaining 100,000 to one Steadman. Thereupon the Hassons each undertook to donate back to the corporation 250,000 shares by means of the cancellation of the original certificates and the issuance of new certificates for the lesser number of shares then remaining to each donor. The original issue to the Hassons was made in consideration of the transfer of certain mining properties to the corporation. On March 15, 1907, the corporation issued to the defendant Gossman 5,000 shares of stock, for which he paid $250. On March 11 and on April 30, 1907, issues totaling 4,000 shares were made to the defendant Koeberle for the sum of $200.

In 1914, the plaintiff obtained a judgment against the company for $7,518.92, and, the corporation being insolvent, execution thereon failed and the judgment remained unsatisfied. In January, 1915, the plaintiff brought separate actions against the defendants Gossman and Koeberle as shareholders in the corporation contending: (1) That the stock was issued to the Hassons for property taken at a gross overvaluation; (2) that by an application of the rule of Herron v. Shaw, 165 Cal. 668, 133 Pac. 488, Ann. Cas. 1915A, 1265, the Hassons were liable to creditors of the corporation for the difference between the value of the property and the par value of the stock, and (3) that by an application of the rule of Perkins v. Cowles, 157 Cal. 625, 108 Pac. 711, 30 L. R. A. (N. S.) 283, 137 Am. St. Rep. 158, the defendants, even if they are bona fide transferees for value, are liable to the plaintiff for the said difference as prorated upon their part of such stock which was subsequently issued to them after being returned to the corporation by the Hassons.

The actions were tried together, and from a single judgment in favor of both defendants

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the plaintiff brings this appeal. The theories advanced by the plaintiff resolve themselves into two main contentions: (1) That the Hassons did not in fact succeed in returning any stock to the corporation, wherefore the issue to the defendants was an over issue of treasury stock, and, as such, an ultra vires issue against which the rule of Herron v. Shaw, supra, should not apply and (2) that the rule of Herron v. Shaw, supra, should not apply against issues of stock by corporations organized solely to develop and operate mining properties where all or practically all of the stock is issued in return for undeveloped claims of a real but necessarily of an unknown and speculative value. One argument of the respondents in support of this contention is that it is a matter of such common knowledge that there is no relation between the par value of mining stock and the assets of the corporation that creditors could not be supposed to rely upon any representation that the corporation had received assets up to the par value of the stock.

[1] Considering respondents' first contention, we note the following facts: The Hassons intended to donate, and the corporation intended to receive, 500,000 shares of the stock. It was noted in the minutes of the corporation that the stock had been donated. The corporation has at no time undertaken to issue certificates representing more than the authorized capital stock. The certificates originally issued to the Hassons, each representing 450,000 shares of stock, were canceled and certificates were delivered to the Hassons, each purporting to represent but 200,000 shares of the stock. This transaction effectively placed 500,000 shares of stock under the control of the corporation. However technically imperfect the form of the donation may have been, the facts show that it was effected, and it must clearly be held valid against any collateral attack. Independently of any question of the effect of an ultra vires issue, it therefore appears that the respondents' first contention is without merit.

[2-4] Turning now to the second contention, we find the law well settled. It should be noted that, although the Ord Mountain Gold Company is a corporation organized under the laws of Arizona and doing business in California, it is to the California law that the parties have appealed in their briefs and arguments. Looking, therefore, to the California law we find it undisputed that, where stock is sold for money and the purchase price is less than the par value of the stock, the difference between the par value and the amount actually paid is the measure of the stockholders' liability to creditors, and that in cases where the stock is not sold for cash, but is issued for real or personal property having no generally defined value, "the rule is that where the corporation and stockholder have agreed upon a given valuation for the property transferred, such valuation is binding and conclusive unless it is fraudulent in purpose or effect. But if the parties have put upon the property a valuation in excess of what they knew or believed to be its true value, this is a constructive fraud upon the creditors, and the stock will be deemed paid only to the extent of the actual value of the property received in exchange for it." Harrison v. Armour, 169 Cal. 787, 147 Pac. 1166; Herron v. Shaw, supra; Vermont Marble Co. v. Declez, 135 Cal. 579, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143.

Cases supporting this rule decided in this jurisdiction and elsewhere are commented upon in Lucey Co. v. McMullen, 173 Pac. 1000, and in Sherman v. Harley, 174 Pac. 901. These cases do not intimate that the rule is not general in its application, or that it is subject to an exception in favor of any given class of corporations. In 1881, however, the case of In re South Mountain Consolidated Mining Co. (D. C.) 7 Sawy. 30, 5 Fed. 403, was decided in the United States District Court for the district of California. In that case the court stated the question before it as follows:

"Does the acceptance of stock in a mining corporation, as they are usually formed in this state, create any obligation, either by contract or under the law, to pay to the corporation or to its creditors the nominal par value of the stock so accepted?"

This question was answered in the negative, the court deciding that a creditor of a mining corporation is left to the statutory liability of the stockholder for his pro rata of the corporate debts. The decision was wholly based upon an asserted difference between mining corporations, as organized in California, and other kinds of corporations. The court recited the custom of giving mining stock a purely arbitrary value, which "neither bears, nor is intended nor supposed by the public to bear, the slightest relation to the real value of the property—a value nearly always conjectural, and very often imaginary." On a review of the case in the Circuit Court of the United States (8 Sawy. 366, 14 Fed. 347), this view was upheld, the court saying:

"Mining corporations in California are, in these particulars, sui generis. They are organized and carried on upon principles, in these respects, wholly different from banking, railroad, insurance, and like commercial corporations having a subscribed capital stock. There is no agreement, express or implied, to pay up any particular amount of stock, and no one understands that there is. Certainly none is intended by the parties."

While in the present case the record does clearly show that the Ord Mountain Gold Company was solely a mining company, the

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facts as revealed in the pleadings, proof, and findings, do not indicate that its capital stock was not subscribed or that there was no agreement, express or implied, to pay any particular amount of stock or that none was intended by the parties. The organization, so far as appears from anything in the record, differed in no material respect from that of an ordinary business corporation.

But, aside from these considerations, an examination of the California cases from the year 1882 to the present reveals the fact that, while the South Mountain Case has been repeatedly cited by the profession as an authority, this court has in each instance refused to do more than give it tentative recognition, and certainly has never approved the doctrine enunciated therein. See, for example, Harmon v. Page, 62 Cal. 448; Vermont Marble Co. v. Declez, 135 Cal. 579, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143; Herron v. Shaw, 165 Cal. 668, 133 Pac. 488, Ann. Cas. 1915A, 1265.

[5] We are aware of no sound principle upon which the decision in the South Mountain Case can be upheld at the present day. The reasons forming the basis for the general rule stated in Herron v. Shaw and Harrison v. Armour, supra, apply as well to mining corporations as to corporations formed for other purposes. Nor do we see any reason why it would work any peculiar hardship upon a mining company, as distinguished from any other kind of corporation, to be required to take property in exchange for stock at what the corporators honestly and intelligently believe to be its actual value. If it is true that there is a custom to fix mining shares at a purely arbitrary par value having no relation to the value of the assets taken therefor, that fact cannot alter the rule of law requiring that there be such a relation. The precise question was raised in See v. Heppenheimer, 69 N. J. Eq. 36, 61 Atl. 843, where it was urged upon the court that it was a matter of common knowledge that stock was issued by New Jersey corporations for property taken at a gross overvaluation. Pitney, V. C., admitted that the practice had been so frequently indulged in that it had brought obloquy upon the state, but asserted that whenever it had been indulged in it had involved a clear infringement of, if not a fraud upon, the letter and spirit of the laws of the state. If, therefore, it is customary for mining corporations in this state to issue stock for property which has no relation to the par value of the stock so issued, we can likewise only express our regret and point out that it has in every case involved a clear infringement of our laws.

[6] It follows that the rule enunciated in Herron v. Shaw and Harrison v. Armour, supra, is a general rule applicable to all classes of corporations, and that the rule stated in Re South Mountain Consolidated Mining Co., supra, no longer properly expresses the law in force in this state. Consequently, unless the corporators knew or believed that the Ord Mountain mining claims were worth $1,000,000, the stock is to be deemed paid only to the extent of the actual value of those claims at the time of the transfer to the corporation. We are also of the opinion upon a review of the cases that, however morally righteous was the belief of the corporators, if it was reached without intelligent examination into the elements of value or by including items not really "property" or by the influence of self-interest, the issue would be as much a violation of the statutory and constitutional provisions as though it had been dictated by corrupt motives. See v. Heppenheimer, supra; Donald v. American Smelting Co., 62 N. J. Eq. 729, 48 Atl. 771, 1116; Holcombe v. Trenton White City Co., 80 N. J. Eq. 122, 82 Atl. 618; Gillett v. Chicago Co., 230 Ill. 373, 82 N. E. 891. It may be remarked at this point that in determining whether or not the corporators did in fact honestly and intelligently believe the Ord Mountain claims to be worth $1,000,000 the circumstances attending and following the transfer should be taken into consideration. Immediately following the transfer, shares of the par value of $1 each and of the total par value of $500,000 were returned to the corporation. A short time thereafter several thousand of these shares were sold to the respondents at 5 cents a share. These circumstances cast grave suspicion, to say the least, upon the existence of any honest and intelligent belief that the Ord Mountain claims were worth $1,000,000.

It follows from the foregoing discussion that evidence should have been received at the trial bearing on the belief of the corporators as to the value of the property, to the end that it might have been determined what that belief was, and whether it was in fact honest and intelligent. The court, however, acting on the theory that the opinion of the corporators was wholly immaterial, confined the issue to the actual value of the property at the time of the transfer to the corporation. The finding of the court on this point is as follows:

"That at said time said mining claims had a value subsequently determined of yielding dividends on an investment of $1,000,000, that said 1,000,000 shares fully paid were not disproportionate in value to the said mining claims, and that the consideration for the issuance of said stock, fully paid up, was reasonable, just, and adequate."

The finding, in effect, rests upon the conclusion that the property was worth $1,000,000, because it would pay dividends on $1,000,000. It is not, however, found that the dividends referred to would be a reasonable or adequate return on an investment of $1,-

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000,000. Moreover, it is evident that future earning capacity rather than present cash value was adopted as a standard. We do not mean to say that prospective earning capacity, properly subordinated to other modes of ascertaining value, may not be considered in determining present cash value. We are compelled to conclude, however, that the court adopted a prospective earning power as the standard of value, and did not consider it as merely some evidence of present cash value which upon a review of the cases we take to be the standard approved by them. It was the duty of the court to determine this value by ascertaining as nearly as possible what a reasonably prudent investor who contemplated spending his own money would have been willing to pay for the Ord Mountain claims under the circumstances under which the corporators acted on the date of the transfer.

That the finding in question was not based upon the application of such a standard may be demonstrated by a review of the evidence. Dr. Koebig, the plaintiff's mining expert, was asked on the cross-examination: "It might be reasonable to expect, Dr. Koebig, that that profit would run into millions, just as much as into thousands?" The doctor answered: "Well, I am not so used to figure by the millions, but certainly this property, in my judgment, was a property that could pay dividends on a very large sum of money—if you please, a million—and good dividends on such, if the indications are borne out by the future development, and my opinion was there will be." This opinion was based upon an examination made after $150,000 had been spent in developing the mine. On the other hand, the same witness at another time in the trial stated that he could best give an idea of his opinion of the value of the mine by recounting a conversation which he had had with Mr. Hasson. It appeared that, at a time after the expenditure of the $150,000 before referred to, Hasson asked Koebig whether it would be wise to accept $250,000 for the property. Koebig answered that that would be getting a "very good value" for the property. Samuel J. Paul, another mining expert called for the plaintiff, testified that at the time of the transfer of the property to the corporation he would have considered it worth between $25,000 and $35,000. This was the only testimony as to the value of the claims.

It is clear from this analysis of the evidence that the finding of the court is based upon prospective earning power as determined at a time subsequent to the transfer. The judgment cannot therefore, be sustained on the theory that the evidence shows that the actual cash value of the property, in the sense in which we have defined that term, was $1,000,000 at the date of the transfer in question.

The judgment appealed from is reversed, and the case remanded for a new trial.

We concur: WILBUR, J.; MELVIN, J.

(180 Cal. 381)

BUFKIN v. CLINE, Sheriff, et al.
(L. A. 4891.)

(Supreme Court of California. May 14, 1919.)

1. APPEAL AND ERROR ⟸1010(1)—FINDING.

Trial court's finding, based on sufficient evidence, is conclusive upon appeal, although there was evidence from which the trial court might have arrived at a different conclusion.

2. FRAUDULENT CONVEYANCES ⟸137(1) — CHANGE OF POSSESSION—EXEMPT PROPERTY.

Civ. Code, § 3440, as to immediate delivery and change of possession of transferred property, by express terms does not apply to exempt property, such as is enumerated in Code Civ. Proc. § 690.

Department 2.

Appeal from Superior Court, Los Angeles County; H. T. Dewhirst, Judge.

Action by Samuel Bufkin against John C. Cline, Sheriff, etc., and others. From judgment for plaintiff, defendants appeal. Affirmed.

Duke Stone, of Los Angeles, for appellants.
Andrew J. Copp, Jr., of Los Angeles, for respondent.

WILBUR, J. This is an action of claim and delivery. Plaintiff had judgment, and defendants appeal. Defendants predicate their right to the property in question upon an attachment issued October 14, 1915, against the property of Katherine Van Alstyne, levied by the defendant sheriff upon the property in question on said date. No specific description of the property is contained in the briefs other than in the findings of the court that said property consisted of household furniture and furnishings and bric-a-brac of said household. Respondent's wife died in 1900. At that time the personal property in question was the community property of himself and wife. Respondent's daughter Katherine thereafter married Van Alstyne, and the plaintiff gave the possession of said furniture to her. The property remained continuously in her possession until July 26, 1915, when it was stored in the warehouse of the Bekins Van & Storage Warehouse, and Katherine Van Alstyne executed a bill of sale thereof to plaintiff. The arrangement between the father and daughter under which she retained possession of the furniture is thus found by the court:

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"On or about the 1st day of December, 1900, upon the death of said Jane H. Bufkin (plaintiff's wife) plaintiff loaned and delivered the possession of said personal property and the whole thereof to the defendant Katherine Van Alstyne for her use during her life as long as she should desire to use the same, or upon her death or surrender of the property, the title to the same to at once be vested in plaintiff, with the right to the immediate possession thereof, reserving in himself the right to recall and repossess himself of said property, or any part thereof, at any time, and continuously between the 1st day of December, 1900, and the 26th day of July, 1915, defendant Katherine Van Alstyne continuously had possession of and used the same in her home as the household furniture of herself and family. On or about the last-mentoned date defendant Katherine Van Alstyne gave up housekeeping, surrendered the possession of said furniture to plaintiff, and as evidence of such transfer of title and possession and redelivery made, executed, and delivered to him a bill of sale, bearing date the 26th day of July, 1915, which was duly recorded July 27, 1915. That on July 26, 1915, plaintiff took possession of said property, and that the same has remained in storage with the Bekins Van & Storage Warehouse."

The court also found that there was no intention to defraud creditors in connection with the change of ownership and possession July 26, 1915. Appellant contends that the transfer of July 26th was invalid as to the defendant creditors, under the provisions of section 3440 of the Civil Code, requiring immediate delivery, followed by an actual and continued change of possession of personal property to effectuate a transfer as against existing creditors. There are two good and sufficient answers to appellants' claim. First, the court found on sufficient evidence that plaintiff was at all times the owner of the property in question, and that Mrs. Van Alstyne was entitled only to the possession thereof. It is true that there was evidence from which the court might have arrived at an opposite conclusion, but the finding of the trial court is conclusive upon us. The transaction of July 26, 1915, therefore, amounted to nothing more than a surrender by the daughter of her right of possession to her father, the plaintiff. There was, therefore, no attachable interest remaining in her. The second answer to appellants' contention is that section 3440, by express terms, does not apply to property exempt from execution. The provision is as follows:

"Provided, however, that the provisions of this section shall not apply to the transfers of wines, etc. * * * nor to any sale, transfer or assignment of any property exempt from execution."

The reason for this provision undoubtedly is that creditors can make no claims to property exempt from execution, and its transfer, therefore, should not be deemed fraudulent as to them. Section 690 of the Code of Civil Procedure provides:

"The following property is exempt from execution and attachment. * * * 2. Necessary household, table and kitchen furniture belonging to the judgment debtor, including," etc.

The finding of the court that there was no intent to defraud creditors on the part of Katherine Van Alstyne by said transfer may have been based in part at least upon the proposition that the property in question was not subject to execution. This point was not discussed by the parties, and for that reason will not be further discussed.

Judgment affirmed.

We concur: MELVIN, J.; LENNON, J.

(40 Cal. App. 641)

ADAMS v. PLETSCH et al. (Civ. 2401.)

(District Court of Appeal, Second District, Division 1, California. April 12, 1919.)

1. APPEAL AND ERROR ⟸994(3)—REVIEW—CREDIBILITY OF WITNESSES.

The weighing and reconciliation of the inconsistencies of the testimony of the defendants by accepting in part or in whole the testimony of either of them was for the trial court.

2. RELEASE ⟸53 — FRAUD — PLEADING AND PROOF.

In an action by a purchaser of stock to recover, as for money had and received, commissions agreed to be paid thereon and on all sums of money collected by one of the defendants on a certain contract, evidence of fraud in procuring from plaintiff an agreement surrendering his claim *held* not admissible, in the absence of an allegation of fraud.

3. APPEAL AND ERROR ⟸1056(1)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Exclusion of evidence as to fraud by promoters of a corporation from whom plaintiff purchased stock, in procuring an agreement of waiver from plaintiff of any claim upon commissions on property transferred by the corporation to one H., if error in suit by plaintiff to recover commissions agreed to be paid upon stock purchased and money collected by defendants on a contract with one H., was not prejudicial, where no property was ever transferred to H. nor any collections made upon H.'s contract with the corporation.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by W. W. Adams against Theo. H. Pletsch and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Tipton & Cailor, of Los Angeles, for appellant.

Head & Marks, of Fullerton, and Elmer I. Moody, of Los Angeles, for respondents.

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SHAW, J. Plaintiff appeals from a judgment entered in favor of defendants, who were promoters of a corporation designated as the Continental Mausoleum Company and who, as agents for the sale of the capital stock of the corporation, were to receive a commission of 20 per cent. upon sales made by them. In furtherance of the business for which it was created, the corporation had made a contract whereby it agreed to purchase from William N. Holway the rights to a certain United States patent for the sum of $65,000. It appears that defendant Pletsch had a contract with Holway for the collection of this money. The defendants, thus representing both Holway and the corporation, agreed to pay plaintiff 10 per cent. commission on all stock which he might buy, and a like sum on all sales of stock in the negotiation of which he assisted, and further agreed that he should be paid 10 per cent. commission on all sums of money collected by Pletsch on the Holway contract. One count of the complaint alleged that, pursuant to this agreement, plaintiff bought stock of the corporation of the value of $3,500, upon which he was entitled to a commission of $700, and that collections of $7,000 were made upon the Holway contract, upon which he was entitled to a like sum of $700, for the total of which judgment was asked.

The court, in effect, found that as to the stock bought by plaintiff, 30,000 shares thereof, valued at $3,000, was not subject to the agreement because the same was made after the purchase; that as to the other $500 worth of stock purchased by plaintiff he received payment of his commission thereon, which fact plaintiff in his testimony admitted to be true. It was further, in effect, found that no collections upon which plaintiff was entitled to commissions had been made on the Holway contract.

[1] The chief ground upon which appellant insists on a reversal is that the evidence is insufficient to support these findings. It would be an idle waste of time for the court to make an extended review of the testimony offered touching the issues so joined. Suffice it to say that counsel for appellant concede the testimony of defendants supports the findings. Their contention is that it is contradictory. Concede so much, nevertheless it was for the trial court to weigh and reconcile such inconsistencies by accepting, in whole or in part, the testimony of either defendant. Both defendants are positive in their statements that at the time plaintiff bought the 30,000 shares of stock there had been no talk or conversation whatever in reference to allowing him any commission whatsoever thereon. They insist that the only agreement regarding commissions on stock bought by plaintiff was made after said purchase by him of the 30,000 shares.

[2] Appellant's attack upon the finding, to the effect that defendants promised to pay him the sum of 10 per cent. on all sums of money in cash collected from the Mausoleum Company by Holway, is based upon the claim that there was transferred to Holway by the company certain contracts and property of the value of $7,000. The agreement, however, as shown by the testimony of defendants, was that the 10 per cent. commission was to be paid only upon sums of money which Holway received, and not upon property which he might agree to accept in lieu of cash. It further shows that defendants consulted plaintiff with reference to the company transferring this property to Holway, at which time he was told that if Holway accepted the property for the agreed sum of $7,000, no commission would be allowed thereon, to all of which plaintiff himself admits that he agreed. Moreover, since Holway testified that upon said contract the company "never paid any money, property, or consideration whatever," it appears that such transfer was never consummated.

While plaintiff admits that he agreed, in case of a transfer of the property to Holway, he would waive any right or claim to commissions upon the value of the property, he insists that he was induced so to do by defendants agreeing to a like waiver on their part, instead of which, however, he claims that defendants obtained the entire property and appropriated it to their own use and benefit, by reason of which fact the agreement of waiver on his part was procured by fraud. The court, however, refused to receive and consider testimony tending to establish such alleged fraudulent acts and representations on the part of defendants, for the reason that the complaint contained no allegation of fraud. The action as brought was for money had and received by defendants to plaintiff's use and benefit, upon which appellant insists, on the authority of Minor v. Baldridge, 123 Cal. 187, 55 Pac. 783, that evidence showing fraud in procuring the agreement of waiver made by plaintiff was admissible. In the case cited it was held that where a condition precedent to the payment of money was falsely represented to have been performed, such fact might be shown in an action in assumpsit. The case is not applicable to the facts under consideration for the reason that here plaintiff entered into an agreement surrendering his claim and right to money which might in a certain contingency become due to him. No money had, as in the Minor Case, been paid, and if the contingency arose under which plaintiff, except for his agreement of waiver so claimed to have been procured by fraud, was entitled to commissions, the facts showing that it was so obtained should have been alleged. Otherwise defendants would not have no-

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tice of the nature of plaintiff's claim based on his repudiation of the contract of waiver. Nichols v. Randall, 136 Cal. 426, 69 Pac. 26.

[3] However, even were the alleged error conceded, plaintiff was not prejudiced thereby, for the reason that it appears without contradiction that the property was not transferred to Holway, nor were any collections made upon his contract with the company.

Judgment affirmed.

We concur: CONREY, P. J.; JAMES, J.

(40 Cal. App. 597)

CITY STREET IMPROVEMENT CO. v. SILVERSHIELD et al. (Civ. 2749.)

(District Court of Appeal, First District, Division 2, California. April 8, 1919.)

1. APPEAL AND ERROR ⟸766—BRIEFS—STATUTE.

In view of Code Civ. Proc. § 953c, requiring parties to print in their briefs such portion of the record as is necessary for the information of the court, where appellants did not print in their opening brief an appendix, and only set out as part of the record a small portion of a private contract, upon the construction of which appellants state they rely, and respondent's brief calls attention to this omission, and appellant's closing brief is also unsatisfactory, the appeal, being frivolous, will not be considered, and judgment will be affirmed.

2. COSTS ⟸260(4) — DAMAGES — FRIVOLOUS APPEAL.

Where an appellant fails to conform to the requirements of Code Civ. Proc. § 953c, requiring the parties to print in their briefs certain portions of the record, and on examination of the record it fails to disclose any merit, and appears solely to have been made for purposes of delay, a proper case exists for the imposition of damages upon appellant for taking a frivolous appeal.

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by the City Street Improvement Company against Henry Silvershield and another. Judgment for plaintiff, and defendants appeal. Affirmed.

W. F. Cowan, of Santa Rosa, for appellants.

Platt Kent, of San Francisco, for respondent.

BRITTAIN, J. The appeal, upon the alternative procedure, is from a judgment upon a private contract for street work in the city of Santa Rosa. In the opening brief there is no appendix, and the only pretense of setting out any part of the record, if indeed it is a part of the record, is a mutilated excerpt from a part of the private contract. There is a statement that one of the principal points upon which the appellants rely is the construction of the contract. The respondent's brief consists of a single paragraph, asking that the judgment be affirmed, for the reason that the appellants have not printed in their brief the portion of the record required for the information of the court, citing Code of Civil Procedure, § 953c, and Miller v. Oliver, 174 Cal. 404, 163 Pac. 357, and stating that the appeal appears to have been taken solely for delay.

In the closing brief is a statement that counsel for the appellants have been assured several times by Courts of Appeal, when presenting cases, that they always make a practice of going fully into the transcript, and, further, in order that there might be no dereliction, in the closing brief they set forth certain matter, which may or may not have been another part of the contract in suit so far as appears from the brief, consisting of three questions with their answers, which standing alone, are entirely unintelligible. There is also set forth what is designated the pretended acceptance by the city of Santa Rosa.

[1, 2] Section 953c, Code of Civil Procedure, is positive in its requirements. It has frequently been construed by both the Supreme Court and the District Courts of Appeal. Miller v. Oliver was decided more than a year before the appellants' opening brief in this case was filed. In that case the Supreme Court awarded damages of $100 against the appellant for a frivolous appeal. The disregard by the appellant in that case of the provisions of section 953c, Code of Civil Procedure, was not more marked than that of the appellants in the present case. Estate of Kieth, 175 Cal. 26, 165 Pac. 10; Welk v. Sorenson, 178 Pac. 498; Whiting-Mead Commercial Co. v. Richards, 180 Pac. 633. The record has been examined, and it fails to disclose merit in the appeal from a judgment of $108.05, interest, and costs.

The judgment is affirmed, and it is adjudged that respondent recover from the appellants the sum of $50 for the taking of a frivolous appeal.

We concur: LANGDON, P. J.; HAVEN, J.

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(40 Cal. App. 686)

SYDNEY v. RICHARDS et al. (Civ. 1914.)

(District Court of Appeal, Third District, California. April 16, 1919. Rehearing Denied by Supreme Court June 12, 1919.)

1. APPEAL AND ERROR ⟸1011(1)—FINDING—REVIEW.

Court finding, based on conflicting evidence, will not be disturbed on appeal.

2. MINES AND MINERALS ⟸19(1)—LOCATION NOTICE—SUFFICIENCY.

Location notices should be liberally construed, and in determining the sufficiency thereof the most important guide is the purpose of the notice, which is to identify the land claimed with reasonable certainty.

3. MINES AND MINERALS ⟸19(1)—LOCATION NOTICE—COMPLIANCE WITH STATUTE—EVIDENCE.

In action to quiet title to copper mining claim, question being whether prior notice of location by defendants contained a sufficient description of land sought to be located under Civ. Code, §§ 1426, 1426a, *held*, that the court below was justified in concluding that there was an honest attempt by defendants to locate said land, that there was a sufficient compliance with the requirements of the law, and that plaintiff had full knowledge of the extent of defendants' claim.

Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Action by J. L. Sydney against John Richards and others. From judgment for defendant named, plaintiff appeals. Affirmed.

F. P. Tuttle, of Merced, for appellant.
John Wall, of Mariposa, for respondents.

BUCK, Presiding Judge pro tem. This is an action to quiet title to a copper mining claim. The defendants Westfall and Beeves filed a disclaimer. The case was tried by the court sitting without a jury, and judgment was for defendant Richards, and plaintiff appeals.

The land in question was unoccupied government mineral land and at the trial plaintiff attempted to prove that she had acquired title thereto by two distinct proceedings: First, that on January 1, 1911, she and one Lisenby, through her husband, posted a notice of location upon the ground, and in 1913 performed more than $100 worth of labor. Afterwards this location was abandoned, and on September 14, 1914, while the land, as she claims, was still unlocated, she made a valid location thereon by posting the proper notice.

[1] As regards the location of January, 1911, the trial court found from conflicting evidence that the required assessment work for the year 1913 had not been done. Under the rule governing this court, this finding will not be disturbed.

As regards the location of September 1914, by plaintiff, there was offered in evidence at the trial a prior notice of location posted on the claim on March 11, 1914, by defendant, which, over the objection of plaintiff, was received in evidence and was the basis upon which judgment in favor of defendant was rendered.

The question in controversy is whether this prior notice of location by defendant contained a sufficient description of the land sought to be located under the provisions of sections 1426 and 1426a of the Civil Code. The following is a copy of the notice of location:

"Notice of Location—Quartz Claim. Notice is hereby given that the undersigned citizen of the United States has, in compliance with the requirements of the Revised Statutes of the United States this day located and claim 1,500 linear feet along the course of this lead, lode, or vein of mineral-bearing quartz, and 300 feet in width on each side of the middle of said lead, load, or vein, together with all mineral deposits contained therein, and all timber growing within the limits of said claim, and all water and water privileges thereon or appurtenant thereto, situate in the Green Mountain mining district, county of Mariposa, and state of California, and more particularly described as follows, to wit: Commencing at a stone monument about 100 feet north of an old incline shaft, thence northerly 600 feet and southerly 900 feet along the vein or lode which is the center line of the claim. The shaft is located about 600 feet west of the N. E. corner of section 4, T. 8 S., R. 18 E. M. D. M. This claim shall be known as the Sunny Side quartz claim."

[2] The recent case of Batt v. Stedman, 173 Pac. 99, decided in this court since briefs were filed herein, lays down the principles which will govern this court in considering the sufficiency of a notice of a mining location. Following other precedents, that case holds that "location notices should be liberally construed, having reference to the circumstances under which, and the character of the parties by which, they are generally made; in determining the sufficiency of the location notice, the most important guide is the purpose of the notice, which is to identify the land claimed with reasonable certainty;" also the statute expressly provides that the description of the claim may be made "by reference to some natural object or permanent monument, as will identify the claim located," and that "in no case shall the claim extend more than 1,500 feet along the course of the vein or lode, nor more than 300 feet on either side thereof, measured from the center line of the vein at the surface," and that the notice must contain "the number of linear feet claimed in length along the course of the vein, each

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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way from the point of discovery, with the width on each side of the center of the claim, and the general course of the vein or lode, as near as may be." Civ. Code, 1426, 1426a.

Now, as regards the natural objects and monuments on the land which were attempted to be used by the defendant to "identify the claim located," the following appears from the testimony: The land in dispute is old mining ground and had been mined years before by the Guggenheims. In 1912, and prior thereto, and at the time of the location, there was on the claim a 115-foot tunnel; also the ground was all clear, and with but a single tree on it; also plaintiff's husband testified that he had known the land for years, that "discovery of copper-bearing ore had been made on the claim; there is a well-defined ledge on the claim, and the apex of the vein extends the whole length of the claim"; and respondent testified:

"On March 11, 1914, I discovered rock in place on the claim bearing valuable copper ore. I built my discovery monument on the vein at this point. It was made of rocks, and was 2 feet wide and 3 feet high; and on that day I placed and posted [the above notice of location] on this discovery monument."

From the foregoing it will appear that there were upon the ground three objects, each of which objects were referred to by the locator in his notice, to wit, the well-defined ledge on the claim, the apex of which "extends the whole length of the claim," the shaft, or tunnel, and the monument. The description in the first place makes the well-defined ledge "the center of the claim," and, second, makes the stone monument referred to as the point of discovery the starting point for the measurement northerly 600 feet and southerly 900 feet of an aggregate distance of "1,500 linear feet along the course of this lead, lode, or vein of mineral-bearing quartz"; and the notice also defines the other dimension of the claim by like reference to this well-defined ledge on the claim as being "300 feet in width on each side of the middle of said lead, lode, or vein."

And, furthermore, by his own conduct, the husband of plaintiff, while acting for her, indicates that the monument referred to in defendant's location notice was a sufficient location of the point of discovery when he testifies:

"I posted the Lone Tree mine location notice in the same monument of rocks where I found the Sunnyside mine notice of location."

Furthermore, he gives no testimony from which it can be inferred that the notice of location posted by the defendant was insufficient to give him or any other person notice or information of the boundaries of defendant's location; his testimony in this action being as follows:

"A few days after March 11, 1914, I was on the ground and found the notice of location of the Sunnyside mine by defendant John Richards in a monument of rocks on the vein. I read this Sunnyside mine notice of location at this time, and then put it back in the monument of rocks where I found it. I did not make any effort to follow the directions contained in the Sunnyside mine location notice to find if any monuments had been placed to mark the claim. I have never made any such effort. The ground is all clear, some grass grows each year, and there is but one single tree on the ground. By little effort I could have readily found and seen any monuments of rocks or any other monuments on the ground. I was advised that the Sunnyside mine location was defective, for the reason that the notice of location did not contain enough writing; that it did not comply with the requirements of the statutes of the state of California, and that was my sole and only reason for making the Lone Tree location on the same ground as claimed by the Sunnyside mine notice of location. I posted the Lone Tree mine location notice in the same monument of rocks wherein I found the Sunnyside mine notice of location."

[3] As stated by this court in the case of Green v. Gavin, 10 Cal. App. 330, at page 337, 101 Pac. 931, at page 933:

"We think the court below was justified in concluding that there was an honest attempt by defendants to locate said land; that there was a sufficient compliance with the requirements of the law; * * * that plaintiff had full knowledge of the extent of defendants' claim."

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

(40 Cal. App. 633)

DURAN v. YELLOW ASTER MIN. & MILL. CO. (Civ. 2615.)

(District Court of Appeal, Second District, Division 1, California. April 11, 1919. Rehearing Denied by Supreme Court June 9, 1919.)

1. MASTER AND SERVANT ⟸285(5)—INJURY TO SERVANT—EVIDENCE—DEFECTIVE ROPE.

In a servant's action for injuries by the breaking of a rope, evidence *held* to justify a finding that the rope which yielded was the part run over by an engine before the accident.

2. NEGLIGENCE ⟸121(2)—PRESUMPTIONS.

When a thing causing injury is shown to be under defendant's management, and the accident is such as in the ordinary course of things does not happen if those in charge use proper care, it affords reasonable evidence, in the absence of explanation, that the accident arose from a want of care.

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3. MASTER AND SERVANT ⟸205(5)—INJURY TO SERVANT—UNSAFE TOOLS — ROPE — EVIDENCE—SUFFICIENCY.

In a servant's action for injuries by the breaking of a rope after it had been run over by an engine, plaintiff, to make a sufficient case for the jury, was not required to do more than show the defect was actually known to defendant or would have been discovered by a reasonable inspection.

4. TRIAL ⟸103—RECEPTION OF EVIDENCE—PURPOSE—EXCEPTION.

In a servant's action for injuries, the master's exception to the introduction of evidence to show that defendant was a rich corporation cannot avail, where there was another and unquestionably legitimate purpose for its introduction, to which such evidence was pertinent.

5. EVIDENCE ⟸127(4)—RES GESTÆ—DECLARATIONS OF INJURED SERVANT—PAIN.

In a servant's personal injury action against a master, testimony of a witness that after the accident, when plaintiff was seeking to use a rake, he heard plaintiff exclaim, "My God! it hurts!" was admissible upon the question of the seriousness of the injury, and there was no error in overruling the objection that it was a self-serving, hearsay declaration and incompetent.

6. DAMAGES ⟸132(8)—EXCESSIVE DAMAGES—PERMANENT DISABILITY OF TWO FINGERS—OTHER CONTINUING DISABILITIES.

Where the injured servant was compelled to undergo much suffering, and there was evidence tending to show permanent disability affecting two fingers of his right hand and other disabilities continuing at the time of trial, nearly two years after the accident, *held*, award of $4,000 did not raise an inference that the verdict was influenced by passion or prejudice.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Vinton E. Duran against the Yellow Aster Mining & Milling Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Ward Chapman, of San Francisco, for appellant.

Frank P. Doherty and B. Rey Schauer, both of San Francisco, for respondent.

CONREY, P. J. The defendant appeals from a judgment in the sum of $4,000 and from an order denying its motion for a new trial. The case was tried by jury. The action was brought to recover damages for personal injuries suffered by the plaintiff while in the employ of the defendant. It was alleged that the accident and injury were caused by negligence of the defendant, which negligence consisted in the selection and use of a rope which was insufficient in size, weight, and strength to sustain and hold the weight of a dump car which had rolled off the track and down the side of the dump, and the accident occurred while defendant's employés, including the plaintiff, were engaged in putting back and placing the car upon the track.

[1] Appellant's principal contention is that the evidence is not sufficient to justify the implied finding of negligence. Counsel for appellant claims that, aside from the fact that the rope broke, the plaintiff offered no evidence whatever of any lack of care on defendant's part in the selection of the rope or in the manner of fastening it, or in any act committed or omitted, unless possibly certain testimony that an engine was permitted to run over the rope where it was tied on the track before the accident was intended to give rise to an inference of negligence.

The evidence is undisputed that a new rope of the size and quality used is good for 4,000 pounds dead weight on a vertical lift, and, if it is a slightly used rope, one-third should be deducted. The rope in question had been used. There is no evidence referring to the tensile strength of such a rope when resisting a sudden jerk or shock; so far as the evidence shows, it may be that such a rope would have broken under a sudden strain produced by an object weighing much less than two-thirds of 4,000 pounds. It was stipulated that the weight of the truck and running gear of the car was 1,600 pounds; that the weight of the bed independent of the running gear and truck was about 1,200 pounds, making a total weight of 2,800 pounds; and appellant claims that the rope was attached to the truck and running gear at the time of the accident, and that the bed of the car was lying apart from the truck and running gear. If the evidence produced by the plaintiff showing his injury by reason of the breaking of the rope was such as to raise an inference of negligence, then, in the absence of a satisfactory explanation of the circumstances on the part of the defendant, it cannot reasonably complain against the finding of such negligence. There being no evidence necessarily proving that the rope was reasonably sufficient to resist a sudden strain caused by an object weighing 1,600 pounds, we cannot say that the jury's conclusion upon the matter of insufficiency of the rope was not sustained by the evidence. Defendant's superintendent, C. H. Frye, was present at the time and place of the accident. He testified as a witness on behalf of the defendant. According to his testimony, there was nobody pulling on the rope; it was simply there as a guide to hold the car while the men were working, and when they lifted the lower side up the car came down a little bit and snapped the rope. "As soon as the car was lifted out of the muck on the side that Mr. Duran was working on, you see it pulled the rope taut and it snapped."

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There does not appear to have been any close inspection of the rope before it was used. Mr. Frye says: "I did not examine the rope myself to see if it was in good condition; if the rope looks all right nobody pays any attention to it." At the commencement of the work one end of the rope was tied to the car and the other end was tied around the two tracks on the grade above. Afterwards and before the moment of the accident an engine had run over the rope and cut it in one place. Where the rope ran over the other rail of the track, the rope was not cut, and there is no evidence showing the extent to which the rope may have been mashed and weakened in any part except where it was cut. It does not appear that any inspection was made by the defendant for the purpose of determining that fact. That part of the rope which had been cut was taken out, and was not in use at the moment of the accident. So far as the evidence shows, that part of the rope which was not cut, but which had been run over by the engine, may have been in use at the moment of the accident, and may have been the part of the rope which yielded under the strain and caused the accident. Under the evidence the jury would have been justified in determining that this was the fact.

[2, 3] In connection with his claim that the evidence does not show any fact or circumstance from which negligence on defendant's part can be deduced, counsel for appellant endeavors to apply the rule that no inference of negligence can be implied from the mere fact that the injury occurs. Such cases as Madden v. Occidental Steamship Co., 86 Cal. 445, 25 Pac. 5, and Sappenfield v. Main Street R. R. Co., 91 Cal. 48, 27 Pac. 590, are cited as sustaining this rule. Those decisions and others are cited and discussed in O'Connor v. Mennie, 169 Cal. 217, 146 Pac. 674. The rule is affirmed that, when a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care. It is proper to say here, as was said in that case, that in order to make a sufficient case for the jury it was not incumbent on the plaintiff, under the circumstances appearing, to do anything further than he did do in the way of showing that the defect in the appliance was actually known to the defendant, or would have been discovered upon the exercise of reasonable care to ascertain its condition. We think that the evidence is sufficient to sustain the finding of negligence.

[4, 5] There are two exceptions to rulings of the court on the admission of testimony. The first exception is based upon the claim that certain redirect examination of the plaintiff which was allowed by the court was indulged for the purpose of conveying to the jury the information that the defendant was a rich corporation. Without setting forth this evidence, it is enough to say that it had another and unquestionably legitimate purpose, to which such evidence was pertinent. The exception is not sustained. The second exception relates to a question asked of plaintiff's witness Kelly as to whether or not he, at a time after the accident when plaintiff was seeking to use a rake, heard plaintiff utter any exclamation. Defendant objected to this upon the ground that it called for a self-serving, hearsay declaration, and was incompetent, but the court overruled the objection on the theory that the plaintiff was calling for a spontaneous exclamation, and the witness answered that the exclamation was, "My God! it hurts!" There was no error in overruling this objection. Dow v. City of Oroville, 22 Cal. App. 215, 226, 134 Pac. 197.

It is claimed that the court erred in its instructions on the measure of damages. The particular instruction selected by appellant for criticism is the following:

"If from the evidence in this case the jury should find that the plaintiff has sustained damages as alleged in his complaint, then, to enable the jury to estimate the amount of such damages, it is not necessary that any witness should have testified or expressed an opinion as to the amount of such damages, but the jury may make such estimate from the evidence in the case and by considering them in connection with their own knowledge and experience in the affairs of life."

Counsel say that this is a true rule in so far as the award had reference to the element of suffering or impairment of health, but is wholly incorrect in so far as loss of earnings or medical expense is concerned. The decision in Rouse v. Pacific Electric Ry. Co., 27 Cal. App. 772, 151 Pac. 164, relied upon by appellant here, is not in point. The instruction discussed in that case referred particularly to the plaintiff's loss of earning power, and told the jury that "it is not necessary that evidence should be presented in this matter." It was held that in giving such instruction the court erred; but no corresponding statement or inference is contained in the instruction presented for consideration here. Moreover, in other instructions given the jury were plainly told that, if they found for the plaintiffs, they should award to him only such actual damages as the evidence showed that he had sustained, etc., "taking into consideration his loss of earnings (if any), necessary expenses in medical and surgical aid, so far as the same appear in evidence in this case (if any)."

[6] Finally, appellant claims that the amount awarded as damages was grossly excessive. The plaintiff was compelled to undergo much suffering, and there is evidence

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tending to show permanent disability affecting two fingers of his right hand, and other disabilities still continuing at the time of the trial, which was nearly two years after the date of the accident. There is no such discrepancy between the evidence and the amount of damages awarded as to raise an inference that the verdict must have been influenced by passion or prejudice on the part of the jury. Perry v. Angelus Hospital Association, 172 Cal. 311, 156 Pac. 449.

The judgment and order are affirmed.

We concur: SHAW, J.; JAMES, J.

(40 Cal. App. 617)

PERAZZI et al. v. DOE ESTATES CO. et al.
(Civ. 2700.)

(District Court of Appeal, First District, Division 2, California. April 11, 1919. On Petition for Rehearing, May 9, 1919; Denied by Supreme Court June 9, 1919.)

1. MECHANICS' LIENS ⟸281(2) — FORECLOSURE—EVIDENCE—SUFFICIENCY.

Evidence in suit to foreclose contractors' liens against lessors of a building, upon which improvements were made at the request of a sublessee, *held* sufficient to sustain finding that the contracts had been completed on the date of the sublessee's death; the fact that some of the changes contemplated were not made until a later date not being necessarily inconsistent with full performance of whatever contracts were made.

2. MECHANICS' LIENS ⟸281(2) — FORECLOSURE — EVIDENCE — SUFFICIENCY — TIME OF COMPLETION.

In suit to foreclose three contractors' liens against the lessors, upon whose building improvements had been made at the request of a sublessee, finding that the contract upon which one of the liens was based was fully performed on March 31st *held* not supported by the evidence; there being testimony by one of the claimants that the work was finished on March 6th, or more than 60 days before filing the lien required by Code Civ. Proc. § 1187, on May 11th.

3. MECHANICS' LIENS ⟸132(4) — TIME FOR FILING LIEN—NOTICE OF COMPLETION.

A contractor's lien, filed more than 60 days after completion of the work, but before 90 days have expired, is too late, and cannot be allowed, under Code Civ. Proc. § 1187, where such contractor has failed to allege and prove the failure of the owner to file his notice of completion.

4. MECHANICS' LIENS ⟸78—KNOWLEDGE OF OWNER — NOTICE BY OWNER TO PREVENT LIEN.

Knowledge shown by allegations in the answer of defendant lessors, in suit by contractors to foreclose lien for work performed at request of a sublessee, that they knew that repairs were being made by such sublessee but were ignorant of the scope of such work, was sufficient to require the filing of the notice required by Code Civ. Proc. § 1192, as a condition of relieving their property from liability for work performed at the request of the sublessee; only such knowledge as would put a prudent man on inquiry being necessary.

5. MECHANICS' LIENS ⟸272, 279—ENFORCEMENT — DEFENSE—NOTICE OF NONLIABILITY BY OWNER.

Where the owners, at the time of their sublessee's death, had knowledge of the improvements made by contractors on the building at the request of such sublessee, the giving of notice of nonliability under Code Civ. Proc. § 1192, is a matter of defense to be pleaded and proved by such owner, on suit by the contractors to foreclose their lien.

On Petition for Rehearing.

6. COSTS ⟸241 — APPEAL — APPORTIONMENT OF COSTS ON APPEAL.

Where, on appeal in suit by contractors to foreclose three liens for improvements made upon a building, two of the liens were held valid and one invalid, the costs of appeal will be prorated among them.

Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by H. J. Perazzi against the Doe Estates Company and others. From a decree for plaintiffs, defendants appeal. Decree reversed, in so far as it decrees a lien in favor of Henry F. Castagnino and Emanuel Castagnino, plaintiffs, and in other respects affirmed.

Pringle & Robbins, Milo R. Robbins, and Arthur H. Redington, all of San Francisco, for appellants.

H. K. Eells and Maxwell McNutt, both of San Francisco, for respondents.

HAVEN, J. The appeal is from a decree of foreclosure of three contractors' liens against the leasehold interest of appellants in certain premises in San Francisco. The claims of lien sued upon are based upon work performed in the making of alterations and repairs to a portion of the building on said premises, occupied by one J. O. Long as a sublessee of appellants. Mr. Long died on March 31, 1914, while said alterations and repairs were in progress. Upon his death the workmen were withdrawn and all work stopped. The lien claims here involved cover work which was all performed prior to the death of Mr. Long, at his instance and request. Appellants claim that two of these liens were filed prematurely, because the contracts upon which they are based had not been completed prior to such filing. The court found that each of the said contracts was completed on March 31, 1914. It is as-

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serted that this finding is unsupported by the evidence, for the reason that the entire alterations and repairs contemplated in the arrangement between Mr. Long and said two respective claimants were not finished at that time. It appears from the evidence that Mr. Long purposed somewhat extensive alterations in the interior arrangements of a market, oyster stand, and barber shop which occupied the portion of the building of which he was the lessee; that preparatory to these general alterations he desired to change the location of the barber shop and oyster stand, and employed the plaintiffs to perform the plumbing, electrical wiring, and painting necessary for that purpose; that there was no definite price agreed upon nor plan adopted for all these preliminary changes, but that the work was laid out from day to day as it progressed, and plaintiffs followed the instructions given to them from time to time by Mr. Long, or his superintending contractor, as to the manner of its performance.

[1] Both of the plaintiffs, to whose claims the objection now under consideration is made, testified that all the work which Mr. Long had requested had been performed prior to his death. This evidence is sufficient to sustain the findings of the trial court that the contracts of these plaintiffs had been completed on March 31, 1914. It further appears that the employés of both plaintiffs were working on the premises at the time of the death, and that all the changes contemplated in the preliminary work had not then been made, but were completed at a later date. In view of the nature of the arrangement between Mr. Long and plaintiffs, it cannot be said that there remained any uncompleted contract between them at the date of the former's death. The evidence last referred to is not necessarily inconsistent with full performance of whatever contracts of the character above indicated were made.

[2] The lien of Castagnino Bros. was upon a claim under a contract for painting, which the court found was fully performed on March 31, 1914. The only evidence in the record as to the time of completion of this contract is the testimony of one of the claimants that the work was finished on March 6, 1914. This finding is therefore not supported by the evidence.

[3] The notice of lien by these claimants was filed for record on May 11, 1914, more than 60 days after the completion of their contract, as fixed by their own testimony. Respondent seeks to sustain this lien on the ground that the owners filed no notice of completion under the provisions of section 1187, Code of Civil Procedure, and that, therefore, the claimants had 90 days within which to file their lien. The record is entirely silent as to the filing, or want of filing, of this notice. We have held in the case of Greely v. Noble (No. 2769, this day filed) 181 Pac. 666, that the burden of alleging and proving the failure of the owner to file this notice is upon the plaintiffs. Having failed to so allege and prove, their lien was too late, and should not have been allowed.

[4] It is further claimed that the record does not disclose when the appellants acquired knowledge of the making of the improvements from which the lien claims arose, and that they never obtained any knowledge of the scope and extent of such improvements. No evidence was introduced upon this matter. Its determination rests, therefore, upon the pleadings. The answer of appellants contains the following allegations:

"Answering paragraph 11 of said first cause of action, these defendants admit that the defendants S. J. Pringle and E. C. Pringle had knowledge that certain alterations and repairs were to be made in said building, but deny that said S. J. Pringle and E. C. Pringle had full knowledge of the alterations and repairs in said complaint set forth, and in this particular said defendants S. J. Pringle and E. C. Pringle allege that said J. O. Long informed them that he desired to make certain alterations and repairs, and that these defendants then requested that a full plan of the repairs be submitted to them for their approval, and that said J. O. Long failed to submit said plan showing said alterations and repairs, and these defendants allege that while they knew that said J. O. Long had commenced work in said building that they did not know just what the scope of the said work was."

The knowledge admitted by the foregoing allegations was sufficient, in our opinion, to require the filing of the notice prescribed by section 1192 of the Code of Civil Procedure as a condition of relieving appellants' property from liability for the cost of the work performed at the request of Mr. Long. Such knowledge need be only sufficient to put a prudent man on inquiry. Gentle v. Britton, 158 Cal. 328, 332, 111 Pac. 9.

[5] Where it is shown that the owners had knowledge of the improvements, the giving of the notice of nonliability under the above section becomes a matter of defense, to be pleaded and proved by defendants. West Coast Lumber Co. v. Newkirk, 80 Cal. 275, 277, 22 Pac. 231; Boscus v. Bohlig, 173 Cal. 687, 691, 162 Pac. 100. The appellants did not meet this burden.

The judgment is reversed, in so far as it decrees a lien in favor of the plaintiffs Henry F. Castagnino and Emanuel Castagnino, as copartners doing business under the firm name and style of Castagnino Bros. In all other respects the judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

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On Petition for Rehearing.

HAVEN, J. The appellants in this action have filed a petition for rehearing, claiming that the court has misinterpreted the contracts of the lien claimants Perazzi and Decker Electrical Construction Company, as set forth in their respective claims of lien; and, further, that, under the interpretation of the contracts adopted by the court, the lien claimants were not original contractors and, therefore, their liens, not having been filed within thirty days, were invalid. Appellants also request a modification of the former opinion as to the prorating of the costs on appeal. In this latter request the respondents have joined in a separate petition, urging, however, a different basis of division of costs.

It appears from the notices of lien filed by said Perazzi and Decker Electrical Construction Company that each of said claimants alleged a contract consisting of two items; first the performance of certain work in changing the location of the barber shop, for which in each case a definite contract price was agreed upon; and, secondly, for the performance of certain other work, with regard to which no definite price was agreed upon, but each of the claimants was to be paid the reasonable value thereof. The evidence disclosed that all of the work upon the barber shop had been performed prior to the death of Mr. Long. The remaining work under each contract was in the process of performance at the time of Mr. Long's death. It is with reference to that work that the construction of the contracts set forth in the former opinion is applicable. There was a definite contract between each of the lien claimants and Mr. Long, as alleged in their respective claims of lien and as established by their testimony. A part of each contract was for the performance of certain work at a definite price, all of which had been performed before Mr. Long's death. The extent and nature of the balance of the work under the contracts was dependent upon instructions to be given from day to day by Mr. Long or his agent. The possibility of the continuance of such instructions from that source was terminated by the death of Mr. Long. While, therefore, the lien claimants were original contractors, we are satisfied that there were no uncompleted contracts at the time of the death of Mr. Long, in the sense that the finding of the trial court of completion on March 31, 1914, was not supported by the evidence. Being original contractors, the liens which were filed fifty-five days after the date of completion were in time.

[6] In the former opinion it is held that two of the liens involved in these consolidated cases were valid and one was invalid. It is urged by both parties to the appeal that under such circumstances the costs of the appeal should be prorated between them. This contention is well founded and is supported by precedent in similar cases.

It is, therefore, ordered that appellants' petition for a rehearing be, and the same is hereby, denied; that the opinion heretofore filed herein be, and the same is hereby, modified by adding at the close thereof the following: "And it is further ordered that appellants recover such proportion of their costs on appeal as the amount of the lien of Henry F. Castagnino and Emanuel Castagnino, as copartners doing business under the name of Castagnino Bros., bears to the total amount of the three liens involved in the appeal; and that the respondents recover such proportion of their costs on appeal as the total amount of the two liens of H. J. Perazzi and Decker Electrical Construction Company bears to the total amount of the three liens involved in the appeal."

We concur: LANGDON, P. J.; BRITTAIN, J.

(40 Cal. App. 570)

McADOO, Director General of Railroads, v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 2753.)

(District Court of Appeal, Second District, Division 1, California. April 4, 1919.)

MASTER AND SERVANT ⟸380—WORKMEN'S COMPENSATION — "SERIOUS AND WILLFUL MISCONDUCT."

Machinist helper's omission to use goggles while clipping off burrs formed in the reaming of saddle-bolt holes contrary to rules and specific instructions, merely because he disliked the goggles, was "serious and willful misconduct" within Workmen's Compensation, Insurance and Safety Act of 1917 (St. 1917, p. 831) § 6, subd. 4, reducing compensation to one-half where injury was caused by "serious and willful misconduct" of injured employé, except where injury resulted in death or permanent partial disability equaling 70% of total, or where employer violated law or safety order of commission.

Petition for certiorari by William G. McAdoo, Director-General of Railroads against Industrial Accident Commission and Robert H. Hogan, to review an order of Industrial Accident Commission awarding to Robert H. Hogan compensation for injuries. Award annulled and case remanded to Industrial Accident Commission for further proceedings with instructions.

Dana T. Smith and E. E. Bennett, both of Los Angeles, for petitioner.

Christopher M. Bradley, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

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CONREY, P. J. Certiorari. Pursuant to stipulation, the above-named petitioner has been substituted in place of the original petitioner, Los Angeles & Salt Lake Railroad Company. The writ was issued to review an order of the Industrial Accident Commission, awarding to Robert H. Hogan compensation for injuries received by him while working as an employé of said railroad company. It is conceded that if the injury received by Hogan was caused by his serious and willful misconduct, this court may set aside the award and remand the case to the commission for the reduction of the award to one-half of the amount allowed by the commission.

Section 6 of the Workmen's Compensation, Insurance and Safety Act of 1917 (Stats. 1917, p. 831), in subdivision 4 thereof, reads as follows:

"Where the injury is caused by the serious and willful misconduct of the injured employé, the compensation otherwise recoverable by him shall be reduced one-half: Provided, however, that such misconduct of the employé shall not be a defense to the claim of the dependents of said employé, if the injury results in death, or to the claim of the employé, if the injury results in a permanent partial disability equaling or in excess of seventy per cent. of total: And provided, further, that such misconduct of said employé shall not be a defense where his injury is caused by the failure of the employer to comply with any provision of law, or any safety order of the commission, with reference to the safety of places of employment."

The award in this case is made upon a permanent partial disability equaling 30¼ per cent. of total disability of the right eye.

The accident by which the applicant, R. H. Hogan, was injured, occurred on February 12, 1918, while he was employed as a machinist's helper. He was reaming saddle-bolt holes in a locomotive with an air motor and reamer. The reamer became stuck, and caused a burr to form in the top of the hole. He removed the reamer and chipped the burr off, and a piece of steel glanced off and struck him in the eye. He was not at that time wearing any goggles or other protection to the eyes. He had been employed as a machinist's helper at that place for about four months, and had several years' experience as a workman in other machine shops. At several places in the shop was posted a circular headed "Safety Rules for Shopmen." One of these was:

"Do not do any chipping or grinding without wearing safety goggles. If you are not provided with goggles, go to foreman."

The applicant admitted that he had seen the notices posted, but that he never read them. Nevertheless, it is conceded that he was "familiar with the purport" of this rule. He knew that the company provided goggles and that they were to be found in the tool room. The following questions and answers are part of the testimony of the applicant before the commission:

"Q. Have you ever used any glasses at all? A. I used goggles when I was doing a regular job of chipping. Q. You were doing a job of chipping at that time? A. Regular chipping job. This is just an incident of where you pick up a hammer and chisel and knock off a chip, and go right ahead with your regular line of work. Q. You were using a reamer driven by air under pressure? A. Yes. Q. And the reamer stuck in the hole? A. Yes. Q. That raised around the edge of the hole some chips of steel? A. Rough place. Just caused a rough place at the top of the hole. That prevented the reamer from running smoothly. In order to get a smooth surface to start from, I knocked those chips off and for that purpose I picked up a hammer and chisel. It was while using a hammer and chisel that the piece of steel flew into my eye. * * * Q. Had you been given any orders at all as to wearing the glasses when you were engaged in such work as that? A. No, sir."

On cross-examination the applicant admitted that he had on another occasion some cast iron burrs in his eyes and had the clerk of the general foreman remove them. He said that he did not remember that, about an hour before the time when he received his injury for which he seeks to obtain compensation, he got another piece of metal in his eye, and also had it removed by the clerk; also he did not remember that the first of these two incidents occurred on the day preceding the accident in question here, and that the clerk and the general foreman both told him to get goggles and wear them when he was doing work where particles of metal were liable to fly. He testified that he knew that goggles were kept in the tool room to be used by workmen, "if they thought they needed them." After the foreman, Keith, and his clerk, Pauff, had testified fully to both of the incidents referred to in the above-mentioned cross-examination, Hogan gave further testimony. In this later testimony the following occurs:

"Q. You have heard the testimony of Mr. Keith and Mr. Pauff as to your having been in the office the day previous with some foreign body in your eye, have you? A. Yes. Q. Is that testimony correct or incorrect? A. I went in there before this, I don't remember whether that was the exact date or not. Q. Do you know how you got the foreign body in your eyes that was in there at that time? A. Drilling holes in cast iron, and the dust in the air from the exhaust of the motor. Q. You told them that was the way you got it in, did you? A. Yes. Q. And you supposed that was the way? A. I told them I was drilling holes in the saddle — Q. The morning you received the injury that caused the loss of your eye had you made a previous visit to Mr. Pauff? A. I had been there before with this dust in my eyes, but I don't remember whether that was the morning before or not. Q. How many times were you there? A. There just on this occasion with this cast

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iron, I remember twice, and he gave me some water, some eye wash to wash it out. Q. Do you recall whether you were there that morning or not? A. I don't remember whether that was the time that I was or not."

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It thus appears that there is no definite contradiction of the testimony given by the foreman and clerk on this matter, but rather that silence which gives consent. The job on which Hogan was employed involved the reaming of about 50 of those saddle bolt holes, and included more than one day's work. That the forming of burrs was a common incident of that work is not denied. It was so much expected that Hogan kept by him a hammer and chisel with which to remove the burrs. He voluntarily and intentionally omitted to obtain and use goggles, contrary to rules of which he had knowledge, and contrary to specific instructions, all of which were laid down for his protection. The only reasonable explanation is that he disliked the goggles because they were, as he said, "in his way," and so he preferred to take the chance of personal injury. This was willful misconduct and it was serious. The case was in essential elements very similar to that disclosed in Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 Pac. 35, where an electric lineman disobeyed a known rule and positive instructions requiring him to wear rubber gloves while handling high-power wires, and in consequence was killed while doing that kind of work without gloves. As the court there said:

"It cannot be doubted that a workman who violates a reasonable rule made for his own protection from serious bodily injury or death is guilty of misconduct, and that where the workman deliberately violates the rule, with knowledge of its existence and of the dangers accompanying its violation, he is guilty of willful misconduct."

The case at bar sharply distinguishes itself from that of Diestelhorst v. Ind. Acc. Com'n, 32 Cal. App. 771, 164 Pac. 44, where the misconduct of the applicant occurred in a moment of thoughtlessness and not with deliberate intention. The commission's finding, that the applicant's injury was not proximately caused by his serious and willful misconduct, is not sustained by the evidence.

Our conclusion is that upon the record produced herein the award to the applicant should have been for only one-half of the amount allowed by the commission, and as to the excess above that amount the commission acted in excess of its powers. The award is annulled, and the case is remanded to the Industrial Accident Commission for further proceedings in accordance with this decision.

We concur: SHAW, J.; JAMES, J.

(40 Cal. App. 550)

BRODERICK v. BRODERICK.

(Civ. 1929, Sac. 2750.)

(District Court of Appeal, Third District, California. April 8, 1919. On Rehearing in Supreme Court in Bank, June 2, 1919.)

1. DIVORCE ⟸184(10)—APPEAL—REVIEW OF FINDINGS.

Even though it be conceded that the trial court should not find that a wife was guilty of adultery except upon evidence convincing to a moral certainty and beyond a reasonable doubt, it is the duty of the appellate court to give the findings the same weight as it would to the verdict of a jury in a criminal case.

2. DIVORCE ⟸127(4)—CORROBORATION.

Civ. Code, § 130, requiring corroboration of the testimony of the parties to a divorce suit, calls for a lesser degree and quantity of corroboration where there is an entire absence of evidence as to collusion.

3. DIVORCE ⟸51—CRUELTY—REVIVAL OF OFFENSE CONDONED.

In view of Civ. Code, §§ 117, 121, extreme cruelty of a wife towards the husband consisting of the filing of a petition for divorce containing a false charge of adultery cannot be regarded as condoned by the husband by his act in thereafter living with the wife, where such act was induced by a promise of the wife to conduct herself properly, which promise she broke by committing fresh acts of misconduct.

4. DIVORCE ⟸116—EXTREME CRUELTY—EVIDENCE.

Where the wife, in her petition for divorce, alleged that defendant, her husband, was guilty of extreme cruelty in falsely charging her with infidelity and immorality, testimony offered by defendant tending to show specific acts of intimacy between plaintiff and men other than her husband was admissible.

5. WITNESSES ⟸275(3)—CROSS-EXAMINATION OF PLAINTIFF—PROPERTY.

Where in an action for divorce plaintiff testified on direct examination that defendant, her husband, had not furnished her with the necessities of life, and had for a long course of years ignored her repeated requests for money, it was proper on her cross-examination to submit to her a letter written by herself to defendant requesting money to pay the expense of an abortion on herself, in which letter she spoke as one who was accustomed to receive what money she asked for.

6. DIVORCE ⟸115—GENERAL REPUTATION—PLACE OF RESIDENCE.

In divorce suit in which defendant's cross-complaint alleged plaintiff's adultery, though plaintiff had not resided in K. county for more than three months prior to the commencement of her action for divorce, evidence as to her general reputation in that county, in which she had lived during most of her life, was admissible; the question of remoteness being for the determination of the trial court.

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Appeal from Superior Court, Kings County; M. L. Short, Judge.

Actions by Blanche Barton Broderick against L. A. Broderick. Judgment for defendant, and plaintiff appeals. Affirmed.

H. A. Blanchard, of San Jose, and H. Scott Jacobs, of Hanford, for appellant.

John G. Covert and John F. Pryor, both of Hanford, for respondent.

BUCK, Presiding Judge pro tem. In September, 1915, appellant brought suit for separate maintenance of herself and minor daughter, alleging as the grounds of action failure to provide and extreme cruelty. In November of the same year she brought suit for divorce and custody of the minor children and all the community property upon the same ground. On motion of respondent these two causes of action were transferred from the county of Santa Clara to the county of Kings; and he answered in each action denying the allegations of cruelty and failure to provide. He also filed cross-complaints in each action, alleging extreme cruelty and adultery and praying for a judgment of divorce. These actions were by stipulation tried together on March 14, 1916. Findings were made that it was not true that respondent was guilty of extreme cruelty or failure to provide; but the court did find that appellant was guilty of extreme cruelty and of adultery. Pursuant to these findings, respondent was granted an interlocutory decree of divorce awarding him the custody of the minor son Lloyd and all of the community property except $2,000. Appellant was awarded the custody of the minor daughter and the sum of $2,000, to be paid in monthly sums of $50 after entry of judgment until the entire award was paid. In the maintenance action the court denied appellant any relief. A motion for a new trial was made by appellant, which was denied, and appellant appealed from the order denying her motion for a new trial, and also from the judgment and order entered in each of the actions. By stipulation the appeals in said actions will be heard and determined together upon the same transcript and briefs.

[1] It is stated in appellant's brief that "the paramount issue on appeal is as to the sufficiency of the evidence to support the findings as to adultery." The evidence is fully set forth in the bill of exceptions, and has been carefully read and considered by the court in the light of counsel's able and earnest brief. No useful or proper purpose can be served by reproducing this evidence in this record. If the trial court believed, as it had a right to, the testimony of the witnesses Meyers, Mr. and Mrs. Martin, Mrs. Davis, Hiram Barton, and the respondent, and distrusted, as it had a right to do, the testimony of the appellant and her co-respondent, Gatlin, there was an ample basis of sufficient proof to establish the court's findings, not only of adultery, but also of extreme cruelty. While learned counsel vigorously attacks the veracity and the character of some of respondent's witnesses, even to the extent of going outside of the record, he does not gainsay the potency of the damaging facts to which they testify. And even though it be conceded that the trial court in an action charging adultery should base its findings of guilt only upon evidence convincing to a moral certainty and beyond a reasonable doubt, it would still be the duty of this court to give at least the same weight to the findings of the trial court as it does to the verdict of a jury in a criminal case. As stated by Justice Henshaw in the case of People v. Durrant, 116 Cal. 200, 48 Pac. 79:

"Upon a review of the evidence by this tribunal, we may not examine with minuteness claims that witnesses are discredited or that their testimony is unworthy of belief, or look to see whether some other conclusion might not have been warranted by the evidence."

Also our Supreme Court, in the case of Robinson v. Robinson, 159 Cal. 203, 113 Pac. 155, which like the case at bar, was a suit for divorce:

"We are bound by the well-established rule that the decision of the trial court upon issues of fact is conclusive upon us in so far as there is any substantial evidence tending fairly to support such decision, even though we may think that a different conclusion should have been arrived at. * * * The trial court was the exclusive judge of all questions of credibility of witnesses and weight of evidence, and must be assumed to have considered all the evidence given in the light of such rules as are laid down by the law for the guidance of the court and jury in the determination of questions of fact. It should further be borne in mind that the question whether acts and conduct constitute such cruelty as, under all the circumstances shown, warrants the granting of a divorce, is of such a nature that the conclusion of the trial court is necessarily entitled to great weight, and it is only where it is clear that it is without any substantial support in the evidence that it will be disturbed on appeal."

And to a much greater extent is it true that "the acts and conduct" constituting adultery are "of such a nature" that an intelligent, observing, and experienced trial judge making full use of his opportunities to observe the conduct, temperament, manner, and appearance of the witnesses before him is in the nature of things more capable of reaching a just conclusion from the evidence than a court of review even with the assistance of able and zealous counsel. 9 R. C. L. § 106; Ellett v. Ellett [157 N. C. 161, 72 S. E. 861], 39 L. R. A. (N. S.) 1135 [Ann. Cas. 1913B, 1215]; Thayer v. Thayer, 101 Mass. 111 [100 Am. Dec. 110]; Cooke v. Cooke, 152

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Ill. 286 [38 N. E. 1027]. And therefore, as stated by Presiding Justice Angellotti in the Robinson Case, above cited:

"We feel that no useful purpose would be subserved by discussion of the evidence given upon matters embraced in the findings that are attacked by learned counsel in his brief as being without support."

[2] The only contention counsel in his brief makes in regard to the finding of cruelty is that—

"The charges of cruelty are not supported by any testimony whatever other than that of the husband and wife, which is insufficient. Civ. Code, § 130. Appellant makes proper explanations as to every charge of cruelty."

The acts constituting cruelty as charged in respondent's cross-complaint and found by the court are that on or about July 2, 1913, the appellant filed her complaint in the county of Glenn, falsely charging that respondent committed adultery with a woman in Los Angeles on April 23, 1913, and praying for a divorce and a division of the property; that she reiterated these false charges in letters to members of her family which were communicated to respondent; that in the spring of 1913 she permitted another man, over the objection of her husband, to occupy one of her rooms as a night lodger; that in July, 1914, she forbade respondent to call her "wife." And as additional acts of cruelty, causing him great mental anguish, respondent charges appellant with some of the same improper conduct with co-respondent, Gatlin, that he had alleged in his cause of action charging adultery.

As regards the suit commenced by appellant in Glenn county falsely charging respondent with adultery, respondent's testimony to the commencement and dismissal of this action and the charges therein is corroborated by the records of the county of Glenn showing the complaint with signature of respondent's attorney with the seal and jurat of the notary public to appellant's verification of the complaint; also a telegram of appellant's attorney authorizing the dismissal of her action. No objection to this evidence was offered except that it "was barred by sections 124, 125, 126 of the Civil Code." There is also corroborating evidence that at the time of this action respondent was a resident of Kings county and went to Los Angeles, not of his own motion or purpose, but at the solicitation of his wife to come in pursuance of a telegram received by him from a stranger in Los Angeles by the name of Davis. This telegram was received in evidence without objection and corroborates the purpose and good faith of respondent's visit to Los Angeles. In the case at bar the record conclusively absolves the parties of any desire or purpose to obtain a divorce by collusion. The record conclusively shows that each party is attempting to obtain for himself or herself and prevent the other from obtaining a decree upon the grounds of cruelty or adultery. A bitter conflict as to property interests and the custody of the children, as well as the evident feelings of the parties leaves the case absolutely devoid of any suspicion of collusion. Consequently, in this case at least, the reason of the rule requiring corroboration is much modified, and a lesser degree and quantity of corroboration will be exacted. Blanchard v. Blanchard, 10 Cal. App. 203, 101 Pac. 536; MacDonald v. MacDonald, 155 Cal. 665, 102 Pac. 927, 25 L. R. A. (N. S.) 45.

[3] Counsel contends that the complaint is stale as regards the alleged false charges of adultery in the Glenn county suit. A similar contention was made in the recent case of Neeley v. Neeley (Sup.) 176 Pac. 163, but in that case our Supreme Court held as follows, in language which is quite applicable to the case at bar:

"We should hesitate to say that an unexplained delay of 3½ years must, as a matter of law, be deemed unreasonable. But that is not the question here. The plaintiff's failure to proceed earlier is fully accounted for by the dismissal of the prior action, and the conduct of the parties thereafter. Civ. Code, § 125. The plaintiff condoned the offenses of 1911, but under the agreement, as well as by the terms of the law itself (Civ. Code, § 117), the condonation carried with it the condition subsequent that the plaintiff should be treated with conjugal kindness. This condition was broken by the defendant in 1915, and the original cause of action thereby revived. Civ. Code, § 121."

In the case at bar it is true that respondent lived with appellant as his wife up to August 5, 1915. But under the law this conditional condonation was revoked by the subsequent misconduct of the appellant with Gatlin, which caused, and was calculated to cause, respondent great mental suffering and of which he did not have knowledge until September 21, 1915.

[4] The appellant assigns as prejudicial error the overruling of her objection to the testimony pertaining to her relations with one John Hanford. This testimony was properly admitted because it was in direct response to and explanatory of issues raised by appellant herself in her complaint and in her own testimony. In her complaint filed in this action plaintiff charges that defendant "willfully inflicted upon her great and grievous mental suffering and anguish, * * *" and that some of said acts of cruelty are "* * * that on numerous occasions within the past ten years, the exact dates of which plaintiff is now unable to specify, the said defendant, without any cause or reason or provocation and wrongfully and falsely accused the plaintiff of infidelity and immorality." Presumably to substantiate this charge in her direct testimony she states that

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"about the 27th of May, about ten years ago, he [respondent] accused me of adultery with John Hanford. * * * All of these charges that my husband made against me were not true. On June 20, 1915, at our home my husband admitted to me that they were not true. He said to me, 'I know you to be the purest woman that ever lived.'" In view of the foregoing it is evident that it was not error for the court to admit in evidence appellant's letter of August 31, 1904, to John Hanford, which contained language that indicated that her relations with Hanford were of such a character as to leave her no cause for rightful complaint as to respondent's charges against her of infidelity. Likewise the testimony of her uncle, Hiram Barton, and J. E. Gruwell that on different occasions in 1904 they had seen her lying on the same bed with John Hanford was relevant and pertinent testimony tending to contradict the allegations of her complaint and the prima facie inferences to be drawn from her testimony that she had rightly suffered great mental and grievous anguish when respondent charged her, as she claims he did charge her, with adultery with John Hanford.

[5] Learned counsel for appellant vigorously contends that the trial court erred in overruling appellant's objection to the introduction in evidence as a part of appellant's cross-examination of a letter written by her to the respondent in March, 1915, which contained, among other things, a request from appellant that he send her some money for hospital treatment in connection with a proposed abortion as well as money for other purposes.

The trial court evidently allowed this letter in evidence on cross-examination just as it allowed the above matters in regard to John Hanford, not for the purpose solely of proving respondent's case, but as evidence tending to explain and qualify general testimony given by appellant herself in direct examination in support of charges made by her in her own complaint against respondent. And in doing this we do not believe that the trial court erred or in any way abused the broad discretion with which the trial court is intrusted upon the cross-examination of a witness who is a party to the action. In her complaint, in narrating one of the particulars in which defendant "had wrongfully and willfully inflicted upon her great and grievous mental suffering and anguish," she charges:

"Defendant has willfully failed, neglected, and refused to provide plaintiff with sufficient food, shelter, or medical attention or sufficient means with which to furnish the same, though able so to do, and had during the greater portion of said time compelled the plaintiff to live upon the charity of her friends and relatives, and thereby causing, and still causes, plaintiff grievous humility and grievous mental suffering."

For the purpose of substantiating these material charges appellant in her direct testimony testified as follows:

"Since 1912 the defendant had not furnished anything for the children and I to live on. I have during that time supported myself and the children by my profession as an osteopathic physician. I have been practicing that since August 1912. He has not paid our grocery bills, rent bills, and has not hardly paid any of the bills in general. I asked him repeatedly for money, and he has refused it. * * * These acts of my husband which I have spoken of have humiliated me."

Upon cross-examination she testified as follows:

"In 1915, while in Los Angeles, I wrote home several times and asked for money. Q. Now you say that you wrote to your husband and requested that he send you money when you were in Los Angeles in 1915; is that a fact? A. Yes, sir; I wrote him several times and asked for money. Q. In one of these letters didn't you write to him for money for the specific purpose of procuring an abortion? Mr. Biaggi: I object to that as not proper cross-examination. A. No, sir; I did not. * * * I wrote the letter which you are showing me, inclosed it in an envelope, placed a postage stamp thereon, addressed it to my husband, and deposited it in a mail box in the city of Los Angeles."

The letter was then received in evidence, subject to the same objection, ruling, and exception, and, among other matters, stated:

"Dear Ardy: Well, I am getting over the effects of my fall, but I can never get over the effects of my visit to the ranch. I am surely pregnant, * * * so I am going to be operated on next week, and you will have to send me some money. * * * I am expecting a check from you to-morrow for those things at Bakersfield. * * * Now you must send me the money at once; I am sick about it. * * * I will have to have money enough to buy some gowns. I only have two and they are both rags, and to pay for operation and hospital fees. * * *"

Whatever else may have been the effect of this letter, in substance and tenor it surely tended to show the actual relations between the parties as regards money matters in 1915. It tended to show that at that time, at least, appellant was asking for money, not as one who was not accustomed to receive it, but was asking for it with the calm and firm assurance of the ordinary housewife, and to that extent the letter serves to explain, modify, and qualify the damaging and general testimony in direct examination that—

"Since 1912 the defendant has not furnished anything for the children and I to live on. He has not hardly paid any of the bills in general. I asked him repeatedly for money, and he has refused."

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Also, in connection with this letter, respondent introduced in evidence a large number of checks which he had sent to appellant in 1915 and at other times.

Learned counsel for appellant have cited and quoted liberally from numerous well-established authorities. But the strongest of these go only to the extent of holding that testimony on cross-examination, however discrediting, is inadmissible only when it is entirely foreign to the case and in no way germane to the matters brought out on direct examination and is offered for the sole purpose and with the sole effect of discrediting the witness or the party to the action. See Sharon v. Sharon, 79 Cal. 633, at page 674, 22 Pac. 26, 131; Estate of James, 124 Cal. 653, 57 Pac. 578, 1008, and cases cited; Short v. Frink, 151 Cal. 83, 90 Pac. 200; People v. Schmitz, 7 Cal. App. 330, 357, 360, 364, 94 Pac. 407, 419, 15 L. R. A. (N. S.) 717. But rules of evidence are primarily rules of exclusion. And in this state from the beginning (Jackson v. Feather River Water Co., 14 Cal. 19) the rule has never been so applied even in criminal cases as to relieve a party when under cross-examination from his sworn obligation to tell the whole truth when it might in any degree tend to explain, qualify, or shed light on any relevant testimony given by him on his own direct examination. As stated by our Supreme Court in the case of People v. Gallagher, 100 Cal. 466, at page 475, 35 Pac. 80, 83:

"Any question which would have the tendency to elicit from him the whole truth about any matter upon which he had been examined in chief, or which would explain, or qualify, or destroy the force of his direct testimony, whether it be to give the whole of a conversation or transaction of which he had given only a part, or to show by his own admissions that he had made contrary statements, or that his conduct had been inconsistent with the statements given in his direct testimony, and thus throw discredit upon them, would be legitimate cross-examination."

The rule applied in the case at bar is illustrated in the case of Davis v. Coblens, 174 U. S. 719, at page 726 (19 Sup. Ct. 832, 43 L. Ed. 1147):

"Walter was called as a witness by plaintiffs; testified that such reconveyance was the only one he had made of lot 10—the lot in controversy. Thereupon defendant's counsel cross-examined him at great length against the objection of plaintiffs regarding his business of buying and selling real estate and the extent of it and character. The ruling of the court permitting the cross-examination is assigned as error. We see no error in it. The question of plaintiffs' counsel was a general one, and opened many things to particular inquiry. The extent and manner of that inquiry was necessarily within the discretion of the court, even though it extended to matters not connected with the examination in chief. In Rea v. Missouri, 17 Wall. 532 [21 L. Ed. 707], it was said: 'Where the cross-examination is directed to matters not inquired about in the principal examination, its course and extent are very largely subject to the control of the court in the exercise of a sound discretion; and the exercise of that discretion is not reviewable on a writ of error.'"

And the following cases from the federal jurisdiction further illustrate the extent to which the federal courts, in response to the demands of a progressive jurisprudence, are applying a rule conducive to the practical and effective administration of justice: Commercial State Bank v. Moore, 227 Fed. 19, 141 C. C. A. 573; Le More v. United States, 253 Fed. 887, at page 896; Diggs v. United States, 242 U. S. 470, 37 Sup. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502. See, also, State v. Carter, 21 N. M. 166, 153 Pac. 271, at page 272; People v. Soeder, 150 Cal. 12, 87 Pac. 1016; Graham v. Larimer, 83 Cal. 173, at page 180, 23 Pac. 286; People v. Burke, 18 Cal. App. 72, at page 78, 122 Pac. 435; People v. Davenport, 13 Cal. App. 632, 110 Pac. 318; People v. Rozelle, 78 Cal. 84, at page 91, 20 Pac. 36.

[6] Counsel also contends:

"That the court erred in permitting Mrs. Grunwell and Mrs. Rice to testify as to the general reputation of appellant in Kings county."

It is true, as stated by counsel, that appellant "at the time of the trial and for more than three months prior to the commencement of the divorce action had been a resident of Santa Clara county." But the evidence also shows that prior to that and for many years she and her family had, for the greater part of her life, lived in the county of Kings. And, as stated in People v. Cord, 157 Cal. 562, 108 Pac. 511:

"It is a question for the court to determine whether or not general reputation in a place of former residence is too remote in point of time to be allowed in evidence."

However, when it seemed to appear upon cross-examination that the witnesses had never discussed her reputation "except in the family," it might have been proper for the court, upon motion being made, to have stricken out the testimony of the witness. But no such motion was made.

The order denying the motion for a new trial and the judgments in each action are affirmed.

We concur: BURNETT, J.; HART, J.

On Rehearing in Supreme Court.

PER CURIAM. We do not regard as material to the decision the portion of the opinion reading as follows:

"Consequently, in this case at least, the reason of the rule requiring corroboration is much modified and a lesser degree and quantity of corroboration will be exacted. Blanchard v. Blanchard, 10 Cal. App. 203; McDonald v. McDonald, 155 Cal. 665."

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And we express no opinion thereon.

The application for a hearing in this court after decision in the District Court of Appeal of the Third Appellate District is denied.

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(40 Cal. App. 653)

DUERR v. SLOAN et al. (Civ. 2743.)

(District Court of Appeal, First District, Division 2, California. April 15, 1919.)

1. ACCOUNT STATED ⟸3, 7—ESSENTIALS.

An account stated must be based on prior dealings and a pre-existing indebtedness, and it constitutes a new contract, either express or implied, into which all prior negotiations merge.

2. ACCOUNT STATED ⟸5 — ASSENT OF PARTIES.

The only difference between an account stated which is expressly created by approval of the debtor indorsed on the bill and one where the contract is implied by reason of the silence of the party receiving the account is that in one case the person charged says the account is correct, and in the other fails to say that it is incorrect.

3. ACCOUNT STATED ⟸6(2)—IMPLIED ASSENT —FAILURE TO OBJECT.

Where there had been prior dealings between certain architects and the owner through her agents, resulting in the completion and acceptance of the building, when a bill was sent by the architects to such owner in care of S., her agent, an account stated was impliedly created in law by the failure of such owner or her agent to object.

4. APPEAL AND ERROR ⟸1011(1)—FINDINGS —CONCLUSIVENESS.

Finding of the lower court upon conflicting evidence is conclusive on appeal.

5. ACCOUNT STATED ⟸6(1)—IMPLIED ASSENT.

The account must have been brought home to the party to be charged in order for such party to be bound by silence.

6. PRINCIPAL AND AGENT ⟸171(8)—RATIFICATION—ACCEPTANCE OF BENEFITS.

Where the owner of a lot accepted the fruits of the dealings between certain architects and her brother and sons which resulted in the completion of a building thereon, she could be held liable to the architects, upon the principle of ratification.

7. PRINCIPAL AND AGENT ⟸145(4)—UNDISCLOSED PRINCIPAL.

Where one deals with another believing him to be the principal, on subsequently learning that he was dealing with an agent of an undisclosed principal, he may recover either from the person with whom he dealt or from the undisclosed principal.

8. PRINCIPAL AND AGENT ⟸177(3)—RENDITION OF ACCOUNT—NOTICE TO AGENT.

The fact that the agent testified he never communicated with his principal regarding architects' bill rendered to him addressed to the owner cannot change the rule of law imputing his knowledge to the principal nor the rule that an account stated is implied from failure to make timely objection to an account based on antecedent dealings.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by A. C. Duerr against William R. Sloan and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Sterling Carr, of San Francisco, for appellants.

Keogh & Olds, of San Francisco, for respondent.

BRITTAIN, J. The defendants substituted as executors of her will on the death of Sarah A. Bryan, appeal from a judgment on an account stated, for architects' services, assigned by O'Brien & Werner to the plaintiff.

In 1911 Mrs. Bryan owned an unimproved lot in San Francisco upon which was erected an apartment house of six stories, known as St. Anthony Building. It cost $90,000 and was accepted September 23, 1913. On September 29, 1913, a statement was sent to the office of W. A. Sloan reading as follows:

September 29, 1913.

Mrs. Sarah A. Bryan, C/O W. A. Sloan, Mills Building, City.

First set of plans and specifications for seven-story steel frame fireproof building to be erected on Geary and Hyde streets	$2,500 00
Architectural services rendered for second set of plans including details, specifications, and superintending based on cost of $90,000.00 @ 5%	4,500 00
	$7,000 00
By cash	3,000 00
Balance due	$4,000 00

The first set of plans, for which, on the statement, there was a charge of $2,500, was prepared by the architects, together with specifications for a class A building upon the order of Jesse Bryan and Sloan. Bids for the construction of the building were being received when Jesse Bryan died. J. S. Bryan, a brother of Jesse Bryan, then instructed the architects to call the matter off and that they would take it up later on. Subsequently Sloan and J. S. Bryan did take the matter up with the architects and ordered the preparation of plans for the cheaper class C building which was erected. The first set of plans was used as a basis of the second set, at least as to the floor plans. The two Bryans were the sons of the owner, and Sloan was her brother.

Before the contract for the building was executed Sloan took to Mrs. Bryan a note and mortgage, which she executed without

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reading, upon which Sloan advanced the money for the payment of the building bills. Mrs. Bryan left everything about the building to Sloan. John Bryan mentioned the matter of the mortgage to her, and she told him to go ahead and do everything that was necessary. After the mortgage was signed, Sloan took to Mrs. Bryan the building contract, which she also signed without reading. Sloan watched the progress of the building and paid all the bills. Neither O'Brien nor Werner ever met Mrs. Bryan, but on one occasion she telephoned to one of them, stating that she learned the name "St. Anthony" was on a foot mat at the door, and, as Jesse and she had a sentiment about this, she wanted the name taken up from there and put over the door. Later Mr. O'Brien telephoned to Mrs. Bryan with reference to something about the building, and she told him she knew nothing about it and had nothing to do with it. She testified she left the matter to Mr. Sloan.

[1-5] On behalf of the appellant many cases are cited to the proposition that in a suit upon an account stated the plaintiff must recover upon the account stated or not at all, and that in this suit recovery cannot be had upon the original items of account. There can be no question of this rule. If an account was stated it constituted a new contract, either express or implied, into which all prior negotiations merged. Gardner v. Watson, 170 Cal. 570, 150 Pac. 994. Numerous citations are made to support other equally well-established rules. An account stated must be based on prior dealings. In this case, when the account was sent to Mrs. Bryan in care of Sloan, the prior dealings between the parties had resulted in the completion and acceptance of the building. There must have been a pre-existing indebtedness. Upon this proposition counsel for the appellants quotes from 1 Corpus Juris, 681. Neither the text nor the cases cited would support a contention that, where a bill for services is rendered and the benefit of the services has been received, the party charged may not expressly agree to the value of the services and create an account stated by an approval indorsed on the bill. The only difference between an account stated thus expressly created and one where the contract is implied by reason of the silence of the party receiving the account is that in one case the person charged says the account is correct, and in the other fails to say it is incorrect. In this case the work was done, and the bill was rendered to Mrs. Bryan in the care of Mr. Sloan as her agent. If neither Mrs. Bryan nor Mr. Sloan, as her agent, objected to the account, the implication of an account stated thereupon arose as a matter of law. Upon the question of whether there was an objection or not, the evidence was conflicting. The lower court determined this question in favor of the respondent. This court is bound by that determination. The account must have been brought home to the party to be charged in order to bind her by her silence. At the time the account was rendered and during the construction of the building Mr. Sloan was in charge of the entire matter, with the consent of Mrs. Bryan. It is contended that his agency was not shown. This matter was also determined by the lower court adversely to the appellant. If there were conflict of evidence on the subject, the finding of the court would be conclusive here, but in view of the statements of Mrs. Bryan on her deposition, statements made by Mr. Sloan and John S. Bryan to the effect that she had never conferred authority upon them amounted merely to their conclusions, and there was no real conflict of evidence. The finding is conclusive.

[6, 7] Apart from the determination of agency existent at the time the account was rendered, it is contended that at the time of the employment of the architects by Jesse Bryan and Sloan to prepare the first set of plans the plaintiff failed to show either an actual agency or an omission or action on the part of Mrs. Bryan which could have generated a belief in the minds of the architects at that time on the subject of agency; hence that no ostensible agency was shown. Many cases are cited upon these elementary principles of agency. In regard to these authorities, as in fact all other authorities and statements of law made on behalf of the appellant, on the oral argument the attorneys for the respondent conceded that the law was as stated and the authorities supported the statements of law. The learned counsel for the appellants has overlooked the rules of law under which a principal may be bound, even though at the time a third party deals with another there was no agency. The person sought to be charged by accepting the fruits of the dealings may be held as principal upon the theory of ratification. Further, the rule is too well established to require citation of authority that, where one deals with another believing him to be the principal, on subsequently learning that he was dealing with an agent of an undisclosed principal, he may recover either from the person with whom he dealt or from the undisclosed principal. In this case Jesse Bryan discussed the matter of the building project with his mother. He attended to her affairs. He and Sloan ordered the first set of plans, which was used as the basis of the second set of plans ordered by Sloan and John S. Bryan, on which the building was erected. Sloan had entire charge of it. Mrs. Bryan had the benefit of the work. As is so strongly urged on behalf of the appellant, the suit here is upon the implied contract of the account stated. The sole question was

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whether, in view of the dealings prior to sending the account, Mrs. Bryan should be held by the implied contract of the account stated. There was evidence to support the finding of the lower court upon which the question was resolved against the appellants.

[8] On behalf of the appellants it is argued that reliance upon the account stated amounts to a fraud upon Mrs. Bryan. This claim of fraud is not pleaded. It is based upon the definition of actual fraud as a suggestion of a fact which is not true by one who does not believe it to be true. It is argued that, since the architects rendered a bill, which counsel for the appellants says was not warranted, it was a suggestion of an untrue fact. To follow the further argument of counsel for the appellants upon this proposition, it would be necessary to assume that, when the architects rendered their bill addressed to Mrs. Bryan in the care of Mr. Sloan, who had paid all other bills, they anticipated that he would fail to inform his principal of the receipt of the bill. The knowledge of the agent is imputed to the principal. The fact that Mr. Sloan testified he had never communicated with Mrs. Bryan in regard to the account cannot change the rule of law imputing his knowledge to Mrs. Bryan. Neither can it affect the rule that an account stated is implied from failure to make timely objection to an account based upon antecedent dealings.

It is claimed the legal principle of ratification cannot be invoked in aid of the respondent, and appellants rely upon section 2334 of the Civil Code, to the effect that the principal is bound by the acts of his agent under a merely ostensible authority to those persons only who have in good faith and without want of ordinary care incurred a liability or parted with value upon the faith thereof. In this suit the plaintiff sought to recover only by reason of the rendition of the account and its retention without objections. At the time of the rendition of the account there was no question of ostensible agency. Sloan was the agent of Mrs. Bryan. There were antecedent dealings of which she accepted the benefits. Sloan, her agent, knew all about them. The evidence fully sustains the findings. It is contended that the motion for nonsuit should have been granted. The grounds of the motion were substantially those which have already been discussed on which the appellants rely to show the evidence did not sustain the findings. The lower court held there was sufficient evidence at the time of the motion to require the defendants to proceed. The motion for nonsuit was properly denied. It was coupled with an order denying motion to strike out substantiallly all the evidence introduced on behalf of the plaintiff. The contentions in regard to striking out the evidence and on objections to its admission were the same grounds as those in support of the argument that the findings were not sustained. The motion was general in terms, as were the objections to the evidence. There was no error in denying the motion to strike out and none in the admission of evidence.

The judgment is affirmed.

We concur: LANGDON, P. J.; HAVEN, J.

(40 Cal. App. 661)

SHERMASTER v. CALIFORNIA HOME BLDG. LOAN CO. (Civ. 2671.)

(District Court of Appeal, First District, Division 1, California. April 15, 1919. On Rehearing, May 15, 1919; Rehearing Denied by Supreme Court June 12, 1919.)

1. DEDICATION ⟸31 — FILING OF PRIVATE MAPS—ACCEPTANCE BY CITY.

The filing of private maps, showing existence of street, in office of recorder did not constitute dedication of the land shown as street, in absence of acceptance thereof by city, or acts by any one amounting to dedication or user.

2. VENDOR AND PURCHASER ⟸34 — REPRESENTATIONS—CONSTRUCTION.

Vendor's representation that land "fronted on a public street" had reference to means of physical access to the property, and not merely to an intangible quality in roadway, giving it the status of a public street.

3. VENDOR AND PURCHASER ⟸34 — FALSE REPRESENTATIONS—FRONTAGE OF PROPERTY.

Vendor's false statement that the property was bounded by a public street on the front was a most material representation.

4. VENDOR AND PURCHASER ⟸37(1) — MISREPRESENTATIONS—INVESTIGATION BY PURCHASER — ASCERTAINMENT OF FALSITY OF REPRESENTATIONS.

Generally, where purchaser avails himself of an opportunity to test the truth of vendor's representations, and discovers, prior to the consummation of the contract, that such representations were false, or by the exercise of reasonable diligence could have so ascertained, he cannot complain that he was deceived by the representations.

5. VENDOR AND PURCHASER ⟸37(2)—MISREPRESENTATIONS — INSPECTION OF PROPERTY — ESTOPPEL.

Where vendor knowingly misrepresented to purchaser, who was a laborer, without experience in the purchase of property, that the property fronted upon public street, purchaser by visiting property, and finding streets obliterated by use of the land for vegetable gardens, and by living on the land for several months before purchasing another piece thereof, was not estopped from asserting that he had been deceived by vendor's misrepresentations, as to property abutting upon street.

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6. CONTRACTS ⟸94(5) — REPRESENTATIONS — INVESTIGATIONS OF TRUTH OF STATEMENTS.

One party to a contract is under no obligation to investigate and verify the statements, to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith.

7. VENDOR AND PURCHASER ⟸127—RESCISSION—AMOUNT OF PURCHASER'S RECOVERY.

Purchaser, upon rescission of contract, is entitled to return of the purchase price paid, with interest, and value of improvements placed upon land by purchaser, less any sum due vendor for use and occupation of land by purchaser.

8. EVIDENCE ⟸118(10)—VALUE OF IMPROVEMENTS.

Testimony, as to cost of improvements placed upon land, is some evidence of their value.

9. VENDOR AND PURCHASER ⟸121—RESCISSION—SUFFICIENCY OF TENDER—WAIVER.

Under Code Civ. Proc. § 2076, requiring objections to tender to be specified, and Civ. Code, § 1501, providing that objections to mode of offer of performance are waived, if not stated at time of offer, where purchaser's attorney wrote vendor offering to rescind contract and tendering quitclaim deed upon payment to purchaser of purchase price, with interest, cost of improvements, and damages, and vendor refused to accept offer to rescind and merely took exception to tender of quitclaim deed, without making specific objection, there was a sufficient offer and a direct refusal of rescission, though purchaser demanded more than he was entitled to recover.

10. VENDOR AND PURCHASER ⟸114—RESCISSION—WAIVER—POSSESSION.

Purchaser's remaining in possession of premises after offer to rescind was not a waiver of his right to rescind, where such possession was necessary to protect the improvements upon property from being carried away by vandals.

On Rehearing.

11. APPEAL AND ERROR ⟸1011(1)—REVIEW—FINDINGS.

A finding on an issue presented by a conflict of evidence is conclusive on appeal.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by C. Shermaster against the California Home Building Loan Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. S. Hutchinson and Walter Slack, both of San Francisco, for appellant.

Henry L. Corson, of San Francisco, for respondent.

WASTE, P. J. Plaintiff had judgment rescinding and canceling two contracts of sale and purchase of real property, and defendant appeals.

From the findings of fact, which are amply supported by the evidence, it appears that the parties entered into two contracts in writing, whereby they mutually agreed that defendant should sell, and plaintiff should buy from defendant, two lots of land situate in the city and county of San Francisco. The particular description of the lot of land, in each contract, began as follows:

"Commencing at a point on the westerly line of Wieland street, distant thereon, etc., from the southerly line of Sunnydale avenue; running thence southerly along said westerly line of Wieland street," etc.

[1] Wieland street was not, at the time of making of the contracts, and never had been, a public street south of Sunnydale avenue. Some years previously the then owners of the property filed in the office of the county recorder of the city and county of San Francisco private maps showing the existence of such street, and indicating thereby a probable intention to dedicate the land to street purposes. No evidence was offered to show acceptance by the city of this land, so indicated on the maps, or acts by any one amounting to such dedication or user. An unexecuted intention of this character would not be sufficient to constitute dedication. Shultz v. Redondo Improvement Co., 156 Cal. 442, 105 Pac. 118; People v. Reed, 81 Cal. 70, 22 Pac. 474, 15 Am. St. Rep. 22.

Some reliance is placed by appellant upon a deed between private parties conveying from one to the other a strip of land, which appears to be coincident with the parcel, which the appellant claims is Wieland street south of Sunnydale avenue, but we see nothing in this private document creating a public easement for street purposes. There was testimony that negotiations appeared to have been commenced between the present owner of the property and the city and county looking to a possible dedication and opening of Wieland street past plaintiff's land, deeds having been tendered for that purpose. But there was no showing that such result was presently probable, and no evidence which would in any way indicate that plaintiff, or any one, had the right to use the strip of land represented by defendant to be Wieland street, adjacent to the property in question, for street purposes.

Plaintiff believed, and relied on, the representations of defendant, concerning the existence of an open, public street, and would not have bought the lots, supposed to front thereon, had he known there was no way of reaching his property, other than over privately owned lands. He began living on the first lot purchased in April, 1914, and in June of the same year he executed the contract for the purchase of the second parcel. He first became aware of the true state of

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affairs when, in December, 1914, he found his property entirely cut off from any ingress or egress, by fences erected all around his property by the owner of the surrounding land. He demanded of defendant a rescission of the contracts, which, being refused, he executed and tendered quitclaim deeds of the property and brought this action.

It appeared from the testimony that during the preliminary negotiations leading to the signing of the first contract, defendants represented to plaintiff that the lot he was purchasing was bounded on the front by Wieland street, that Wieland street was an open street, south of Sunnydale avenue, and that the property could be driven to in wagons from any direction. Plaintiff was shown a map or plat of the property on which Wieland street was designated as fully laid out. Plaintiff visited the property before signing the contract, approaching it from Walbridge street, which was on the south of the tract of land, going over the adjacent lots to reach it. He located the exact property by "stepping it off from Sunnydale avenue." He saw a fence to the north, and between the land he was intending to buy and Sunnydale avenue. On this fence was a sign bearing the name "Wieland Street" in large letters. There were no indications on the ground of a street leading to or adjacent to the property. Plaintiff communicated the fact of his discovery of the fence to the defendant's agent, who assured him that it was not rightfully there and he "would go out with an automobile and tear the fence down."

[2] We cannot adopt the suggestion of appellant on this appeal that the representation of defendant, alleged and found to the effect that the lands and premises described in the contracts "fronted on a public street, to wit, Wieland street," had no relation to the means of physical access to the property, "but refers to an intangible quality in the roadway, giving it the status of a public street."

[3] The false statement, made by the defendant, that the real property, agreed to be sold to plaintiff was bounded by a public street, on the front, was a most material representation. Upon discovering that the representation was false, plaintiff was entitled to demand and recover, the consideration paid by him. Shultz et al. v. Redondo Improvement Co., supra. He was also entitled to recover the value of the improvements made on the premises, after deducting therefrom the fair rental value of the property. Garvey v. Lashells, 151 Cal. 526, 91 Pac. 498; Gates v. McLean, 70 Cal. 50, 11 Pac. 489.

[4, 5] The appellant contends that the plaintiff is estopped to claim a reliance on its representations, because he went on the land and examined it before signing the first contract, and lived on that portion several months before buying the second piece. Generally speaking, if one under such circumstances avails himself of an opportunity to test the truth of the representation made, and thereby discovers, prior to the consummation of the contract, that such representations were false, or by the exercise of reasonable diligence could have so ascertained, he will not be heard to say that he was deceived by them. Gratz v. Schuler, 25 Cal. App. 117, 142 Pac. 899. But we do not believe it requires citation of authority to establish that the situation of the parties, in the present case, gave plaintiff the right to believe and rely on the representations made by defendant. The trial court found that he was a laborer, and not accustomed to buying land. The evidence before us as to the lots, their location, condition of adjacent streets, fencing thereabouts, and ways of ingress and egress, warrants the conclusion that they formed part of a larger unimproved tract of land. All the streets in the vicinity appear to have been obliterated by the use of the tract as vegetable gardens. The result of the physical examination of the property made by plaintiff, before entering into the first contract, under these circumstances, was not such as to destroy his belief in, and reliance on, defendant's representations. He had been given a map showing the existence of the street. The assurance of defendant's agent concerning the fence would only serve to confirm his belief, and strengthen his reliance upon the truth of defendant's word.

The lots had been owned by the defendant for many years before the making of the contracts with plaintiff. The defendant knew that Wieland street, adjacent to the property, was not a public street, and that there was trouble in relation thereto. The president of the defendant company testified that he informed plaintiff of these facts before the contracts were made, but the trial court found otherwise. Defendant should not now be allowed to shift the burden of its misrepresentations onto plaintiff.

"One who makes statements false in fact, and induces another to buy property, cannot defeat liability for the false statements by showing that if the other party had suspected him of falsehood or doubted the accuracy of the statements, such party, by ordinary diligence and by inquiry of persons whom he knew to be cognizant with the truth, could have learned of the accuracy or falsity of the statements." Spreckels v. Gorrill, 152 Cal. at 395, 92 Pac. 1017.

[6] One party to a contract "is under no obligation to investigate and verify the statements to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith." Dow v. Swain, 125 Cal. 674, 58 Pac. 271.

[7] Plaintiff fenced a portion of his land, dug a well, put in a pump, and built a small

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house, all at a "cost" of more than $500. The evidence relating to the value of the improvements placed on the property by the plaintiff seems to have been largely confined to the question of the cost. Only one witness (for defendant) fixed the value of the house at $150. The court in its findings arrived at the amount of the judgment for the plaintiff by adding the amount paid by plaintiff on account of the purchase of the lots, plus interest, with $250 added for "value of improvements placed on the land and premises, exclusive of any sum due defendant from plaintiff for use and occupation of said land and premises since said contract of sale was entered into." Provided there was evidence to support the finding in this regard, the method of determining the amount of the judgment was correct. Garvey v. Lashells, supra; Gates v. McLean, supra.

[9] The testimony as to cost of the improvements was some evidence of value.

Furthermore, no objection was made at the trial as to this method of fixing the value, which seems to have been acquiesced in by all parties and by the court.

The rental value of the property was established by a witness for defendant. While the court's finding is not as full and explicit as it might be, we are of the view that it was justified by the evidence, and is sufficiently clear to support the verdict.

Appellant contends that the plaintiff did not give proper notice of rescission prior to the commencement of the action. When plaintiff found there was trouble about the street, he moved very promptly. He notified defendant, and was told by its officers: "The best thing to do is to see your lawyer, and we will see our attorney. We sold the property as we bought it." He did see his lawyer, who wrote to defendant, on behalf of plaintiff, "I am now making you an offer to rescind his contracts," describing them, "and Mr. Shermaster herewith makes you a tender of a quitclaim deed to all his interest in and to said land upon the payment to him of the sum already paid," etc., specifying the amounts of purchase price (with interest), the cost of improvements and damages. Plaintiff had previously executed such a quitclaim deed, and it was in the hands of his attorney for delivery.

Defendant, by its attorney, in reply to the notification by plaintiff, just referred to, wrote that it expected "to carry out to the fullest extent all their agreements with Mr. Shermaster (plaintiff). They, however, do not accept any offer made by you to rescind his contracts. They also take exception to any alleged tender which you suggest in regard to a quitclaim deed." The communication further stated that when all payments had been made by plaintiff, defendant would "give him deeds in accordance with the terms of his respective agreements."

[9] Here was a sufficient offer, and a direct refusal of rescission. Plaintiff demanded more from defendant than he was entitled to recover, but, in the absence of any specific objection made to the tender, the exception thereto noted availed defendant nothing, and must be now disregarded. Civ. Code, § 1501; Code Civ. Proc. § 2076; Kofoed v. Gordon, 122 Cal. 314, 54 Pac. 1115; Latimer v. Capay Valley Land Co., 137 Cal. 286, 70 Pac. 82.

The contracts of sale were executory, and the acceptance of the quitclaim deed by defendant would have restored everything of value which plaintiff had received from it.

[10] It developed during the trial that after the offer of rescission, plaintiff remained, and was still living, on the premises. He testified that unless he did so the house would be carried away, owing, no doubt, to its location in a sparsely inhabited neighborhood. Appellant contends that plaintiff, having remained in possession, cannot maintain this equitable action in rescission, but must be relegated to a legal action for damages for breach of contract. In our view, under the evidence, plaintiff's so-called possession was only an effort made in good faith to protect the property for all parties to the litigation. He had made a good tender or restoration of the premises, which was refused. If he abandoned the premises the improvements would be carried away by vandals. He came into court and offered to do equity, when in his complaint he offered to make a quitclaim deed to the land to defendant upon cancellation of the contracts being adjudged. The court, in its decree, directed that such quitclaim be executed.

We do not believe that plaintiff's remaining on the premises under the circumstances amounted to a waiver of his right to rescind.

Defendant has not suffered any injury by reason of plaintiff's act in remaining in such tentative possession, for the court found that the value of the improvements placed on the land, exclusive of any rental that might be due defendant for the use and occupation of the land, was the sum of $250. We may assume that the court allowed defendant the sum of $8 per month for the use of the land, that being the sum fixed by its own witnesses, for the full period of the 24 months from the date of occupation by plaintiff to the trial. We may further assume that the court fixed in its own mind the value of the improvements at somewhere near the amount they cost, that being the course pursued in the examination of the witnesses by the court. The judgment as rendered appears to give defendant full credit for the reasonable use and occupation during the term specified, and under the circumstances it should not be heard to complain.

What we have last said also disposes of

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defendant's contention that the judgment was excessive.

The judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

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On Rehearing.

PER CURIAM. The petition for a rehearing is denied, but the opinion in this case, heretofore filed, is modified in the following particular:

[11] The ninth paragraph of said opinion should read as follows: The lots had been owned by the defendant for many years before the making of the contracts with plaintiff. The defendant knew that Wieland street, adjacent to the property, was not a public street, and that there was trouble in relation thereto. The president of the defendant company testified that he was familiar with the condition of the streets and roadways in the tract, "having been out there probably two or three or more times a year since 1906." He further testified that "at none of the times he had been on the property was the portion of Wieland street as shown on the map, south of Sunnydale avenue extending through the property of Crim, open." The agent, Webb, to whom defendant intrusted the sale of the lots in the tract, testified that at the time of the sale he told plaintiff the condition of Wieland street, and the fact that it was not a public street at that time, but that he thought it could be opened. On the issue presented by the conflict of evidence, arising from all the testimony bearing on this subject, the trial court found in support of plaintiff, and we are bound by the finding in that regard.

(40 Cal. App. 592)

AUDITORIUM CO. v. BARSOTTI et al.
(Civ. 2658.)

(District Court of Appeal, First District, Division 1, California. April 7, 1919.)

1. EVIDENCE ⟸424 — WRITTEN AGREEMENTS —CONTRADICTION—PAROL EVIDENCE.

While as between the parties to it, or as between them and other persons extending credit upon its face as forming a partnership relation, the parties to a written agreement would not be permitted to contradict its terms by parol evidence, such principle does not apply to cases where the question as to the real understanding between the parties signing the agreement arises between them, or any of them, and outside parties who have in their dealings not known of or depended upon the existence of a partnership relation.

2. PARTNERSHIP ⟸5—NATURE OF RELATION —INTEREST IN PROFITS.

The mere agreement between two or more persons to divide the profits of an undertaking is not sufficient to constitute them partners, but it is the association of two or more persons for the purpose of carrying on business together which is the distinguishing feature of a partnership.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Partnership.]

3. PARTNERSHIP ⟸6—SHARING PROFITS.

Where one person advanced money to another on condition that he share in the profits, the money advanced to be repaid, whether the enterprise was successful or not, the transaction did not create a partnership relation, but rather that of debtor and creditor.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by the Auditorium Company against C. Barsotti and others, as partners. From a judgment in favor of the named defendant, plaintiff appeals. Affirmed.

Olin Wellborn, Jr., A. I. McCormick, and Stephen Monteleone, all of Los Angeles, for appellant.

Charles Baer, of San Francisco, for respondent.

RICHARDS, J. This action was commenced by the plaintiff against the defendants, who were alleged to be partners doing business under the firm name and style of the "Western Metropolitan Grand Opera Company," to recover the aggregate sum of $9,739.86 upon three separate counts; the first and second being upon accounts stated, for the sums of $2,490.34 and $4,949.52, respectively, and the third count being for money had and received, in the sum of $2,300. The defendant D'Avigneau defaulted, and the action as to him was later dismissed. The defendants Barsotti and Patrizi answered separately, each denying that Barsotti was at any time a member of the alleged copartnership, but each alleging that the defendants Patrizi and D'Avigneau constituted its only members. The only issue presented upon this appeal is as to whether the defendant Barsotti was in fact a partner of his codefendants. The trial court found that he was not and rendered judgment accordingly in his favor. The plaintiff and appellant herein urges that the evidence is insufficient to support the findings and judgment of the court in this regard.

A review of the record in the case convinces us that the evidence is sufficient to fairly establish the following facts:

During the year 1913 the defendants Patrizi and D'Avigneau were interested in the production of grand opera. In the spring of that year the former of these discussed with

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the officers of the plaintiff the matter of the organization of a company for the purpose of playing grand opera engagements in San Francisco and Los Angeles during that year. To that end Patrizi became associated with D'Avigneau, and on August 13, 1913, an agreement in writing was entered into between the officers of the plaintiff and Patrizi and D'Avigneau as parties of the second part by which the former were to advance to the latter the sum of $7,500 on or before August 31, 1913, upon the express condition that the latter should secure on or before said date the additional sum of $12,000, which combined sums were to be used for the purpose of organizing and operating an opera company to fill said engagements. Patrizi and D'Avigneau endeavored to raise this sum, said sum to be supplied by them by subscription, but failed in this endeavor, whereupon D'Avigneau suggested to Patrizi that he attempt to obtain the money from his friend Barsotti. They discussed between themselves the inducement apparently in the way of a bonus which should be offered to Barsotti to furnish this money, and agreed to offer him one-third of the profits of the San Francisco and Los Angeles engagements. Patrizi went to Barsotti with the proposition and induced him to advance the sum of $10,000. Barsotti and Patrizi both testify that this was to be an advance to be repaid out of the first profits earned in these engagements. Thereupon Patrizi drew up the document which is mainly relied upon by the appellant herein as being the articles of the alleged partnership, which document was signed by Patrizi, D'Avigneau, and Barsotti. It recited that it was the intention of the parties to it to establish an operatic organization, to be known as the "Western Metropolitan Opera Company," to give an opera season in San Francisco and in Los Angeles, and that it was agreed by them that "each will hold one-third interest in said enterprise, and that, if any profits will be derived from same at the end of the contemplated season, said profits are to be divided equally among said three parties." As to the part which Barsotti was to perform in this undertaking it was agreed:

"Dr. C. Barsotti will help Messrs. Patrizi and D'Avigneau in securing a certain sum of money of about $10,000 by a note to be signed also by E. Patrizi and E. D'Avigneau, and to furnish certain bonds and guaranties which may be needed to help the work and development of the enterprise."

The evidence further shows that, after the execution of this agreement, Barsotti did pledge his credit at a certain San Francisco bank, by which the sum of $10,000 was realized, and that thereafter the two defendants Patrizi and D'Avigneau went ahead with the execution of the contract which they had entered into with the plaintiff's officers. The evidence sufficiently shows that as to the transactions between these two defendants and the plaintiff, through its officers, Barsotti was never consulted, nor his consent or signature asked or given, in the making or signing of agreements, or in any of the negotiations between these parties, and we think the evidence also sufficiently shows that neither the plaintiff nor any of its officers were aware of any such relation as that of partnership between Barsotti and his two codefendants until after the liabilities upon which this action is predicated had arisen, and that at no time did the plaintiff deal with, or extend credit to, his said codefendants upon the belief that Barsotti was their copartner. While upon the witness stand, both Barsotti and Patrizi denied the existence of such copartnership, and both testified that the understanding and agreement was that the money secured through Barsotti's credit and accommodation was to be repaid to him, whether the opera enterprise was successful or not.

[1-3] Upon the face of the foregoing state of facts we think there was sufficient evidence to support the finding of the trial court that a copartnership was not shown to have existed between Patrizi, D'Avigneau, and Barsotti so as to render the latter liable upon the obligations created as between the former two persons and the plaintiff herein. It is true that the written agreement upon which the plaintiff relies as conclusively establishing such relation, standing alone, would strongly support such a conclusion; and while, as between the parties to it, or as between them and third persons extending credit upon its face as forming such partnership relation, the parties to it would not be permitted to contradict its terms, this principle does not apply to cases where the question as to what the real understanding between the parties signing the agreement was, arises as between them or any of them and outside parties who have in their dealings not known of or depended upon the existence of a partnership relation. Under such conditions the parties may be permitted orally or by circumstances to show that no partnership in fact was contemplated between them, notwithstanding the terms of their written agreement. It is to be noted in this connection that the words "partners" or "partnership" are nowhere to be found in the writing upon which the plaintiff mainly relies, but that the partnership, if any, is to be inferred from the fact that the parties to it were to share equally in the profits, if any, of the enterprise which the two parties other than Barsotti were to actively engage in. It has been quite uniformly held that the mere agreement between two or more persons to divide the profits of an undertaking is not sufficient to constitute them

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partners, but that it is "the association of two or more persons for the purpose of carrying on business together," which is the distinguishing feature of a partnership. Hammond v. Borgwardt, 126 Cal. 611, 59 Pac. 121; Coward v. Clanton, 122 Cal. 451, 55 Pac. 147; Vanderhurst v. De Witt, 95 Cal. 57, 30 Pac. 94, 20 L. R. A. 595; Cadenasso v. Antonelle, 127 Cal. 382, 59 Pac. 765; Title, etc., Co. v. Grider, 152 Cal. 746, 94 Pac. 601. An instructive case, strongly resembling, in some of its aspects, the case at bar, is that of Gille H. & I. Co. v. McCleverty, 89 Mo. App. 158, in which the court says:

"We think that the contract shows it to have been the intention that McCleverty should advance a certain amount of money which Harrison was to use in his mercantile business, and if successful he was to return it with one-third of the profits; and if unsuccessful, and the advancement was lost, then that was to be the end of the matter as far as the former was concerned. It is true that the contract does not expressly provide that Harrison was to return the advancement, but we think that fact may be fairly inferred from all the facts and circumstances disclosed by the evidence. Our conclusion is that the transaction between the defendants did not create the partnership relation, but rather that of debtor and creditor."

It will thus sufficiently appear that it is our conclusion that the findings and judgment of the trial court are amply supported by the evidence in the case.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

(40 Cal. App. 515)

JAMES EVA ESTATE v. MECCA CO.

(Civ. 2741.)

(District Court of Appeal. First District, Division 2, California. April 1, 1919. On Rehearing in Supreme Court May 29, 1919.)

1. INSURANCE ⟸2—STATUTORY PROVISIONS—CONTRACTS OF INSURANCE.

Pol. Code, § 594, subd. 5, invalidating "all policies and other contracts of insurance" issued without compliance with sections 594 to 596, relating to office of insurance commissioners and transaction of insurance business, does not require brewing company to comply therewith by placing itself under jurisdiction of insurance commissioner before making contract guaranteeing performance of a lease by one of its customers; such statutes applying exclusively to the conduct of business of insurance.

2. CORPORATIONS ⟸370(1) — POWERS—"ULTRA VIRES."

The term "ultra vires" may refer to an act entirely beyond the scope of the powers of the corporation to perform under any circumstances or for any purpose, or may be applied to an act within general powers of corporation for some purposes but beyond such powers for other purposes.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ultra Vires.]

3. CORPORATIONS ⟸385—ULTRA VIRES ACTS—AVAILABILITY AS A DEFENSE.

When the act is within the corporate powers for some purpose or under some conditions, the defense of ultra vires is not available unless it be shown that the party dealing with the corporation had notice of the intention to perform the act for an unauthorized purpose, or under circumstances not justifying its performance.

4. CORPORATIONS ⟸385—ULTRA VIRES ACTS.

The attempt of a corporation to use the defense of ultra vires as a means of escaping its liability to a third party is regarded with much less favor than when a direct attack is made upon such corporate act by a stockholder or by the state.

5. CORPORATIONS ⟸389—ULTRA VIRES ACTS—BURDEN OF PROOF.

Where corporate act is within the powers of the corporation for some purposes, and is claimed to be without its powers under given circumstances, the burden of proving latter state of affairs rests upon corporation denying its liability.

6. CORPORATIONS ⟸461—POWERS—BREWING COMPANY—EXTENDING AID TO CUSTOMERS.

Corporation whose purpose, as provided by its articles of incorporation, is to operate and maintain the general business of brewing and malting, may, in furtherance of its own interest, extend financial aid to its customers.

7. CORPORATIONS ⟸389—ULTRA VIRES ACTS—GUARANTY CONTRACT—BURDEN OF PROOF.

Brewing corporation seeking to avoid liability on its contract guaranteeing performance of a lease by one of its customers on ground that contract was ultra vires has burden of proving that it received no benefit therefrom, since such guaranty might, under some circumstances, be within its corporate powers.

8. GUARANTY ⟸87—DISCHARGE OF GUARANTOR—PLEADING.

In lessor's action against guarantor of lessee's performance, defense that guarantor was discharged by alteration of lease is not available where not pleaded.

9. LANDLORD AND TENANT ⟸200(2)—REBATE IN RENT—EFFECT ON LEASE.

Rebates for certain months from amount of rent specified in lease are not sufficient to establish a change in the written contract so as to affect the amount of future installments of rent.

10. GUARANTY ⟸53(3)—DISCHARGE OF GUARANTOR—CHANGE IN CONTRACT.

Rebate granted by lessor in amount of rent from rate specified in lease did not discharge guarantor of lessee's performance of lease,

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where guarantor asked for and consented to such change.

On Rehearing in Supreme Court.

11. CORPORATIONS ⟸389 — ULTRA VIRES CONTRACT — BENEFIT TO CORPORATION — SUFFICIENCY OF EVIDENCE.

In lessor's action against brewing company on its contract guaranteeing performance of a lease by one of its customers, where ultra vires defense was interposed, evidence *held* to show that the contract was of benefit to the brewing company.

Appeal from Superior Court, Alameda County; W. M. Conley, Judge.

Action by the James Eva Estate against the Mecca Company and the Oakland Brewing & Malting Company. Judgment for plaintiff, and the last-named defendant appeals. Affirmed. Rehearing denied in Supreme Court.

Snook & Church, of Oakland, for appellant.

W. B. Rinehart, of Oakland, for respondent.

HAVEN, J. Action by a lessor for the collection of delinquent rent, against its lessee and two sureties, upon a bond guaranteeing the faithful performance on the part of said lessee of the covenants of a written lease. The lessee suffered default and the action was tried as against the sureties alone. Judgment was rendered against both sureties, from which one of them appeals. The appellant urges three grounds for reversal, which will be considered in the order in which they are made.

[1] It is claimed that the bond executed by appellant is void because "it was entered into contrary to express statutory law, to wit, sections 594–596, inclusive, of the Political Code of the state of California." The sections referred to are found in article 16 of the Political Code, which article by its title and provisions refers to the office of insurance commissioner, the performance of his duties, and the transaction of the business of insurance under his supervision. The particular sections relied upon are section 594, subd. 5, which provides that fidelity and surety insurance includes "* * * guaranteeing and executing all bonds, undertakings, and contracts of suretyship, and guaranteeing the performance of contracts other than insurance policies," and the closing paragraph of subdivision 6 of section 596, which reads as follows: "All policies and other contracts of insurance, issued without full compliance by all parties concerned with the laws of this state, shall be null and void." Appellant urges that the bond here sued upon comes within the term "other contracts of insurance" found in section 596, as defined in section 594. If such contention is correct, it follows that it is illegal for any corporation to execute in this state any bond guaranteeing the performance of any contract, or even to guarantee the payment of a promissory note, without having first complied with the provisions of the Political Code above referred to, and placed itself under the jurisdiction of the insurance commissioner. In our opinion the Code sections relied upon are intended to apply exclusively to the conduct of the business of insurance as such, and their provisions cannot be stretched to cover the case of a single contract of guaranty such as the one involved in this action. We hold therefore, that said sections have no application to the facts of this case.

[2, 3] It is next contended that the contract sued upon is a mere naked guaranty, and is therefore ultra vires of the purposes and powers of the appellant corporation, and for that reason void. The term ultra vires, when applied to the act of a corporation, is used in different senses. It may indicate that the act referred to is entirely beyond the scope of the powers of the corporation to perform under any circumstances or for any purpose, or, again, the term may be applied to an act of a corporation which may be fully within the scope of the general powers of the corporation for some purposes, but beyond such powers for other purposes. The rights of persons dealing with the corporation vary according as the act is ultra vires in one or the other of these senses. When the act is within the corporate powers for some purposes or under some conditions, the rights of parties who have dealt with the corporation, under the express or implied representation that it is acting within such powers in the making of a particular contract, are entitled to favorable consideration. In such a case the defense of ultra vires is not available, unless it be shown that the party dealing with the corporation had notice of the intention to perform the act for an unauthorized purpose, or under circumstances not justifying its performance. Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, at pages 578 to 588, 99 Am. Dec. 300; 10 Cyc. 1148–9.

[4] The attempt of a corporation to use the defense of ultra vires as a means of escaping its liability to third parties is regarded with much less favor than when a direct attack upon such corporate act is made by a stockholder or by the state. McQuaide v. Enterprise Brewing Co., 14 Cal. App. 315, 111 Pac. 927.

[5] It is the further established rule in this state that, in cases where the corporate act is within the powers of the corporation for some purposes and is claimed to be without its powers under given circumstances, the burden of proving the latter state of affairs rests upon the corporation denying its lia-

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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bility. Miners' Ditch Co. v. Zellerbach, 37 Cal. at page 585, 99 Am. Dec. 300; Morgan v. Board of Education, 136 Cal. 245, 247, 68 Pac. 703; Brown v. Board of Education, 103 Cal. 531, 534, 37 Pac. 503.

[6] With the above principles in mind, we take up the record before us. The plaintiff introduced in evidence its lease, to which the bond sued upon is attached. Accompanying this bond is a certified copy of a resolution duly adopted by the directors of the appellant corporation, wherein it is recited that it is for the best interests of that corporation that the lessee "shall secure the rights and privileges of the said lease under the terms thereof." In its attempt to prove that the execution of this bond was beyond its corporate powers, appellant introduced in evidence its articles of incorporation. These provide that the purpose of the corporation is to operate and maintain the general business of brewing and malting. Under such general powers a corporation may, in furtherance of its own interests, extend financial aid to its customers. Armour & Co. v. Rosenberg & Sons Co., 173 Pac. 404.

[7] It is conceded by appellant that if a corporation derives a direct and substantial benefit from the making of a contract of the character of the one here involved, "then the contract will be considered to be intra vires, or possibly, if ultra vires, that the corporation will be estopped to set up that defense." In other words, it is admitted that the execution of a guaranty of this character might, under some circumstances, be within the corporate powers of appellant. The case falls, therefore, directly within the principles of law above referred to. The execution of the bond was not beyond the powers of the corporation under all circumstances or for all purposes. In order to sustain the defense that its execution under the circumstances of this case was beyond such powers, it was incumbent upon appellant to show that it received no direct benefit therefrom. An examination of the record discloses no evidence of that character. On the contrary, it appears that the appellant was a creditor of the lessee, at the time the delinquent rent sued for accrued, upon a merchandise and cash loan account. There is no direct evidence, however, that this relation existed at the time the bond was executed, nor that the purchase of merchandise from appellant was a condition for the execution of such bond. It is unnecessary to determine whether or not this is sufficient proof of the receipt of a direct benefit by the appellant corporation. The appellant did not prove that no such benefit was received by it. The burden of proof as to that matter being upon appellant, it cannot be held that the contract was ultra vires of the powers of the corporation.

[8-10] The final contention of appellant is that the guarantor was discharged from liability for the reason that the principal obligation of the lessee was changed and altered in a material respect without the consent of the guarantor. The change in the principal obligation relied upon is the fact that the lessor made a rebate, for certain months, from the amount of rent specified in the lease, to the lessee and to a committee of its creditors. To this contention there are three answers: (1) No such defense was pleaded by the defendant. (2) Concessions of this kind are not sufficient to establish a change in the written contract so as to affect the amount of future installments of rent. Sinnige v. Oswald, 170 Cal. 55, 57, 148 Pac. 203. (3) Part of these concessions of rent were made to the committee of creditors, of whom Mr. Wieking, the vice president of the appellant corporation, was one. He was called as a witness and asked by the court whether or not the arrangement of a rebate of $150 on the $450 monthly rent was satisfactory to him. He stated that it was, and the only objection he had to the rebate was that it was not as large as he had sought to obtain. The appellant corporation, through its vice president, having asked for and consented to this change in the amount of rent, cannot be heard to object thereto.

In our opinion none of the contentions of appellant is well founded. The judgment is therefore affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

On Rehearing in Supreme Court.

PER CURIAM. [11] In view of the circumstances disclosed by the evidence in this case, including the recital in the resolution adopted by the directors of the appellant corporation to the effect that it is for the best interests of the corporation that the lessee shall secure the rights and privileges of the lease, we are satisfied that there was a sufficient showing of benefit to appellant corporation to make its undertaking valid. We express no opinion on the question of burden of proof discussed in the opinion.

The application for a hearing in this matter after decision by the District Court of Appeal of the First Appellate District, Division 2, is denied.

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(26 Wyo. 214)

CULBERTSON v. AINSWORTH et al.
(No. 952.)

(Supreme Court of Wyoming. June 16, 1919.)

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1. APPEAL AND ERROR ⟸509—RECORD—SERVICE OF NOTICE OF APPEAL.

Under Laws 1917, c. 32, § 2, requiring filing and service of notice of appeal within ten days from entry of judgment appealed from, fact of service of notice in time must appear from the record to give court judisdiction.

2. APPEAL AND ERROR ⟸425—NOTICE OF APPEAL—TIME OF SERVICE.

Under Laws 1917, c. 32, § 2, providing that appeal is taken by serving notice of appeal within ten days from entry of judgment and notice shall be filed within said ten days, both service and filing are necessary to confer jurisdiction, and service of notice prior to entry of judgment is insufficient.

3. APPEAL AND ERROR ⟸715(2)—SERVICE OF NOTICE OF APPEAL—TIME FOR SERVICE.

Where in a notice of appeal by plaintiff dated prior to, but filed after, entry and filing of judgment, the indorsement of service thereupon was undated, affidavits by defendants showing service prior to entry of judgment cannot be considered.

4. APPEAL AND ERROR ⟸937(3)—NOTICE OF APPEAL — SERVICE — SERVICE AFTER JUDGMENT—PRESUMPTION.

Where a notice of appeal was dated prior to entry and filing of judgment, and the indorsement acknowledging service appearing upon such notice was undated, no presumption arises from the record that the notice was served within ten days after entry of judgment under Laws 1917, c. 32, § 2, though the notice of appeal was filed after such entry of judgment.

5. APPEAL AND ERROR ⟸429—NOTICE OF APPEAL—SERVICE—WAIVER.

Waiver by stipulation of the parties of the service of notice of appeal is not competent, since jurisdiction of the cause, on appeal cannot be conferred upon the court by consent; the direct appeal statute (Laws 1917, c. 32, § 2) containing no provision authorizing a waiver of service of appeal, as does Comp. St. 1910, §§ 5111 and 5112, relating to proceedings in error.

Appeal from District Court, Washakie County; James H. Burgess, Judge.

Action by Roger Culbertson, administrator of the estate of William D. Albee, deceased, against Frank S. Ainsworth and another. Judgment for defendants, and plaintiff appeals. Motion to dismiss appeal granted.

R. B. West, of Basin, for appellant.

E. E. Enterline, of Billings, Mont., for respondents.

PER CURIAM. This case is here on direct appeal and a motion has been submitted to dismiss the appeal. The only ground stated in the motion which we think necessary to consider is that the notice of appeal was given prior to the filing and entry of the judgment appealed from.

[1-3] The record was filed in this court on July 27, 1918, and the motion to dismiss was filed on September 30, 1918, and submitted on October 17, 1918. It appears from the record that the cause was tried in the district court on March 22, 1918, and that at the close of the evidence on that day the court announced that the judgment would be for the defendants; that a judgment order in favor of the defendants containing also the findings was signed by the district judge who tried the cause under the date of March 23, 1918, and as done in open court on that day. and was filed and entered on March 29, 1918; that the notice of appeal, dated March 25, 1918, and stating, in substance, that the plaintiff appealed from the judgment rendered on March 23, 1918, and certain specified portions of the findings, was filed with the clerk of the district court on March 30, 1918; and that there was indorsed upon said notice as filed the following undated acknowledgment of service signed by the attorney for the defendants: "Copy of notice received and further service thereof waived." The record contains no other proof of service of the notice.

The statute under which the appeal is taken provides:

"An appeal must be taken by serving a notice in writing to such effect, signed by the appellant, or his attorney, upon the opposing party, or his attorney, within ten days from the entry of the order or judgment appealed from, and said notice of appeal shall be filed with the clerk of the district court where the order or judgment appealed from is entered, within said ten days." Chapter 32, § 2, Laws 1917.

It was held in Hahn v. Citizens' State Bank, 25 Wyo. 467, 171 Pac. 889, 172 Pac. 705, that a notice of appeal served and filed before the judgment appealed from was entered was premature and ineffective to bring the case here for review under the statute aforesaid.

The filing of the notice in this case was not premature, for it was filed after the judgmnt was entered—the day following such entry. But the service of the notice within the time prescribed therefor after the entry of the judgment or order appealed from is also essential to give this court jurisdiction, if, indeed, service of the notice is not the principal act required to be done within the prescribed time in taking the appeal. The language of the statute is that an appeal must be taken by serving a notice in writing to such effect, etc., and that "said notice" shall be filed within said ten days. Clearly, therefore, the notice must be served within ten days from the entry of the judgment, and the fact of such service within that

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time must be shown by the record to give this court jurisdiction. 4 C. J. p. 39, § 1612, and page 41, § 1616; 2 Standard Ency. Proc. pp. 318, 346; 2 Ency. Pl. & Pr. 230. This necessarily requires the filing of proof of service with the clerk of the district court and the incorporation thereof in the record, although an acceptance or acknowledgment of service properly signed written or indorsed upon the notice as filed and showing the date of service will be sufficient as proof of such service.

But unfortunately the written acknowledgment of the service of the notice in this case is not dated, and there is nothing in the record to show when the service thus acknowledged was accepted or made. The respondents, by affidavits attached to the motion to dismiss, show that the original notice was received by their attorney on March 26, 1918, and that service thereof was accepted by the indorsement aforesaid thereon on March 27, 1918. But we doubt our right to consider such affidavits filed in this court. In Hahn v. Bank, supra, we said with reference to affidavits filed here to show the fact of the entry of the judgment or order appealed from and the date of such entry that this court, in its consideration of the case, is confined to the record on appeal, and that we did not think it competent to show merely by affidavits filed in this court the fact that the judgment or order appealed from was or was not entered or when the entry thereof was made, thereby contradicting or supplying a deficiency in the record in that respect, but that affidavits might, no doubt, be proper in support of a motion to return the record for correction, or to afford an opportunity for its correction or amendment in the district court. And see Wright v. Ross, 26 Cal. 262; Bonds v. Hickman, 29 Cal. 460.

[4, 5] Upon the record, therefore, it does appear that the notice was served after, and not before, the entry of the judgment, unless it may be presumed from the facts appearing by the record that it was so served, or unless it is competent to waive service of the notice by stipulation. And we do not think the presumption legally or properly follows from the facts in the record that the notice was served within the time prescribed by the statute, though, no doubt, it might be presumed that it was served prior to the time the notice was filed and either before or on the date of such filing, from the fact that as filed the notice bears the indorsement acknowledging service as aforesaid. But that filing occurred on the next day after the entry of the judgment, and the notice is dated on March 25, 1918, four days before the judgment was entered, making it possible for the notice to have been served prior to such entry. Nor do we think it competent to waive the service of notice of appeal, for jurisdiction of the cause on appeal cannot be conferred on this court by consent. In re Gold Street v. Newton, 2 Dak. 39, 3 N. W. 311, 8 N. W. 139; Oliver v. Harvey, 5 Or. 360; Wolf v. Smith, 6 Or. 73; Wright v. Ross, 26 Cal. 262; Bonds v. Hickman, 29 Cal. 460. The statute of California provided that an appeal shall be taken by filing with the clerk a notice of appeal, and serving a copy thereof upon the adverse party or his attorney. The court said that the filing of the notice of the appeal is indispensable to enable the appellate court to obtain jurisdiction of the cause, and that a waiver of the filing by the stipulation of the parties is not the equivalent of filing the notice, "for consent, though it may waive error, cannot confer jurisdiction." Bonds v. Hickman, supra. The Oregon statute provided that the appellant shall cause a notice to be served on the adverse party, and file the original with proof of service indorsed thereon with the clerk, and that an appeal shall be taken and perfected in the manner prescribed, and not otherwise. In Oliver v. Harvey, supra, it was held that the service and filing of the notice of appeal was indispensable in order to enable the appellate court to obtain jurisdiction of the cause, and that the parties could not waive the filing of the notice, since consent cannot confer jurisdiction. We refer specifically to these cases, for the reason that the statutes considered were quite similar to our own. If it would be competent to waive service of the notice, or if such a waiver should be permitted by statute, we think the waiver of further service included in the indorsed acknowledgment of service upon the notice would amount to such a waiver. But, unlike the statutory provisions providing for bringing causes to this court by a proceeding in error which, while requiring the issuance and service of a summons in error, provide that the defendant in error, or his attorney, may waive, in writing the issue or service of the summons (Comp. Stat. 1910, §§ 5111, 5112), the direct appeal statute contains no provision authorizing a waiver of the service of the notice of appeal.

We are forced to conclude, therefore, that the record in this case fails to show a service of the notice within the time prescribed by the statute. If we were to consider the affidavits attached to the motion showing the date of service, it would appear that the notice was in fact served prior to the entry of the judgment, and no counter affidavits have been filed. But, doubting our right to consider affidavits filed only in this court showing the fact as to the date of service, we think it better to dispose of the matter upon the showing made by the record.

It follows that the motion must be sustained, and the appeal dismissed, and it will be so ordered.

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(26 Wyo. 170)

MILLER v. AMORETTI. (No. 900.)

(Supreme Court of Wyoming. June 3, 1919.)

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1. BANKS AND BANKING ⟸44 — LIABILITY OF STOCKHOLDERS — STATUTES — CONSTRUCTION.

Rev. Codes Mont. § 4012, providing that the stockholders of every banking corporation "formed under this chapter or which may avail itself of its provisions," shall be liable to the extent of the par value of the stock owned by them for the corporation debts, is not confined in its operation to banking corporations organized under the act in which such section appears, but applies to banking companies existing at the time the act was passed.

2. BANKS AND BANKING ⟸77(3)—LIABILITY OF STOCKHOLDERS — ENFORCEMENT IN FOREIGN STATE.

The receiver of an insolvent Montana bank, who has no greater rights than a chancery receiver, and is merely an assignee of the insolvent, cannot maintain in a foreign state an action to enforce the liability of a stockholder under Rev. Codes Mont. § 4012, created exclusively for the benefit of creditors, where he cannot bring such suit in Montana either under the statute named or Laws 1915, c. 89, §§ 50, 60, providing for the appointment of a receiver under stated conditions.

3. COURTS ⟸92, 95(1) — PRECEDENTS — DICTUM.

The Supreme Court of Wyoming, in deciding whether a receiver appointed in Montana can maintain an action in Wyoming to enforce the liability of stockholders of a bank under the Montana statute, will follow a decision of the Montana Supreme Court, holding that the statute created a right of action in creditors alone, though the action in which the decision was rendered was one brought by creditors, and the question arose only incidentally on the issue of a right of set-off by defendant of a claim against the bank.

4. JUDGMENT ⟸818(1)—FOREIGN JUDGMENT —FULL FAITH AND CREDIT.

Where a receiver of an insolvent bank, in pursuance of an order of the appointing court, brought an action in a court of another state to enforce the statutory liability of stockholder, denial by such court of his right to recover does not violate Const. U. S. art. 4, § 1, requiring full faith and credit to be given in each state to the judicial proceedings of another state, since inquiry into the foreign court's jurisdiction is not a denial of full faith and credit.

Error to District Court, Fremont County; Chas. E. Winter, Judge.

Action by H. B. Miller, as receiver of the Farmers' State Bank of Bridger, Mont., a corporation, against Eugene Amoretti, Jr. From the court's ruling in sustaining a demurrer to plaintiff's petition as amended, and a judgment entered for defendant, plaintiff brings error. Affirmed.

E. H. Fourt, of Lander, for plaintiff in error.

Ralph Kimball, of Lander, for defendant in error.

POTTER, J. This is an action brought by the receiver of the Farmers' State Bank of Bridger, Mont., to recover of the defendant as a stockholder of the bank an amount equal to the amount of his stock, alleged to be due under a statute imposing a liability to that extent, in addition to the amount invested in the stock, upon the stockholders of a banking corporation, severally and individually, for all contracts, debts, and engagements of the corporation. Demurrers to the original and an amended petition having been sustained, a second amended petition was filed, to which also a demurrer was filed and sustained, and thereupon, the plaintiff excepting to the ruling, and refusing to further plead, judgment was rendered and entered in favor of the defendant. The plaintiff brings the case here on error, assigning as error the order sustaining the demurrer to the second amended petition, and the rendering of judgment against the plaintiff.

The second amended petition alleges: That the Farmers' State Bank of Bridger is, and at all the times mentioned in said petition was, a corporation duly organized under the laws of the state of Montana. That its principal place of business is at Bridger, in Carbon county, Mont. That on the 8th day of May, 1915, the said bank was insolvent and unable to pay its indebtedness, and its business had been suspended by order of the superintendent of banks of said state. That by an order of that date of the district court of the Thirteenth judicial district of said state, in and for the county of Carbon, the plaintiff was appointed receiver of said bank, "to take charge of its property and assets, collect all indebtedness due it, and generally to manage its business and affairs subject to the direction and approval of said court," and that at all times since said date the said plaintiff has been, and is, the duly appointed, qualified, and acting receiver of said bank. That it is necessary to collect from each stockholder of the bank to apply on its indebtedness the full amount of money for which he is liable as such stockholder, to wit, a sum equal to the par value of the capital stock owned and held by him in addition to the purchase price thereof. That a sum equal to the total amount of the capital stock of the bank, to wit, the sum of $30,000, if paid in full by the stockholders, together with all the property and assets of the bank, will be wholly insufficient to pay its indebtedness. That on the 10th day of June, 1915, the said court, by an order duly made and entered, authorized and directed the plaintiff, for the purpose aforesaid, to assess each

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stockholder in an amount equal to the par value of his stock, to demand payment thereof, and to take any action necessary to enforce collection of the same, said order in that respect reading as follows:

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"H. B. Miller, receiver of the above-named Farmers' State Bank of Bridger, is hereby expressly authorized and directed to forthwith assess and demand from each of the above-named stockholders of said bank the payment of an amount equal to the par value of the capital stock owned and held by him, and to be applied upon the indebtedness of said bank, and said receiver is hereby further authorized and empowered to bring such actions or take such other steps as he may find necessary to enforce the collection and payment of such assessments."

That the defendant at all the times mentioned in the petition has been, and is, the owner of 25 shares of the capital stock of said bank of the par value of $100 each, and is liable as such stockholder for the sum of $2,500 of the indebtedness of said bank; such liability arising under and by virtue of the provisions of section 4012 of the Revised Codes of the state of Montana, being a portion of the chapter of the Civil Code of that state, entitled "Regulations of Banking Corporations," which said section reads as follows:

"The stockholders of every corporation formed under this chapter, or which may avail itself of its provisions, shall be severally and individually liable, equally and ratably, and not one for the other, for all contracts, debts and engagements of such corporation to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

That the district courts of the state of Montana are courts of original jurisdiction in all cases at law and in equity. That the statutes of Montana provide for the appointment of a receiver in cases where a bank fails or becomes insolvent. That it is provided by section 50 of chapter 89 of the Laws of that state of 1915 as follows:

"Whenever the reserve of any bank shall fall below the amount required herein to be kept [fifteen per cent. of deposit liabilities], such bank shall not increase its loans or discounts otherwise than by discounting or purchasing bills of exchange payable at sight or on demand, and the superintendent of banks shall notify any bank whose reserve may be below the amount herein required, to make good such reserve, and in case the bank fails, for thirty days thereafter, to make good such reserve, the superintendent of banks may notify the Attorney General, and he shall institute proceedings for the appointment of a receiver and to wind up the business of the bank."

That section 60 of the Laws of 1915 provides:

"It appearing necessary to have a receiver appointed for any such bank or banks, the superintendent of banks shall make a full and complete statement of account and report to the Governor with respect to the conditions of its business and affairs; and thereafter, should it appear to the Governor that application should be made for the appointment of a receiver he shall thereupon direct the Attorney General to file a petition in the district court of the county in which the bank is situated asking for the appointment of a receiver, in the name of the state of Montana, and such a petition shall be controlling and by the court so considered and acted upon, even though stockholders, creditors, or others may have theretofore filed application for the appointment of a receiver."

That between the said 10th of June, 1915, and the commencement of this action plaintiff demanded of defendant the payment of an amount equal to the par value of his stock, but that the latter has failed, neglected, or refused to pay the same or any part thereof, and that there is now justly due and owing from the defendant to the plaintiff, by reason of the facts aforesaid, the full sum of $2,500, no part of which has been paid. That on the 18th day of November, 1916, in the said district court, in said state, the said receivership being under consideration, and upon proceedings duly had in said court, the said court found that at the time of the appointment of said receiver, and that at all times since said date, the assets of the said bank have been and are of less amount than its liabilities. That said bank was and is wholly insolvent, and that its liabilities exceed the assets by more that $54,000. That the holders of said stock at the date of the appointment of the receiver are each liable, severally and individually, equally and ratably, for the debts of said bank, to the extent and amount invested by them, and that it was ordered, adjudged, and decreed by said court that said bank was then wholly insolvent; that the proven liabilities exceed the value of the assets by the sum of $54,000; that the receiver proceed by legal action to enforce the liability of the holders of the capital stock of said bank as provided by section 4012 of the Civil Code of the state of Montana; and that the said receiver is authorized to take whatever steps are necessary to secure the payment of said liability.

The demurrer states three grounds: (1) That the court has no jurisdiction of the subject of the action; (2) that the plaintiff has no legal capacity to sue; (3) that the petition does not state facts sufficient to constitute a cause of action. Two points are urged in support of the order sustaining the demurrer and the judgment thereon: (1) That the petition fails to show a double liability on the part of stockholders under the statute pleaded declaring such a liability, for the reason that it does not allege that the bank was organized under the law containing the provision imposing the liability. (2) That the petition fails to show any authority in the

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receiver to sue for and recover from the stockholders the amount of such liability.

[1] The first point is based upon the words of the section of the Montana statute (section 4012, Rev. Codes), imposing the liability upon stockholders of every corporation "formed under this chapter, or which may avail itself of its provisions," by reason of which it is contended for the defendant that no such liability is created except on the part of stockholders of a banking corporation organized under the law containing said provision subsequent to the enactment of the statute. If the statute had not been construed by the Supreme Court of Montana with reference to the words upon which said contention is made, we would not be inclined to consider this point, since we regard the question as to the right of the receiver to sue, suggested by the second point, as the principal and decisive question in the case. But that court has construed the section against the defendant's contention, holding that the words "formed under this chapter or which may avail itself of its provisions" have no place in the section and cannot be assigned any meaning, and that the provisions of the act applied to existing concerns, as well as those thereafter to be organized; and as so construed the section imposing the liability was held to be valid. Barth v. Pock, 51 Mont. 418, 155 Pac. 282.

[2] The question suggested by the second point, whether, upon the facts alleged, the stockholder's liability under the statute pleaded may be enforced in an action brought by the receiver to recover the amount, is broader than the jurisdiction of this court to decide, for it involves the right of the receiver to sue in the state in which he was appointed, and this court can only conclusively determine his right to sue in this state, and the question as presented by the facts is of course limited to the right to sue in this state. But for the purpose of deciding that question it is proper first to inquire as to the receiver's authority in the state of his appointment. If he is not authorized to maintain a suit of this character in that state, where the liability is imposed, he would certainly not be entitled to maintain such a suit in a foreign state, either as of right or by comity. Evans v. Nellis, 187 U. S. 271, 23 Sup. Ct. 74, 47 L. Ed. 173; Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380.

It is well settled that under a statute like that in Montana the liability of the stockholder is contractual, that it is not an asset of the corporation, nor enforceable by an assessment upon stockholders by or for the corporation, but that it is created exclusively for the benefit of, and runs directly to, the creditors. And the general and prevailing rule, sustained by the great weight of authority, is that the liability cannot be enforced by a general receiver of the insolvent corporation, unless authorized to do so by statute, either expressly or as judicially construed, or the liability is declared by statute to be an asset of the corporation. 1 Cook on Corp. (6th Ed.) § 218; 3 Clark & Marshall, Priv. Corp. §§ 820, 821; 3 R. C. L. 414; 23 R. C. L. 119; 7 C. J. 518; 2 Morse on Banks and Banking (5th Ed.) 696; Jones on Insolv. Corp. § 543; Williams v. Carver, 171 Cal. 658, 154 Pac. 472; Zang v. Wyant, 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145; Bank v. Scott, 144 Ky. 575, 139 S. W. 801; Runnor v. Dwiggins, 147 Ind. 238, 46 N. E. 580, 36 L. R. A. 645; Golden v. Cervenka, 278 Ill. 409, 116 N. E. 273; Van Tuyl v. Carpenter, 135 Tenn. 629, 188 S. W. 234; McLaughlin v. Kimball, 20 Utah, 254, 58 Pac. 685, 77 Am. St. Rep. 908; Steinke v. Loofbourow, 17 Utah, 252, 54 Pac. 120; Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380; Finney v. Guy, 189 U. S. 335, 23 Sup. Ct. 558, 47 L. Ed. 839.

In Morse on Banks and Banking, after stating who may sue for unpaid installments upon subscription for shares, it is said:

"But if the demand is for further contribution beyond the amount of the par value of the shares already paid or due under the original subscriptions, then it would seem that, unless the statute expressly makes the sums thus contributed assets of the corporation, and directly gives the right of collection to the receiver or trustee, the suit should properly be brought by the creditors whose claims are to be paid out of the proceeds. It is their sole and peculiar right, which they are at liberty to enforce when they please or altogether to forego. There seems to be no ground upon which any other person could sustain suits of this description, and hence it has been regarded as proper for the creditors themselves to bring them."

The principle is stated in Clark & Marshall on Private Corporations at the section cited as follows:

"In the absence of provision to the contrary, the individual liability for corporate debts imposed upon the stockholders of a corporation by a charter, statutory, or constitutional provision is solely for the benefit of, and directly to, creditors, and they only can enforce the same. The liability is not imposed for the benefit of the corporation, and is not in any sense a part of the assets, like unpaid subscriptions of stock, and, unless so provided by statute, it cannot be enforced by the corporation itself, by assessment or otherwise, even for the purpose of raising a fund for the payments of debts. It follows that the liability does not pass under an assignment by the corporation for the benefit of creditors, so as to entitle the assignee to enforce it; nor, in the absence of provision to such effect, can the liability be enforced by an assignee or receiver in bankruptcy or insolvency of the corporation, or by an agent appointed by the stockholders to wind up the affairs of the corporation, or by a receiver appointed by a court of equity, whether appointed at the suit of a stockholder or at the suit of a creditor, and whether he is a general receiver invested with all the 'estate, property, and eq-

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uitable interests of the corporation,' or a special receiver appointed for the purpose."

In 7 Corpus Juris, 518, it is said on this subject:

"Under some statutes the action to enforce the liability of stockholders is properly brought by the receiver of the bank, or it may be brought either by the receiver or by the creditors; but where the statute does not designate by whom such an action shall be brought, the right of a receiver to sue depends on the view taken of the character of the stockholders' liability, so that, if it is regarded as a corporate asset, the receiver can sue therefor, while, if it is not so regarded, a suit cannot be brought by the receiver, but only by the creditors."

It seems clear that where, in addition to imposing the liability upon stockholders, the statute declares such liability an asset of the corporation, the receiver is vested with title thereto and the right to enforce it. Some statutes so providing go beyond that, and also provide for the enforcement of the liability by the receiver, assignee, or other officer having the right to collect and distribute the corporate assets. Where, without declaring the liability to be an asset of the corporation, the receiver is required or authorized to enforce the liability, it is held that he is not then merely the ordinary chancery receiver, but that the legal effect of such provision is to make him a quasi assignee and representative of the creditors, vested as such with their rights of action against stockholders; and upon that ground his right to sue in a foreign jurisdiction is sustained. Bernheimer v. Converse, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163; Converse v. Hamilton, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749, Ann. Cas. 1913D, 1292; 1 Cook on Corp. (6th Ed.) 218.

And the right of the receiver to maintain such an action in a foreign state is sustained also where the statute, though silent as to the procedure for enforcing the liability, has been construed by the highest court of the state in which it was enacted as requiring or authorizing the liability to be enforced by the receiver, and upon substantially the same ground as where the power is expressly conferred by the statute. Howarth v. Lombard, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301; Howarth v. Angle, 162 N. Y. 179, 56 N. E. 489, 47 L. R. A. 725; Howarth v. Ellwanger (C. C.) 86 Fed. 54. These cases were brought by a receiver appointed in the state of Washington, to recover upon the liability of stockholders imposed by the Constitution and a statute of that state, under which, as construed by the Supreme Court of the state, in connection with other statutes, the liability becomes part of the corporate assets, and is enforceable only by a receiver of the insolvent bank. See Wilson v. Book, 13 Wash. 676, 43 Pac. 939.

And in Howarth v. Lombard, supra, said construction was held to be binding upon the Massachusetts court. In Howarth v. Angle, the court said that the "implied promise" of the stockholder as to such statutory liability "runs to the creditors, and may, according to the common law of the state where it was made, be enforced for the benefit of creditors by a receiver of the corporation appointed to wind up its affairs"; and, further, referring to the decision of the Supreme Court of Washington respecting the nature of the liability, "the statutory liability of stockholders is an asset of the insolvent bank, 'the title to which was in said receiver as a trust fund for the purpose of satisfying the claims of' creditors." In Howarth v. Ellwanger, the court said:

"The courts of Washington have decided that this liability can only be enforced by a receiver under the direction of the court [citing cases]. The practical effect of a ruling that a receiver cannot maintain the suit would be to render the law nugatory as to all but resident stockholders. The Washington courts having ruled that a receiver only can bring the suit, it is manifest, should the federal courts and other state courts hold that he cannot maintain the action, that the defendant not only, but all stockholders beyond the jurisdiction of the Washington courts, will escape a liability intended to be uniform and for the benefit of all creditors."

The distinction in this respect, under the decisions above referred to, between an ordinary chancery receiver and one who is authorized by statute to enforce the liability, when the action is brought in a foreign jurisdiction, is well illustrated by two cases above cited, decided by the Supreme Court of the United States: Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380, and Converse v. Hamilton, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749, Ann. Cas. 1913D, 1292. Each was an action brought by a receiver of an insolvent Minnesota corporation to enforce an alleged double liability under the Constitution and statutes of that state. In Hale v. Allinson it appeared that the statute provided a remedy for enforcing the liability, which did not include or authorize an action by the receiver. And the Supreme Court of Minnesota had decided that the statute provided the only remedy, a single action, in which all persons having or claiming an interest in the subject should be joined or particularly represented, and their respective rights, equities, and liabilities finally settled and determined: that the receiver of an insolvent corporation was not a proper person to bring such action; and that a receiver could not maintain an action to enforce the superadded liability. The action was brought in a circuit court of the United States in Pennsylvania, where a demurrer to the bill was sustained; the demurrer stating, among others, two grounds, upon each of which it was held that the judgment sustaining the demurrer should be

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affirmed, viz.: (1) That the receiver had no right to sue in the courts of a state foreign to that in which he was appointed; (2) that if he had a right to sue there, no ground of equitable jurisdiction was set forth in the bill, but the remedy, if any, was at law. We are concerned here principally with the discussion of the first ground.

Having referred to the decisions of the Minnesota Supreme Court denying the right of the receiver to maintain an action to enforce the liability, the court said:

"If a receiver cannot maintain this kind of an action in the courts of his own state, because its statute provides another in the name of a creditor, or permits it only after the performance of conditions precedent which he has not performed, he cannot, although appointed in the state, maintain such action in a foreign jurisdiction. * * * This would seemingly be enough to compel the affirmance of the judgment herein, when we see that the Minnesota Supreme Court has held that a receiver cannot maintain such an action as this in the courts of that state. * * * We are of opinion, following the decisions of the highest court of Minnesota, that the statutes of that state do not provide for the appointment of a receiver to recover as such the amount of the added liability of the nonresident shareholders to creditors of an insolvent corporation. They do not provide that such liability shall be assets of the corporation, to be recovered by the receiver and payable to its creditors when such liability is enforced and the money recovered. There is no transfer of any right or title to a receiver to enforce the liability (certainly not as to nonresident stockholders), nor is it a case where any assignment of such right by the creditors has been made, so that the receiver is, in fact, an assignee of the persons interested in the recovery from the stockholders."

And the court said further that it was a simple case of the appointment, authorized by statute, of a receiver by a court of equity in the exercise of its general jurisdiction, with no title to the fund in him, and where he "acts simply as the arm of the court, without any other right or title," and that "the question of comity cannot avail in a case where the courts of the state in which the receiver was appointed hold that an action similar to the one brought in the foreign jurisdiction cannot be maintained by him in the courts of the state of his appointment."

In that case it appeared also that the receiver, by order of the court appointing him, had been "authorized, empowered and directed to institute and prosecute all such actions or proceedings in foreign jurisdictions as may be necessary" for the purpose of enforcing the liability of nonresident stockholders. As to that matter the court said that the nonresident stockholders were only nominal parties in the Minnesota suit; that no service of process was made upon one of them; that no judgment was rendered against them; and that the action was not therefore ancillary or auxiliary to the Minnesota decree, and did not aid in the enforcement of that decree because there was no decree against such stockholders to be enforced.

It appeared in the case of Converse v. Hamilton, which had been brought in a state court in Wisconsin, that another statute had been enacted in Minnesota not involved in the case of Hale v. Allinson, which prescribed the mode of enforcing the liability pursued in the case then before the court, that by such later statute provision was made for bringing in all creditors into a sequestration suit, for the presentation and adjudication of their claims, ascertaining the relation of the corporate debts and expenses of receivership to the available assets, and whether and to what extent a resort to the double liability of stockholders was necessary, for levying assessments upon stockholders necessary to pay the debts, and for investing the receiver with authority to collect such assessments on behalf of the creditors, and to maintain actions therefor against each stockholder, severally, in Minnesota, "or in any other state or country where such stockholder, or any property subject to attachment, garnishment or other process in an action against such stockholder, may be found."

Referring to that statute, after stating that under the earlier statute a receiver could not sue on behalf of the creditors in a home court or elsewhere, citing Hale v. Allinson, supra, and Finney v. Guy, 189 U. S. 335, 23 Sup. Ct. 558, 47 L. Ed. 839, the court said:

"Under this statute, as interpreted by the Supreme Court of the state, as also by this court, the receiver is not an ordinary chancery receiver or arm of the court appointing him, but a quasi assignee and representative of the creditors, and when the order levying the assessment is made he becomes invested with the creditors' rights of action against the stockholders, and with full authority to enforce the same in any court of competent jurisdiction in the state or elsewhere. Straw & Ellsworth Co. v. Kilbourne Co., supra [80 Minn. 125, 83 N. W. 36]; Bernheimer v. Converse, supra [206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163]. * * * It is true that an ordinary chancery receiver is a mere arm of the court appointing him, is invested with no estate in the property committed to his charge, and is clothed with no power to exercise his official duties in other jurisdictions. Booth v. Clark, 17 How. 322 [15 L. Ed. 164]; Hale v. Allinson, 188 U. S. 56 [23 Sup. Ct. 244, 47 L. Ed. 380]; Great Western Mining & Mfg. Co. v. Harris, 198 U. S. 561 [25 Sup. Ct. 770, 49 L. Ed. 1163]. But here the receiver was not merely an ordinary chancery receiver, but much more. By the proceedings in the sequestration suit, had conformably to the laws of Minnesota, he became a quasi assignee and representative of the creditors, was invested with their rights of action against the stockholders, and was charged with the enforcement of those rights in the courts of that state and elsewhere. So when he invoked the aid of the Wisconsin court the case presented was, in substance, that of a trustee.

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clothed with adequate title for the occasion, seeking to enforce, for the benefit of his cestuis que trustent, a right of action, transitory in character, against one who was liable contractually and severally, if at all."

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The court, in the same opinion, had said that—

"The liability is not to the corporation, but to the creditors collectively, is not penal, but contractual, is not joint, but several, and the mode and means of its enforcement are subject to legislative regulation."

Now, in the case here, while the petition alleges that the stockholder is liable to the extent of the par value of his stock for the bank's indebtedness, and sets out the statute declaring the liability, and also two sections providing for the appointment of a receiver under stated conditions, the matter of the recovery of the liability is not mentioned in either of the sections pleaded, and it is not alleged or claimed that there is any statute in Montana prescribing the procedure or method for enforcing such liability, or declaring that the receiver shall have power or authority to enforce or collect the same, or directing that he do so, or that the statutes set out in the petition have been construed by the Supreme Court of Montana as conferring such authority upon the receiver. Some contention is made upon the provision that the Attorney General's petition for the appointment of a receiver "shall be controlling and by the court so considered and acted upon, even though stockholders, creditors or others may have filed application for the appointment of a receiver." But that provision does not seem to mean anything more than that the receiver shall be appointed in the proceeding instituted by the Attorney General, by direction of the Governor, rather than in another pending proceeding brought by stockholders or creditors, in case of conflict between any such proceedings.

Upon the allegations of the petition, therefore, the case seems to be controlled by the general rule that the liability is not an asset of the corporation, but runs directly to the creditors, and is not enforceable by a receiver having no greater rights than the ordinary chancery receiver. And there is nothing in the statutory provisions for the appointment of a receiver, set out in the petition, making him anything more than an officer or the arm of the court appointing him for the collection and distribution of the corporate assets, and to wind up the business of the bank. The conclusion would necessarily follow, in our opinion, that the receiver does not show a right to maintain this action.

[3] But we are materially aided in thus interpreting the statutes by the officially published decisions of the highest court in Montana on the subject, for we find that the statutes have been considered and construed by the Supreme Court of that state. In a decision by that court in November, 1914, it was held that the receiver of an insolvent bank, like the receiver in charge of the estate of any other insolvent, is the arm of the court to accomplish the distribution of the assets of the insolvent, and occupies a position in no respect different from that of the insolvent prior to the appointment, and that he becomes merely the assignee of the insolvent, and has exactly the same rights. Williams v. Johnson, 50 Mont. 7, 144 Pac. 768, Ann. Cas. 1916D, 595. In a more recent case, in which the receiver in this case appears to have been a party representing the same insolvent bank, the same court again had occasion to consider the character of such a receivership, and said:

"A receivership and an assignment for the benefit of creditors are two different things (Babcock v. Maxwell, 21 Mont. 507, 513, 54 Pac. 943), but this court has said that the position of a receiver is no better and no higher than that of an assignee; he occupies a situation not materially different from that of the insolvent prior to the appointment; he is the arm of the court to accomplish, when necessary, the distribution of the assets of the insolvent according to the rights of those entitled thereto" (citing Williams v. Johnson, supra). Ætna Acc. & Liability Co. v. Miller, Receiver of Farmers' Bank of Bridger, 54 Mont. 377, 170 Pac. 760, L. R. A. 1918C, 954.

And in Barth v. Pock, 51 Mont. 418, 155 Pac. 282, that court held that the receiver of an insolvent bank cannot maintain an action to enforce the liability of its stockholders under the statute aforesaid, and that it can only be enforced by creditors.

That case was decided in December, 1915, prior to the filing of the first amended petition in this case, and nearly a year before the second amended petition was filed. In that action, which was brought, apparently by creditors, against certain stockholders of an insolvent bank, the State Savings Bank of Butte, to enforce their liability under the Montana statute, the court had before it two questions affecting that liability: First, the stockholder's right to set off against his liability the amount of the bank's indebtedness to him; and, second, the liability of a stockholder upon stock which had been donated by him to the bank some time prior to its suspension for the purpose of increasing its surplus and providing a fund to pay losses incurred by the bank, and which remained unsold at the time of its failure. Explaining the reasons for denying the asserted right of set-off, and holding the stockholder liable on the unsold donated stock, the court defined the nature of the liability under the statute, and declared that it could not be enforced by the bank or its receiver, but only in a suit by creditors. When discussing the alleged right of set-off the court said:

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"The double liability of a stockholder in a banking corporation is in its nature contractual and not penal. * * * The liability is several and individual, created by statute in favor of all who are creditors at the date of the bank's failure. Under this statute, the fund collected from an assessment upon the stock is held in trust for a ratable distribution among all the creditors, and its character is such as to preclude the idea that a stockholder may have his creditor's claim set off against his stockholder's liability. The two claims do not arise in the same right. His claim is against the bank, while his liability is to the creditors—not to the bank."

And, considering the question of the liability upon the donated stock, upon the contention that under the decisions of the court to the effect that a domestic corporation may purchase its own stock it must also have the right to accept a gift thereof, resulting in relieving the stockholder from liability upon the stock so donated, the court said, after stating that a distinction is clearly drawn in that state between a trading and a banking corporation:

"The statutory double liability of a stockholder is peculiar to the law governing banking corporations—including therein trust companies. The creditor of a trading corporation must look to the corporation's assets for the discharge of his claim, but, in a sense, the creditor of a banking corporation has double security. He may look to all the assets of the bank in the first instance, and, if they are not sufficient, he may then call upon the stockholders to contribute a fund which may equal the par value of the entire authorized capital. Over such fund the corporation has no control. It cannot release a stockholder from all or any portion of his liability, and neither it nor the receiver in charge of its affairs can even maintain an action for its enforcement, for it is not a corporate asset. Zang v. Wyant, 25 Colo. 551, 71 Am. St. Rep. 145, 56 Pac. 565; Farmers' Bank v. Scott, 144 Ky. 575, 139 S. W. 801. It is a reserve trust fund created for the benefit of creditors, and under our statute must be distributed ratably to all of them. Its character is so far distinct that collection can be enforced only at the suit of all the creditors or by one or more creditors for the use and benefit of all. Bank v. Scott, above; 3 Clark & Marshall on Private Corporations, p. 2584; 3 R. C. L. 412."

That construction of the statute by the Montana Supreme Court is certainly persuasive as to its interpretation in this case, and should be followed by this court, even if we might be of the opinion that it should be construed otherwise, unless it was not necessary to a decision of any question then before the court. And we do not feel at liberty to regard it as mere dictum. The statement that an action to enforce the liability cannot be maintained by the receiver of the bank may not have been necessary, since it does not appear that the receiver was a party to the case. But creditors were parties, as we understand the case, seeking as plaintiffs to recover upon the liability, and the court's statement that collection can be enforced only by the creditors or by one or more creditors for the use and benefit of all seems to have been pertinent, though perhaps outside the issues presented by the defenses considered in the opinion; and the result was an affirmance of a judgment in favor of the creditors.

If the statement as to the right of a receiver to enforce the liability might be held so far from necessary to a decision of the case as to amount to mere dictum, what was said as to the nature of the liability—that it is not a corporate asset, that the corporation has no control over it, that neither it nor its receiver can release a stockholder from his liability, and that the liability is to creditors and not to the bank—cannot, we think, be considered as unnecessary to a decision in the case upon the questions presented. That the liability is to the creditors and not to the bank was stated as a reason precluding the idea that a stockholder might have his claim as a creditor set off against his liability. That it is not a corporate asset, or, when collected, a fund over which the corporation has any control, and that the bank cannot release the liability, were stated as grounds for the conclusion that a donation by a stockholder of part of his stock to the bank did not relieve him from liability thereon, where it remained unsold at the time of the bank's failure. And upon these several points so decided, and the other decisions of the Montana court above cited, holding that the receiver of an insolvent bank is the arm of the court for distributing the corporate assets, that he is merely the assignee of the insolvent, that he occupies a position in no respect different from that of the insolvent prior to his appointment, and has exactly the same rights, it would follow, and we might reasonably expect said court to hold, that an action could not be maintained by the receiver to enforce the statutory liability of stockholders. What was said as to that matter does not appear to have been questioned in any subsequent case, and we think it may be accepted as controlling the procedure in Montana respecting the authority of the receiver to enforce such liability. It is in harmony with the prevailing rule, which, in the absence of a ruling in Montana to the contrary, we would feel compelled to hold applicable upon the facts in the case.

[4] It is chiefly argued by counsel for the receiver that a decision denying his right to recover upon the liability will violate section 1 of article 4 of the federal Constitution, requiring that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. But it is well settled that said provision does not prevent an inquiry into the jurisdiction of the court which rendered the judgment over the subject-matter, or the parties affected by it, or into the facts necessary

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to give the original court jurisdiction. 2 Watson on Const. 1196; Tucker on Const. § 306; Simmons v. Saul, 138 U. S. 439, 11 Sup. Ct. 369, 34 L. Ed. 1054; Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897; Reynolds v. Stockton, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464. And the contention here is completely answered in Hale v. Allinson, supra, where a similar, but much clearer and more comprehensive, order had been made by the court appointing the receiver; and also, under like conditions, in Finney v. Guy, supra.

The contention was directly made in Finney v. Guy that the Wisconsin court had failed to give full faith and credit to the laws and judgments of the state of Minnesota, but it was held by the Supreme Court of the United States that in refusing to allow the receiver appointed in Minnesota to maintain the action, although he had been expressly authorized to proceed against stockholders in other jurisdictions by an order of the court appointing him, the courts of Wisconsin did not fail to give full faith and credit to the laws and judgments of Minnesota, since the Supreme Court of Minnesota had decided that the liability was not enforceable by the receiver.

We conclude that it was not error to sustain the demurrer, and the judgment will be affirmed.

Affirmed.

BEARD, C. J., concurs.

BLYDENBURGH, J., being ill, did not participate in the decision.

(26 Wyo. 191)

MILLER v. PALMER. (No. 901.)

(Supreme Court of Wyoming. June 3, 1919.)

Error to District Court, Fremont County; Chas. E. Winter, Judge.

Action by H. B. Miller, as Receiver of the Farmers' State Bank of Bridger, Mont., a corporation, against Mrs. J. L. Palmer, née Mrs. Marie Amoretti. From the court's ruling in sustaining a demurrer to plaintiff's petition as amended, and a judgment entered for defendant, plaintiff brings error. Affirmed.

E. H. Fourt, of Lander, for plaintiff in error.
John Dillon, of Lander, for defendant in error.

POTTER, J. This case involves the same questions and upon the same facts that are considered in Miller, as Receiver, v. Amoretti, 181 Pac. 420, this day decided. The two cases were submitted together. It is alleged that Mrs. Palmer, the defendant, is the owner of 12½ shares of the stock of the Farmers' State Bank of Bridger, Mont., and it is sought to recover, in this suit by the receiver of said bank, her superadded liability, under the Montana statute. A demurrer to the petition, as amended, was sustained, and upon the plaintiff refusing to further plead, judgment was rendered for the defendant. The case being here on error, the judgment is affirmed on the grounds and for the reasons stated in the opinion in the case aforesaid of Miller v. Amoretti.

Affirmed.

BEARD, C. J., concurs.

BLYDENBURGH, J., being ill, did not participate in the decision.

(25 N. M. 296)

DE FAYETTE et al. v. VAUGHN. (No. 2125.)

(Supreme Court of New Mexico. May 19, 1919.)

(Syllabus by the Court.)

APPEAL AND ERROR ⟸351(1)—TIME FOR APPEAL—STATUTE.

Under an order allowing an appeal dated May 26, 1917, and filed June 8, 1917, which order appellant admits was not signed until June 8, 1917, the appellant is not within the six months which the statute allows for appeals from the district to the Supreme Court, where the order appealed from is dated November 28, 1916, vacating a default judgment, even if it is admitted that such order vacating a judgment is a final judgment, from which an appeal may be taken under section 1, c. 77, Laws 1915.

Appeal from District Court, Santa Fé County; Abbott, Judge.

Action by Carlota G. De Fayette and others against Martha P. Vaughn; H. S. Bowman, administrator, substituted. Judgment against defendant by default, motion to vacate default and stay execution and to permit filing of answer to amended complaint granted, and plaintiffs appeal. Appeal dismissed.

E. P. Davies, of Santa Fé, for appellants.
H. S. Bowman, of Santa Fé, for appellee.

RAYNOLDS, J. The original complaint in this case was filed on February 18, 1916. The defendant interposed a demurrer thereto, which was filed on March 8, 1916. Plaintiff below, appellant here, elected to plead over without a ruling on the demurrer, and on June 2, 1916, filed her first amended complaint. On July 14, 1916, 42 days thereafter, appellee filed a motion for an order to require the appellant to give security for costs. On July 19, 1916, a certificate of nonappearance was filed by the clerk of the district court, and on July 24, 1916, appellee was declared to be in default, and judgment

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rendered against her, as prayed in said amended complaint. Execution was issued on October 24, 1916. On November 25, 1916, more than 60 days after the entry of judgment, appellee filed a motion to vacate said judgment, to stay execution and to permit the filing of an answer to the amended complaint. On November 28, 1916, an order was entered granting the relief asked in said motion. A subsequent motion on December 29, 1916, was then filed by the appellant, moving the court to reconsider the motion to vacate previously entered, and reconsider the judgment. On January 3, 1917, appellee filed an amended motion to vacate the judgment. Upon hearing these last two mentioned motions, the court on March 26, 1917, adhered to its former order of November 28, 1916, vacating the judgment, recalling the execution, and allowing the appellee to answer. From the order of November 28, 1916, vacating the default judgment and the second order of March 26, 1917, adhering to the first order, this appeal is taken, and the appellant assigns as error the action of the trial court in setting aside the default judgment.

The motion for the order allowing an appeal and the order thereon allowing the appeal, which were both on the same sheet of paper, were filed June 8, 1917. The order allowing the appeal was dated May 26, 1917. The appellee, in a motion filed March 25, 1918, moved the court to dismiss the appeal on the ground: First, that the orders of November 28, 1916, and March 26, 1917, are not final judgments, and this court has no jurisdiction to consider them; and, second, that the application praying for an order allowing the appeal and the order granting the appeal were not made within the time prescribed for the allowance of appeals from the district to the Supreme Court.

The appellant admits in his brief that the order for the appeal was granted on the day the motion for appeal was made, and was filed on the same day, i. e., June 8, 1917. Even if it is conceded that the order of November 28, 1916, vacating the judgment, is final judgment from which an appeal can be taken under chapter 77, § 1, of the Laws of 1915, the appellant is not within the six-month period which the statute gives for appeals, and the second ground of appellee's motion disposes of the case. The appeal must be taken within the time allowed by law, which in this case is six months. 3 C. J. "Appeal and Error," p. 1040, pars. 1032, 1077, 1122. The order allowing the appeal cannot be dated back so as to give the court jurisdiction when the time has passed for taking the appeal. The court cannot do indirectly what it cannot do directly. 3 C. J. "Appeal and Error," §§ 1077, 1122; 2 Cent. Dig. "Appeal and Error," § 1922, and cases cited; Wait v. Van Allen, 22 N. Y. 319.

For the reasons above stated, the motion to dismiss the appeal is granted; and it is so ordered.

PARKER and ROBERTS, JJ., concur.

(25 N. M. 260)

POINTER v. LEWIS. (No. 2250.)

(Supreme Court of New Mexico. May 8, 1919.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE ⟸174(2½)—APPEAL TO DISTRICT COURT—ITEMIZED STATEMENT—PROOF.

Where, on appeal from a justice of the peace court to the district court, an itemized statement is demanded by the defendant in conformity with section 4149, Code 1915, and none is furnished, the defendant cannot, over defendant's objection, prove the items of his account in district court. The furnishing of such statement on proper demand is a prerequisite to proof of items therein at the trial.

2. JUSTICES OF THE PEACE ⟸172—APPEAL TO DISTRICT COURT—ITEMIZED STATEMENT—PROOF.

The procedure in the district court on appeal does not follow that of the justice court, and, where a demand is made after appeal to the district court in that court for an itemized statement, on which the claim or defense is based, such statement must be furnished before proof can be made upon the claim or defense in the district court.

3. JUSTICES OF THE PEACE ⟸141(2), 173(3)—APPEAL TO DISTRICT COURT — PROCEDURE — TRIAL DE NOVO.

The district court on appeals from the justice of the peace courts is a court of limited jurisdiction, in this, that it looks to the record and papers of the justice court for its jurisdiction to try de novo on appeal; but the district court is not bound by the procedure of the justice court when trying the case de novo on appeal.

Appeal from District Court, Chaves County; McClure, Judge.

Suit in justice court by J. T. Pointer against W. R. Lewis, with cross-complaint by defendant. Judgment in justice court for plaintiff, and from the judgment of the district court, on appeal in favor of plaintiff, less the defendant's claim, he appeals. Reversed and remanded, with instructions to enter judgment for defendant for the amount of his counterclaim.

The appellee herein brought suit in the justice court of precinct 13, Chaves county, N. M., claiming an indebtedness of $68.90. To this complaint the appellant filed a cross-complaint setting up that appellee was indebted to appellant in the sum of $9.50 after allowing all just debts, credits, and

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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offsets. Judgment was rendered by the justice in favor of the appellee and against the appellant for the sum of $62.75. Appeal was taken by the appellant to the district court, where, before trial, appellant made a written demand on the appellee for an itemized statement of his claim, the service of which demand was admitted by the appellee at the trial. The district court, over the appellant's objection that he had not been furnished with an itemized statement within the time required by law, admitted testimony and allowed the appellee to testify from a book of accounts in proof of the amount of his claim. The district court rendered judgment against the appellant and in favor of the appellee for $62.40, being the amount found due appellee ($71.90), less $9.50, appellant's counterclaim. Appellant introduced no evidence in the district court except a verified cross-complaint which he had filed in the justice court. From the judgment of the district court the appellant appeals to this court, and assigns as error the action of the district court in admitting evidence over his objection after failure of appellee to furnish an itemized statement of the account within the time required by law.

J. C. Gilbert, of Roswell, for appellant.
J. T. Evans, of Roswell, for appellee.

RAYNOLDS, J. (after stating the facts as above). [1, 2] Section 4149 of the Codification of 1915, upon which appellant relies for a reversal of the judgment of the district court, is as follows:

"It is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must deliver to the adverse party, within ten days after the demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof. The court or judge thereof may order a further account when the one delivered is too general, or is defective in any particular."

This statute, as applied to suits begun in the district courts, was construed in Orange County Sawmill Co. v. Carmichael, 17 N. M. 69, 121 Pac. 608, where it was held that, when a demand is properly and seasonably made under this statute for an itemized statement, and none is furnished within the time required by law, evidence offered at the trial by the party failing to furnish such statement is properly excluded. The appellee, however, contends that this statute applies only to suits originating in the district courts, and that, when a case is appealed from the justice court, the procedure of the justice courts should be followed, and cites section 3224, Codification of 1915, in support of his contention. The statute referred to is as follows:

"The case up on such appeal shall be tried de novo and the same rules shall govern the district court in said trial that are prescribed for the government of justices courts."

This statute just quoted has been construed many times by this court, but the exact point raised in this case has not been decided; that is, whether or not a district court is bound to follow the procedure of the justice courts in cases appealed therefrom. It has been held under this section that the district court in a trial de novo may render its independent judgment even in cases involving the discretion of the justice court. State v. Coats, 18 N. M. 314, 137 Pac. 597. It has also been held that, when a case is tried anew on appeal in the district court, judgment may be rendered in it as if such case had originated in the district court. Crolot v. Maloy, 2 N. M. 198. The district court may allow all necessary amendments to pleading in a case appealed from the justice court to the district court. Sanchez v. Luna, 1 N. M. 242. The Constitution (article 6, § 27) provides that all appeals from the justice courts to the district courts shall be tried de novo unless otherwise provided by law. The appellee cites Barruel v. Irwin, 2 N. M. 223, in support of his contention, but in that case the question only of the jurisdiction was involved; the court holding that on such an appeal from the justice court to the district court the district court looked to the papers sent up by the justice for the purpose of determining whether or not the justice had jurisdiction in the first instance. If the justice court had jurisdiction in the first instance, then the case seems to infer that the district court would proceed to try it de novo according to district court procedure. We believe this to be the proper construction of this statute.

[3] The district court on appeals from the justice courts had no jurisdiction to try such cases unless the justice court had jurisdiction. The case of Barruel v. Irwin is limited to that point, and not to be extended so as to bind the district courts to the rules and procedure of the justice courts. In this case the appeal had been taken and the case set for trial in the district court. The appellee was seasonably notified under section 4149, Codification 1915, to furnish a copy of the account which was the basis of his claim. This appellee failed to do, and we are of the opinion that the court erred in admitting evidence of this account when a copy of the same had been demanded and the same not furnished within the time required by law. There are other errors assigned by the appellant, but, in the view we take of the case, it is not necessary to consider them.

The case is therefore reversed and remanded, with instructions to enter judgment for appellant for $9.50; and it is so ordered.

PARKER, C. J., and ROBERTS, J., concur.

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(35 N. M. 276)

PACE v. WIGHT. (No. 2200.)

(Supreme Court of New Mexico. May 28, 1918. On Rehearing, May 8, 1919. Second Motion for Rehearing Denied June 7, 1919.)

(Syllabus by the Court.)

1. TAXATION ⟸688—TAX SALES—CURATIVE STATUTE.

The curative provision of section 25, c. 22, Laws 1899, relative to tax sales, does not apply to jurisdictional defects.

2. TAXATION ⟸734(1)—TAX SALE—JURISDICTION—DELINQUENCY.

The fact that property was in fact sold for delinquent taxes is jurisdictional; for, if no sale in fact occurred, the bases for the subsequent proceedings would not exist.

3. EVIDENCE ⟸158(16)—BEST AND SECONDARY—TAX SALE — PROCEEDINGS — DELINQUENCY.

The proceedings on which tax sales depend are to be proved by the records or by the originals from which the records should be made up. The fact that real estate was sold for delinquent taxes must necessarily be established by the record, and cannot be proved by the parol evidence of the county treasurer who made the sale.

4. TAXATION ⟸684(2)—TAX SALES—RECORDS —STATUTE.

Section 23, c. 22, Laws 1899, requires the collector to keep a book of sales containing the date of sale, description of the property sold, name of the purchaser, and amount for which sold. Section 22 of the same act provides that, where property is struck off to the county, the collector shall make an entry, "Sold to the county," on the tax roll opposite the tax. It is the duty of the county treasurer making the sale to record the facts in the official record, and such entry cannot be made by the successor in office of the county treasurer who made the sale, such successor having no personal knowledge of the fact recorded, and there being no memorandum from which to make the same.

5. RECORDS ⟸3—OFFICIAL REGISTERS—ENTRIES.

It is essential to the official character of official registers that the entries in them be made promptly, or at least without such long delay as to impair their credibility, and that they be made by the person whose duty it was to make them and in the mode required by law, if any has been prescribed.

Parker, J., dissenting.

On Rehearing.

6. CONSTITUTIONAL LAW ⟸188 — PROPERTY OF STATE—RETROACTIVE STATUTE.

The Legislature may pass a retroactive law operating on property belonging to the state, and such law will not be unconstitutional so long as private rights are not infringed.

7. CONSTITUTIONAL LAW ⟸139—TAXATION ⟸696—IMPAIRMENT OF OBLIGATION OF CONTRACT—EXTENSION OF TIME FOR REDEMPTION FROM TAX SALE CERTIFICATE — PURCHASE BY STATE.

Where a tax sale certificate is held by a private individual, the purchaser has a vested right to a deed at the time specified in the law under which the purchase was made, and the Legislature cannot subsequently extend the period of redemption, as such extension would be an impairment of the obligation of the contract. But this rule is held not to apply where the state itself is the purchaser at the tax sale, as the extension of the time in that case is not a violation of contract rights, but an act of grace.

8. TAXATION ⟸696, 699 — TAX SALE — REDEMPTION—REPEAL OF STATUTE—CONSTRUCTION.

Chapter 22, Laws 1899, which provide that the owner of land might redeem from a tax sale at any time within three years from the date of sale, was specifically repealed by chapter 84, Laws 1913. Under the later act it was provided that the owner might redeem at any time within three years from the date of recording the certificate of sale. *Held*, that the later act applied to certificates of sale held by the county acquired under the former law, and that the owner was entitled to redeem at any time within three years from the recording of such certificate of sale.

Appeal from District Court, Union County; Leib, Judge.

Suit to quiet title by Susie S. Pace against Mark D. Wight. Judgment for defendant, and plaintiff appeals. Affirmed.

O. P. Easterwood, of Clayton, for appellant.

L. H. Larwill, of Denver, Colo., for appellee.

ROBERTS, J. This suit was instituted in the court below by appellant to quiet her title in and to certain real estate situated in Union county. Appellee answered, setting up the fact that he was the owner of the land by deed from one Lenora Sullivan; that appellant claimed title under a tax deed which was alleged to be invalid on various grounds, the principal one being that the tax certificate upon which the deed was based was not made by the collector in office at the time said sale was held, or by any of his deputies. In other words, the validity of the deed was attacked on the ground that it was based upon a void certificate of sale. Another defense set up was, that under chapter 84, Laws 1913, the owner had the right to redeem the land at any time within three years from the date the certificate of sale was recorded, and that proper tender had been made within such time.

To the answer appellant demurred, and, her demurrer being overruled, she filed a re-

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ply. The facts may be briefly stated as follows:

The land in question was listed for assessment in the year 1909. Taxes were levied thereon, and remained unpaid, and the land was advertised for sale. This much is shown by the record evidence introduced by the plaintiff at the trial.

Appellant then introduced R. Q. Palmer as her witness, who testified that he was county treasurer of Union county from 1909 to January, 1912. He also testified that the land was advertised for sale for delinquent taxes together with other real estate; that it was all offered for sale on the 15th day of January, 1911; that there were no bidders for the land in question; and that he thought he thereafter struck it off to Union county. He made no record whatever of the transaction. In January, 1912, Nestor C. De Baca became county treasurer, and on March 4, 1914, De Baca or one of his deputies marked on the roll opposite this land the words, "Sold to the County," and at the same time a record was made in the treasurer's record of delinquent tax sales showing a sale of the land to the county on January 15, 1911. At the same time he made a certificate of sale in which he recited that he, Nestor C. De Baca, did, on January 15, 1911, sell the land in question to the county of Union. The certificate was signed by him, and was indorsed "March 14, 1913, as for January 15, 1911." This certificate was not recorded until September 17, 1915. The court refused to find that a sale of the land for taxes to the county was made, and entered judgment for the appellee.

[1, 2] But two questions will be considered here, one being decisive of the case, and the other being determined because fairly presented and of great public interest. The first question is as to whether or not the evidence established the fact that a sale of the land in question for delinquent taxes actually occurred. If no sale was in fact made, title did not pass to the county, and the attempted issuance of the certificate of sale and its subsequent assignment to Gow, through whom appellant obtained title, would be a nullity. The taxes were levied and the sale was made, if there was a sale under the provisions of chapter 22, Laws 1899. Under section 25 of that chapter it is provided:

"And no bill of review or other action attacking the title to any property sold at tax sale in accordance with this act shall be entertained by any court, nor shall such sale or title be invalidated by any proceedings except upon the ground that the taxes, penalties, interest, and costs had been paid before the sale, or that the property was not subject to taxation."

The effect of this curative provision has been before this court in several cases. It was first considered in the case of Straus v. Foxworth, 16 N. M. 442, 117 Pac. 831. It was there held that the sale vests a title in the purchaser which can be invalidated only on the ground that the taxes, penalties, interest, and costs have been paid before the sale, or that the property was not subject to taxation, and that it could not be invalidated for irregularities in the proceedings leading up to the sale unless they were fraudulent or amounted to jurisdictional defects. The rule in this case was followed in the later cases of Maxwell v. Page, 23 N. M. 356, 168 Pac. 492; Hiltscher v. Jones, 23 N. M. 674, 170 Pac. 884; Knight v. Fairless, 23 N. M. 479, 169 Pac. 312. In all of these cases it is conceded that jurisdictional defects are not cured by the curative provisions of the statute. In other words, it is essential that the property should have been listed for taxation, and that the tax should have been laid.

The fact that the property was in fact sold for delinquent taxes is likewise jurisdictional; for, if no sale in fact occurred, the basis for subsequent proceedings would not exist. In Black on Tax Titles, § 452, the author sets out the indispensable requirements essential to constitute a valid exercise of the taxing power, without which no tax sale could be validly made, which is as follows:

"First, that a tax has been levied; second, that the property sold is subject to taxation; third, that the property has been assessed; fourth, that the taxes had not been paid; fifth, a statutory warrant for the sale; sixth, a sale made under such warrant."

"The proceedings on which tax sales depend are to be proved by the records or by the originals from which the records should be made up." Black on Tax Titles, § 446.

[3-5] The fact that real estate was sold for delinquent taxes must necessarily be established by the record, and cannot be proved by the parol evidence of the county treasurer who made the sale. Section 23, c. 22, Laws 1899, provides:

"The collector shall keep a book of sale containing the date of sale, description of the property sold, name of purchaser and amount for which sold.'"

Section 22 of the same chapter provides that, when there are no bidders for real estate offered for sale, it shall be struck off to the county, and that the collector shall make an entry, "Sold to the county," on the tax roll opposite the tax. The book of sales required by section 23 is intended to provide an official record of the sale and to give information to the public and to the party whose property has been sold of such fact. It is the register wherein the collector records the fact known to him and done by him, or under his direction, that he has sold the real estate therein described to the county or to the individual purchaser who may have bought at the sale; it is designed to afford evidence of the official act, and in order to be competent evidence and establish the fact recorded therein, it is essential that the entry should

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have been made by the person whose duty it was to do so. In other words, the entry should be made by the party who performed the act recorded. In Greenleaf on Evidence (16th Ed.) vol. 1, § 485, the author says:

"It is deemed essential to the official character of these books that the entries in them be made promptly, or at least without such long delay as to impair their credibility, and that they may be made by the person whose duty it was to make them and in the mode required by law, if any has been prescribed."

In Jones on Evidence, vol. 3, § 509, the same rule is announced.

In the case of Warren v. Bray, 8 B. & C. 813, 108 Eng. Reprint, 1245, the question arose as to the admissibility of a register in evidence for the purpose of establishing the date of birth; the entry not having been made by the minister of the parish at the time the act occurred, but by his successor in office. The court said:

"The register ought not to have been received in evidence. Registers should be made up promptly, and by the person whose duty it is to make them up. The register of baptism in this case purports to bear date the 6th of February, 1776, but it was not made up till June, 1777, and then it was made up not by the person who was minister of the parish at the time of the baptism, or by a person who appeared at that time to have any connection with the parish, but by one who afterwards became the minister of the parish. It must be taken, therefore, that he made this entry after the death of the minister of the parish who was present at this baptism. He was recording a fact, therefore, not within his own knowledge, but one of which he received information from the clerk."

The same facts substantially exist in the present case. Palmer was the treasurer who is supposed to have made the sale, and, if made by him, it was his duty to have recorded the fact. He failed to do so, and left no written memorandum of evidence of any kind of the fact that he had made the sale. His successor in office, without any personal knowledge of the matter whatever, made the record show that a sale had in fact taken place some two years and three months prior to the entry of the record, a fact wholly without his knowledge, and which, if it had occurred, it was the duty of his predecessor to have recorded. De Baca had no authority to make the entry, and the record thus afforded no evidence of the fact that a sale took place, thereby justifying the issuance of the certificate of sale, and the subsequent proceedings wholly failed to show that a sale of the land in question to the county actually was made.

It would lead to manifest injustice and afford ample opportunities for fraud to announce a rule that would justify such a proceeding. The owner of real estate might examine the records in the treasurer's office from time to time and fail to find any record showing that his property had been sold for taxes. After the time had expired for redemption, in case a sale had actually been made, the county treasurer or his successor in office might make up a record, issue a certificate of sale to the county, assign the certificate to a private individual, issue a deed, and take from the landowner his real estate, and he would be without remedy. In Minnesota (Smith v. Lambert, 68 Minn. 313, 71 N. W. 381) it is held that a certificate of sale required to be issued by the county auditor to a purchaser at a sale of forfeited lands to the state is not valid unless executed at the time of sale or within a reasonable time thereafter. Many Minnesota cases will be found collected and discussed in this opinion, all to the same effect.

It is not necessary for us to follow or approve the rule adhered to by the Minnesota courts. If the record of the sale had been made by the county treasurer who made the sale, it is probable that his successor could have legally issued the certificate of sale; but here the succeeding treasurer not only issued the certificate of sale some two and a quarter years after the sale is supposed to have occurred, which would have been invalid under the rule announced by the Minnesota courts, but he made up the record upon which the certificate was issued. We think the court below properly refused to find that a sale in fact had taken place, and for this reason the judgment will be affirmed.

There is another question which should be considered because of the public interest, and that is as to whether the owner of land sold under the law of 1899 has a right to redeem within three years from the date of the sale as provided by that law or whether the right of redemption is governed by chapter 84, Laws 1913. The former act authorizes redemption within three years from the date of sale. The latter act authorizes redemption within three years from the date the certificate of sale is recorded. As the certificate in question was owned by Union county, it is undoubtedly true, as contended by appellee, that the state could pass a retroactive law dealing with such property and the right of redemption. 8 Cyc. 902; 6 Am. & Eng. Ency. of Law, 940; Commissioners v. Lucas, 93 U. S. 108, 23 L. Ed. 822.

The question remains, however, as to whether the Legislature intended that the latter act should apply to certificates of sale theretofore issued to and held by the various counties. Section 38 of the latter act provides that the county shall give to the purchaser a certificate of sale, and that such certificate must be recorded, and that redemption may be made at any time within three years from the date of recording such certificate, or duplicate certificate, provided for in section 36 of said act. The provisions of said section as to what the certificate shall contain, where it shall be recorded, and how

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it can be redeemed apply solely to certificates thereafter issued.

It is our opinion that certificates issued under the 1899 law are controlled by that law. It is only certificates issued by the collector "under section 36" of said act that must be recorded and from which the former owner may redeem within three years from the date of the recording of such certificate. Sections 4100 and 4101 of the Compiled Laws of New Mexico 1897 were in force at the time of the said tax sale and at the time the right of redemption therefrom expired, and these sections were not repealed by the 1913 law. Section 4100 provided for the issuance of a tax deed three years after the date of sale. Section 38, c. 84, Laws 1913, provides:

"Such former owner may at any time, within three years from the date of recording such certificate, or duplicate certificate, provided for in section 36 thereof, redeem the property."

To construe said section 38 as applying to certificates issued under the 1899 law would be to make it conflict with and nullify said section 4100. It is the duty of the court to give force and effect to both sections.

In the case of Crane v. Cox, 18 N. M. 377, 137 Pac. 589, it was held that the act of 1913 should be limited to prospective operation. It is a general rule of law that statutes are to be construed as prospective, and not retrospective, unless constrained to the contrary course by the rigor of the phraseology. 1 Cooley on Taxation, 495. In the case of Smith v. Auditor General, 20 Mich. 398, in an opinion written by Justice Cooley, it was said:

"We do not understand it to be questioned that it was competent for the Legislature to make the general provisions of the act of 1869 apply to the taxes previously assessed and returned, so far as the subsequent proceedings to be taken by the state were concerned, if they had seen fit to do so. The question is whether they have expressed an intention to that effect. Unless the intention distinctly appears, the familiar rule of construction which presumes that legislation is designed to have prospective operation only will require the court to hold that the legislative purpose was that this act should apply only to the taxes subsequently assessed."

In the case of Blakemore v. Cooper, 15 N. D. 5, 106 N. W. 566, 4 L. R. A. (N. S.) 1074, 125 Am. St. Rep. 574, the court cites a great many cases in support of the rule that the repeal or revision of a statute is to have prospective operation only, unless the intent of the Legislature to the contrary clearly appears. There is nothing in the act under consideration which makes it clearly apparent that it was the intention of the Legislature that the redemption feature should apply to sales made under the former statute.

We conclude that said section 38 of the Act of 1913 does not act retrospectively and does not in any way affect or refer to tax certificates issued under the 1899 law, and does not extend or revive the right of redemption on certificates issued under said law.

For the reasons stated, the judgment of the district court will be affirmed; and it is so ordered.

HANNA, C. J., concurs.

PARKER, J. I dissent. The act of 1913 was intended to have a retroactive effect and to govern all cases in regard to the right of redemption.

On Rehearing.

ROBERTS, J. In the original opinion the judgment of the lower court was affirmed on the ground that the evidence failed to establish the fact that a sale of the land in question for delinquent taxes actually occurred. Appellant has filed a motion for rehearing, in which she points out that this was not an issuable fact in the case, because appellee in his answer expressly alleged that the property had been sold for taxes, under which sale and the deed issued thereon appellant was claiming title to the land. The court overlooked this admission in the answer, and the oversight was occasioned by the fact that in this court the case was argued orally on behalf of appellee and was submitted by appellant on briefs. In the oral argument appellee stressed the fact that the evidence failed to show a sale, and upon examining the transcript of evidence we found this contention was correct. It is only fair to appellee, however, to say that there was no intention upon the part of his counsel to mislead the court. His statement was a prelude to a discussion of the effect of the tax sale certificate issued more than two years after the sale, and the failure of the county treasurer to make the required entries on the tax roll and in the tax sale record. The court, in the former opinion, without making an investigation of the pleadings, took it for granted that the answer denied that the property had been sold for taxes, and, as the evidence failed to show a sale, concluded that the judgment of the court, although based on other grounds, could be sustained because of the failure on the part of appellant to show a tax sale. In this we were in error, because, as the answer admitted a sale of the land in question at the time stated in the tax sale certificate and deed, appellant was not required to prove this fact.

"A party who formally and explicitly admits, by his pleading, that which establishes plaintiff's right, will not be suffered to deny its existence or to prove any state of facts inconsistent with that admission." 31 Cyc. 211.

A tax sale upon which the deed in question was based having been admitted in the answer, the failure of the collector to note on the tax roll the fact of the sale or to enter

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the same in the tax sale record or to issue the tax sale certificate is of no moment. These records and the issuance of the tax sale certificate were only record evidence by which the sale could be proved. In the case of Hiltscher v. Jones, 23 N. M. 674, 170 Pac. 884, this court said:

"The tax sale certificate, which, of course, is thereafter issued, is only written evidence or an acknowledgment that the sale has taken place. When the property has been struck off, the rights of the purchaser become fixed."

In that case the court quoted with approval from the case of Bruno v. Madison, 38 Utah, 485, 113 Pac. 1030, Ann. Cas. 1913B, 584, and if the reasoning in that case is applied to the present case, it will be clearly seen that the failure on the part of the treasurer to make the entry and do the acts referred to does not affect the rights of the appellant, under his tax deed; appellee having admitted the fact that the sale took place.

On rehearing the court has reconsidered the question as to whether the owner of lands sold under the law of 1899 (chapter 22, Laws 1899) to the county, the certificate of sale being held by the county at the time of the enactment of chapter 84, Laws 1913, has the right to redeem from such sale under the later statute, or whether the right of redemption is governed by the statute in force at the time of the sale. Under the law of 1899 the owner was authorized to redeem at any time within three years from the date of sale. Under the act of 1913, the owner was permitted to redeem at any time within three years from the date of recording the certificate of sale. The certificate in question in this case was not recorded until 1915, and appellee offered to redeem within three years from the date of the recording of such certificate. The act of 1913 specifically repealed chapter 22, Laws 1899, and contained no saving clause.

[6, 7] Appellant argues that the latter statute could have no application to past sales under which the rights of the parties had become fixed; that tax statutes are given a prospective operation, and in the former opinion the majority of the court agreed with the appellant and held that the later enactment had no application to the certificate in question. Upon a reconsideration of the question, however, we have concluded that we were in error in such construction. The general rule is that, when an act of the Legislature is repealed without a saving clause, it is considered, except as to transactions past and closed, as though it had never existed. Sutherland on Stat. Const. § 282. As between private individuals, when a right has arisen on a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting such right, the repeal of the statute will not affect it, or an action for its enforcement. Sutherland on Stat. Const. § 284. Undoubtedly the repeal of a statute under which a tax sale certificate is acquired by a private individual would not affect the rights of the holder of such certificate. His rights would be governed by the law in force at the time of the purchase, and it would not be competent for the Legislature to enact a statute which would impair such rights; but the Legislature may pass a retroactive law operating on property belonging to the state, and such law will not be unconstitutional so long as private rights are not infringed. 8 Cyc. 902. In 6 A. & E. Ency. of Law, p. 940, it is said:

"The state may constitutionally pass retrospective laws impairing her own rights."

See, also, People v. Frisbie, 26 Cal. 135; State v. Dexter, 10 R. I. 341.

Municipal corporations are mere instrumentalities of the state, for the convenient administration of government, and their powers may be qualified, enlarged, or withdrawn at the pleasure of the Legislature. Property rights which they hold are subject to legislative control, as they are merely agents of the state in the administration of government. Commissioners v. Lucas, 93 U. S. 108, 23 L. Ed. 822.

[8] Where a tax sale certificate is held by a private individual, the purchaser has a vested right to a deed at the time specified in the law under which the purchase was made, and the Legislature cannot subsequently extend the period of redemption, as such extension would be an impairment of the obligation of the contract. 37 Cyc. 1390. But this rule is held not to apply where the state itself is the purchaser at the tax sale, as the extension of the time in that case is not a violation of the contract rights, but an act of grace. Adkin v. Pillen, 136 Mich. 682, 100 N. W. 176; State v. Smith, 36 Minn. 456, 32 N. W. 174. This right has been at times exercised by the Legislature of this state. By the repeal of the act of 1899 by the act of 1913 we thus have this condition as to tax sale certificates purchased under the law of 1899: Those purchased by private individuals by reason of constitutional provisions against the impairment of the obligations of a contract under the 1899 statute would not be affected by its repeal. That the later statute undoubtedly attempted to do so may be admitted, because, as stated, the later act contained no saving clause and completely wiped out all the provisions of the former act. But, by reason of the constitutional provision, such later act could have no effect upon the rights of such private purchaser. Such repeal, however, was not rendered ineffectual by any constitutional inhibition as to tax sale certificates held by the county by purchase under the former act. Consequently it would and did apply to such certificates.

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This being true, we must look to the later act to ascertain the rights of the landowner to redeem from such sale, and we find that he is given three years from the date of recording the certificate of sale. If such certificate had been recorded by the county treasurer at the time it was, or should have been, issued, as required by the act of 1899, of course the owner would have had the right of redemption within three years from such recordation. While the act of 1913 requires the recordation of the assignment of such certificate, the redemption right does not date from the recording of the assignment, but from the recording of the original tax certificate. State ex rel. Ols v. Romero, Treasurer, 181 Pac. 435, not yet officially reported. That the purchaser from the state takes the certificate as it exists at the time of its assignment cannot be questioned.

"Where land is forfeited to the state for nonpayment of taxes, or bid in by the state at a tax sale, its subsequent conveyance to a purchaser from the state will ordinarily invest him with any and all titles which the state holds to the particular property, although he may take subject to conditions subsequent, such as a requirement of notice to the former owner, the nonobservance of which may divest his title, or subject to the right of the original owner, his grantees, or mortgagees to obtain a reconveyance." 37 Cyc. 1473.

"The appellant took his deed for the land [a tax deed] in the same condition in which the state held it, and subject to the same equities and defenses." Martin v. Barbour, 140 U. S. 634, 11 Sup. Ct. 944, 35 L. Ed. 546.

To the same effect are Wilcox v. Leach, 123 N. C. 74, 31 S. E. 374; Felch v. Travis (C. C.) 92 Fed. 210; Shelley v. Towle, 16 Neb. 194, 20 N. W. 25.

Appellant has cited many cases in her brief, but all these are to the effect that the state is powerless to affect the rights of private purchasers under tax sale certificates, and have no application to the question here presented. We hold that the act of 1913 applies to tax sale certificates held by the counties at the time the act became effective, and that such act had the effect to extend the time of redemption to three years from the date of recording the certificate of purchase as to all tax sale certificates held by the various counties at the time such law became effective. In this case the trial court found that the landowner had offered to redeem within three years from the date of recording the certificate of sale, and further held that the act of 1913 applied.

We agree with the trial court, and for this reason the former opinion will be adhered to; and it is so ordered.

PARKER, C. J., and RAYNOLDS, J., concur.

(35 N. M. 290)

STATE ex rel. OLS et al. v. ROMERO, County Treasurer and Collector. (No. 2231.)

(Supreme Court of New Mexico. May 8, 1919. Rehearing Denied June 7, 1919.)

(Syllabus by the Court.)

1. TAXATION ⟸699—TAX SALE—REDEMPTION—STATUTE.

Where the county purchased a tax sale certificate at a tax sale on August 17, 1912, for delinquent taxes for the year 1910, and said certificate was not recorded until June 18, 1913, the statute of 1913 (Laws of 1913, c. 84, §§ 36 and 38) applies to such sale and recording, and the owner of the property has three years from the recording of the certificate to redeem. A tender of taxes by the owner on November 16, 1916, is not within the period allowed by the statute for redemption, following Pace v. Wight, 181 Pac. 430, not yet officially reported

2. TAXATION ⟸742—TAX SALE—CERTIFICATE—SALE AT AUCTION OR PRIVATE SALE—STATUTE.

Where the statute provides (Laws of 1913, c. 84, § 36) that the duplicate certificate of the tax sale which has been purchased by the county shall be sold by the collector, and if it cannot be sold at private sale before the regular sale of property for delinquent taxes in the next succeeding year, then it is to be sold at public auction at such delinquent tax sale, the statute does not thereby limit the method of sale to a sale at public auction after the period specified, but the collector and treasurer may sell it at any time at private sale.

Appeal from District Court, Torrance County; E. L. Medler, Judge.

Mandamus by the State of New Mexico, on the relation of Mrs. Kathleen Ols and another, against Raymundo Romero, as Treasurer and Collector of Torrance County, N. M. Demurrer to complaint overruled, demurrer to answer sustained, judgment for plaintiffs, and defendant appeals. Reversed and remanded, with directions.

On the 27th day of July, 1917, a complaint was filed in the district court of the state of New Mexico within and for the county of Torrance alleging, among other things, that plaintiffs are the owners in fee simple of lots 11 and 12 in block 37 of the Duran, N. M., town site; that on the 17th day of August, 1912, there was due and owing on said property taxes in the sum of $2.90, for which sum the treasurer and collector of Torrance county did on the 17th day of August, 1912, execute a certificate of sale for said lands to the county of Torrance; that on the 16th day of November, 1915, the certificate of sale for said lands was sold to John Ulury for the sum of $2.90; that on the 16th day of November, 1916, plaintiff tendered the amount of taxes due on said real estate, together with penalty and interest on said sum, and

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demanded a certificate of redemption; that the treasurer and collector of Torrance county refused to accept the said sum, and refused to issue plaintiff the certificate of redemption, and still refuses so to do, and praying that a peremptory writ of mandamus issue commanding the said treasurer and collector to accept the taxes, together with all costs and interest due thereon on said lots 11 and 12, block 37, of the Duran town site, and that the said treasurer and collector issue a certificate of redemption for said lands and real estate.

Defendant demurred to the complaint on the ground that more than three years have elapsed between the date of sale of tax certificate and date plaintiff tendered the amount of taxes.

The demurrer was overruled on the 3d day of December, 1917. The defendant then answered that the property was assessed for taxes in 1910 to unknown owners; that on the 17th day of August, 1912, the property was sold to the county of Torrance as appears from tax sale certificate 484; that the said tax sale certificate was recorded on the 18th day of June, 1913, in Book 6, page 74, of the records of tax sale certificates of Torrance county; that on the 16th day of November, 1915, he sold and assigned the said tax sale certificate to John Ulury, and that on the 17th day of November, 1915, said assignment of tax sale certificate 484 to John Ulury was recorded by the treasurer of Torrance county, N. M.; that on the 13th day of July, 1916, the treasurer and collector executed and delivered a tax deed to John Ulury for the said lots.

Plaintiff demurred to the answer on the ground that it does not state a defense to the matters and things set up in the complaint for the reason: (1) That on the 18th day of June, 1913, when tax sale certificate No. 484 was recorded, the recording of said certificate was null and void and of no effect for the reason that chapter 22 of the Laws of 1899 and chapter 134 of the Laws of 1905 were repealed by chapter 84 of the Laws of 1913; (2) that the answer shows that certificate was sold and assigned on the 16th day of November, 1915, and that the assignment of certificate was recorded on November 17, 1915, which was not sufficient, as chapter 84 of the Laws of 1913 requires that the assignment and certificate be recorded, and that the owner have three years from the date of such recording of the tax sale certificate in which to redeem said property by paying to the county treasurer for the use of the purchaser or his assigns, the amount of purchase money with interest, together with the taxes which may have been paid upon the property by the purchaser or his assigns; (3) because the treasurer of Torrance county executed a deed to the purchaser on the 13th day of July, 1916, for lots 11 and 12, block 37, of the Duran town site, eight months from the date the certificate was assigned, when such tax deed could not have been executed and delivered until three years from the 17th day of November, 1915, and that said tax deed is null and void and of no effect.

The demurrer to the answer was sustained; the appellant treasurer refusing to plead further. He was then ordered by the court to accept the amount tendered by the appellee and to issue a certificate of redemption to the appellee. From this judgment the treasurer appealed to this court, and assigns as error the action of the trial court in overruling the appellant's demurrer to plaintiff's complaint and the sustaining of plaintiff's demurrer to the defendant's answer.

H. L. Patton, Atty. Gen., for appellant.

F. Faircloth, of Santa Rosa, for appellees.

RAYNOLDS, J. (after stating the facts as above). [1] The sale of the property in question in this case was made to the county on August 17, 1912, for taxes for the year 1910. The certificate of this sale to the county was not recorded until June 18, 1913. In the meantime chapter 22, Laws of 1899, and chapter 134, Laws of 1905, had been repealed, and the new law, chapter 84, Laws of 1913, had been enacted, providing a method of recording and selling certificates of tax sales. Under the law of 1899 the owner of the property had three years from the date of sale to redeem, and the date of sale was held in Hiltscher v. Jones, 23 N. M. 674, 170 Pac. 884, to be the date on which the property was struck off to the county. And it was further held that the failure to record the certificate had no effect in extending the period of redemption. Since that case was decided the Legislature has enacted a new law in regard to tax sales (Laws of 1913, c. 84), which this court has held in Pace v. Wight (No. 2200) 181 Pac. 430, decided at this term of court, applies to tax sales where the tax certificate has been bought in by the county, as it has been in the present case. The statute, so far as material in this case, is as follows:

"Sec. 36. When any property shall be struck off to the county as aforesaid, it shall be the duty of the collector to sell and assign the duplicate certificate of such sale to any person who will at any time pay the full face value thereof with accrued interest, and if the same cannot be sold at private sale before the regular sale of property for delinquent taxes in the next succeeding year, such certificate shall be sold at public auction at the time of such delinquent tax sale to the highest bidder for cash by the county collector then in office, but in no case shall such certificate of sale be sold for less than the full amount of the taxes and interest due after notice stating the time and place of sale, a brief description of the property, the

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amount due and the name of the person against whom the tax was assessed, or that it was assessed against unknown owners, if such be the case, shall have been published for four consecutive weeks, as provided in section 34 hereof."

"Sec. 38. Upon payment of the amount for which any real estate is sold, the collector shall give to the purchaser a certificate of sale containing a description of the property sold, stating the name of the person or persons to whom the same was assessed or that it was assessed to unknown owners, as the case may be, the amount paid therefor, and that it was sold for taxes, with the date of sale, and that the sale is subject to the right of the owner to redeem the property within three years by paying the amount paid at such sale with interest thereon at the rate of one per cent. per month, which certificate must be recorded in the office of the county clerk in a book kept for the purpose of recording such certificates. Such former owner may at any time, within three years from the date of recording such certificate, or duplicate certificate, provided for in section 36 hereof, redeem the property by paying to the county collector for the use of the purchaser, or his assigns, the amount of purchase money with interest, as aforesaid, together with any taxes which may have been paid upon the property by the purchaser or his assigns, with interest at the same rate, and such former owner may retain possession of the property until the time of redemption has expired."

The certificate of sale in this case was recorded twice. The certificate of sale to the county was recorded June 18, 1913, and the assignment and certificate of sale from the county to Ulury was recorded November 17, 1915. Appellee maintains that the owner may redeem at any time within three years from the recording of the certificate of sale from the county to Ulury, i. e., three years from November 17, 1915, or until November 17, 1918, and that his tender of taxes on November 16, 1916, was within the period allowed for redemption. We do not so construe the law. The statute allowed three years from the recording of the certificate, and the certificate of sale to the county was recorded on June 13, 1913, giving the owner three years, or until June 14, 1916, in which to redeem, and a tender made, as in this case, on November 16, 1916, was made too late. The fact that the assignment and certificate of sale from the county to Ulury was recorded later does not extend the time of redemption to three years from that date. As we construe the statute, the owner was entitled to three years from the recording of the certificate, and such recording meant the first recording, and not a subsequent one. The object of the recording was to give constructive notice, and the law was complied with when this notice was given.

[2] It is also urged that in attempting to sell the certificate to Ulury on November 16, 1915, the treasurer did not comply with the law in regard to such sales, in that he did not sell the certificate at public auction. We hold that the statute does not provide an exclusive method of sale, but by its plain and unambiguous language the treasurer had the right to sell either at private sale or public auction, provided that, when he attempted to sell at public auction, he complied with the statutory requirements as to notice of such public auction.

For the reasons above stated, we believe the trial court erred in allowing appellee to redeem and in ordering appellant to accept the amount tendered and to issue a certificate of redemption, and the case is therefore reversed and remanded, with directions to proceed in accordance with this opinion; and it is so ordered.

PARKER, C. J., and ROBERTS, J., concur.

(42 Nev. 497)

MILLER v. WALSER et al. (No. 2360.)

(Supreme Court of Nevada. June 6, 1919.)

1. APPEAL AND ERROR ⟸719(1) — MATTERS REVIEWABLE—ASSIGNMENTS OF ERROR.

Where an appeal is upon the judgment roll alone no assignment of errors is necessary.

2. APPEAL AND ERROR ⟸544(3) — MATTERS REVIEWABLE—BILL OF EXCEPTIONS.

On an appeal upon the judgment roll alone, where the judgment roll shows that a demurrer to the complaint was presented to the court and discloses a ruling thereon, an order sustaining a demurrer is deemed to have been excepted to, under St. 1915, c. 208, and alleged error in so ruling is not required to be presented by bill of exceptions.

3. APPEAL AND ERROR ⟸939—MATTERS REVIEWABLE — SUFFICIENCY OF TRANSCRIPT—PRESUMPTIONS.

Where a judgment roll contains a demurrer to the complaint, and an amended complaint is in the record, it will be inferred that the demurrer was sustained, and that the original complaint was superseded by the amended complaint, and the absence of the original complaint from the transcript of the record is a mere technical omission, which could have been cured on suggestion of diminution of the record under Supreme Court rule No. 8 (154 Pac. ix), and could not have prejudiced the rights of respondent.

4. APPEAL AND ERROR ⟸628(3)—WAIVER OF RIGHT TO DISMISSAL OF APPEAL.

An objection that transcript of record was not filed within 30 days after appeal had been perfected, in compliance with Supreme Court rule No. 2 (154 Pac. viii) was waived, where, after the transcript was filed, counsel for the parties entered into stipulations in which additional time to serve and file points and authorities was given to counsel for respondent,

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especially where respondent failed to timely move for dismissal.

5. JOINT ADVENTURES ⊂⊃1 — CONSTRUCTION OF AGREEMENT.

Where parties agreed to use their joint efforts to acquire mining property in equal interest and to convey the title thereto to a corporation to be formed by them for the purpose of taking over the property, the acquirement of the claims being the primary purpose of the agreement, there was a contract of joint adventure, consummated when the minds of the parties met and they made mutual promises to contribute certain money and services.

6. JOINT ADVENTURES ⊂⊃1—CONSIDERATION —MUTUAL PROMISES.

A contract of joint adventure is sufficiently supported by a consideration growing out of the mutual promises of the parties.

7. JOINT ADVENTURES ⊂⊃4(1)—MUTUAL DUTY OF MEMBERS—CHARACTER OF RELATION.

Where several parties entered into an agreement to acquire mining property in equal interest and to convey the title thereto to a corporation to be formed by them for the purpose of taking over the claims, one party to furnish certain amount of money and another to examine the claims and ascertain as to whether or not they had any value, the relation created laid upon the one examining the claims a strict duty to deal fairly with the other members, and to give the other members a chance to perform upon having discovered that the claims were of great value, and he could not foreclose their rights to share in the property and profits by advancing the necessary money himself.

8. JOINT ADVENTURES ⊂⊃4(1)—ADVANCES.

Where an agreement was entered into to acquire mining claims in equal interest, one party to furnish money and another party to contribute his services and experience in inspecting the claims, money advanced by the one inspecting the claims to purchase the same, not giving the person who was to contribute the money a chance to participate, will be considered in the nature of a loan to the joint adventure, and for the benefit of all the joint adventurers.

9. JOINT ADVENTURES ⊂⊃5(1)—CONTRACTS—ENFORCEMENT IN EQUITY.

One member to a contract of joint adventure may sue the other at law for a breach of the contract, or he may bring suit in equity for an accounting.

10. TRUSTS ⊂⊃103(1) — IMPLIED TRUST — BREACH OF DUTY BY JOINT ADVENTURER.

Where several persons entered into an agreement to acquire mining property in equal interests, one party to contribute experience and service in inspecting the mining property, a corporation to be formed if he approved the mining property, and the person inspecting the property, in violation of his agreement, withheld from the one agreeing to furnish the money the fact that the property was of great value, appropriating the interest of such person by advancing the purchase price himself, an implied trust resulted as effectually as if the absent member had actually furnished the consideration to purchase the property.

11. LIMITATION OF ACTIONS ⊂⊃39(2)—STATUTE APPLICABLE—BREACH OF CONTRACT.

Action, by one claiming to be member of joint adventure, to establish his interest in the property acquired by the adventure and for an accounting, was founded upon the agreement creating the trust relation between the parties, and therefore governed by the four-year statute of limitation (Rev. Laws, § 4970), and not by the three-year statute applicable to actions based on fraud; an allegation in the complaint, that plaintiff was prevented from complying with his agreement to contribute to the adventure by the concealment by defendants of information, not changing the character of the action to one of fraud, but being a mere excuse for nonperformance by plaintiff.

12. LIMITATION OF ACTIONS ⊂⊃46(6) — CONTRACTS OF JOINT ADVENTURE—VIOLATION—ACCRUAL OF CAUSE OF ACTION.

An action by a party to a contract of joint adventure for a division of property and an accounting of profits accrued upon breach of the contract by the other members.

13. TRUSTS ⊂⊃92½ — IMPLIED TRUST — FRAUDS, STATUTE OF.

Where an implied trust is effectuated by breach of contract, contract on which it was based, notwithstanding it was made for the purpose of acquiring an estate or interest in land, need not be in writing.

14. EQUITY ⊂⊃72(1)—"LACHES"—PREJUDICE FROM DELAY.

Strictly speaking, laches implies more than mere lapse of time in asserting a right, requiring some actual or presumable change of circumstances rendering it inequitable to grant relief.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Laches.]

15. EQUITY ⊂⊃72(1) — LACHES—PREJUDICE—NATURE.

Some of the circumstances, in addition to the lapse of time, which will in equity constitute laches, are destruction of the muniments of title, the death or removal of the parties, the number of innocent purchasers who may be affected, radical changes in the condition or value of the property, and its speculative character.

16. EQUITY ⊂⊃73 — LACHES—LOSS OF EVIDENCE.

Any circumstances tending to obscure the truth of a matter, as a loss of witnesses through the efflux of time, may prompt a court of equity to apply the doctrine of laches.

17. EQUITY ⊂⊃72(1)—LACHES—PREJUDICE.

If it appears that an adverse party has lost any advantage which he might have retained if plaintiff's claim had been asserted with reasonable promptness, or is exposed to any injury through inexcusable delay, a court of equity will not interfere to grant relief to the dilatory claimant.

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18. PLEADING ⟸214(1)—DEMURRER—ADMISSIONS.

On demurrer to the complaint, allegations in the complaint are to be taken as true.

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19. JOINT ADVENTURES ⟸5(1)—ACTION BETWEEN MEMBERS — LACHES — ADVANCES IN VALUE.

Mere fact that mining property has advanced considerably in value should not bar recovery, under the doctrine of laches, by a member of a contract of joint adventure, where the plaintiff was prevented from contributing his share through the fraud and concealment of the other members, and is seeking an accounting.

20. EQUITY ⟸87(2)—LACHES—DELAY SHORT OF PERIOD OF LIMITATIONS.

Where the statute of limitations has not run, strong circumstances must exist to require the application of the doctrine of laches.

21. PLEADING ⟸193(4) — LACHES — DEMURRERS TO COMPLAINT.

On demurrer to complaint, on ground that it shows that plaintiff was guilty of laches, it must appear from averments in complaint that plaintiff was guilty of laches.

Sanders, J., dissenting.

Appeal from District Court, Washoe County; R. C. Stoddard, Judge.

Action by C. N. Miller against Mark Walser and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Wm. Woodburn, of Reno, for appellant.

Cheney, Downer, Price & Hawkins, of Reno, for respondents.

DUCKER, J. In this action the district court sustained respondents' demurrer to the amended complaint. Appellant refused to amend and elected to stand upon the amended complaint. The court entered judgment dismissing the amended complaint and denying the relief sought by appellant in this action. From the judgment and order sustaining the demurrer, this appeal is taken.

The respondents ask that the appeal be dismissed upon the grounds: First, that the transcript of the record was not filed within 30 days after the appeal had been perfected, in pursuance of rule II of the Rules of the Supreme Court (154 Pac. viii); second, that a complete transcript of the record on appeal or a complete transcript of the judgment roll has not been filed in this court; third, that no bill of exceptions has been filed in the action; fourth, that appellant has not assigned, served, or filed any assignment of errors, as prescribed by law.

[1, 2] As the appeal is upon the judgment roll alone, no assignment of errors is necessary. Talbot v. Mack, 41 Nev. 245, 169 Pac. 25. The same is true as to a bill of exceptions. The judgment roll shows that the demurrer to the amended complaint was presented to the court, and discloses the ruling thereon. The order sustaining the demurrer is deemed to have been excepted to. St. 1915, § 321. The alleged error, thus appearing upon the face of the judgment roll, is not required to be incorporated in a bill of exceptions.

[3] The objection presented by the motion to dismiss on the second ground, namely, an incomplete transcript of the record, must be disregarded. This objection is taken to the omission of the original complaint from the judgment roll, which constitutes the record on appeal. The judgment roll contains the demurrer to the complaint. That it was sustained by the court may be inferred from the amended complaint in the record. The original complaint was therefore superseded by the amended pleading, and the absence of the former from the transcript of the record is a mere technical omission, which cannot affect the rights of respondents, and could have been cured on suggestion of diminution of the record, as prescribed by rule VIII of this court (154 Pac. ix). Rule VIII reads:

"Exceptions or objections to the transcript, statement, the undertaking on appeal, notice of appeal, or to its service or proof of service, or any technical exception or objection to the record affecting the right of appellant to be heard on the points of error assigned, which might be cured on suggestion of diminution of the record, must be taken at the first term after the transcript is filed, and must be noted in the written or printed points of the respondent and filed at least one day before the argument, or they will not be regarded."

No exception or objection to the transcript on this ground has been noted in respondents' brief as required by said rule VIII. For the reasons given, the objection will be disregarded. Kirman v. Johnson, 30 Nev. 150, 93 Pac. 500, 96 Pac. 1057.

[4] By the first ground of the motion to dismiss the appeal, it is objected that the transcript of the record was not filed within 30 days after the appeal had been perfected, in compliance with rule II of the Supreme Court, which reads:

"The transcript of the record on appeal shall be filed within thirty (30) days after the appeal has been perfected, and the statement settled, if there be one."

It appears from the record that the appeal from the judgment on demurrer was perfected on August 24, 1918, and that the transcript on appeal was filed on October 7, 1918. Notice of motion to dismiss the appeal was filed on November 30, 1918, and served on counsel for appellant on the preceding day. After the transcript on appeal was filed, counsel for the parties herein entered into

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two stipulations, one of date of October 21, 1918, and the other of date of November 12, 1918, in which additional time to serve and file points and authorities was given to counsel for respondents.

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It is contended by appellant that the effect of these stipulations, and respondents' failure to promptly move for a dismissal under said rule VIII, operate as a waiver of the motion to dismiss the appeal. We think the contention must be admitted. As the extension of time given in the stipulations was for the benefit of counsel for respondents, it may be presumed that they were entered into at their request. By entering into these stipulations, which were made for their accommodation, and by reserving no objection therein as to the time when the transcript on appeal was filed, they recognized the appeal, and their failure to timely move for a dismissal under the rule is an additional reason why a waiver of the objection should be enforced against respondents. The right to move to dismiss an appeal may be waived upon any grounds that are not jurisdictional. Botsford v. Van Riper, 32 Nev. 225, 106 Pac. 440; Henningsen v. T. & G. R. R. Co., 32 Nev. 51, 104 Pac. 223. The motion to dismiss the appeal is denied.

We will consider the appeal on its merits. In substance, it is alleged in the amended complaint (which will hereinafter be alluded to as the complaint) that on or about the 16th day of April, 1913, one R. L. Ray had an option to purchase certain mining claims known as Packard No. 1, Packard No. 2, and Packard Fraction, situated in the Rochester mining district, county of Humboldt, Nev., and represented to appellant and respondents that the said claims were of value; that on the same day all of these parties entered into an oral agreement and joint adventure, promising to use their joint efforts to acquire said claims, and share an equal interest therein, and to thereafter organize a corporation to take over the mining claims and to share equally in the stock issued by said corporation in payment for said claims; that it was agreed that Ray was to contribute to the joint adventure his right to purchase the claims, Margrave his services, knowledge, and experience as a mining engineer, Walser his legal services required to be rendered to the adventure, and appellant the sum of $2,500; that, before appellant was to contribute the said sum, Margrave was to examine the claims, and if, in his opinion, the same were of value and as represented by Ray, Margrave and Walser were to immediately notify appellant at Reno, Nev., to that effect; and that appellant, upon being so notified, was to contribute said sum of $2,500.

It is further alleged that on or about the 17th day of April, 1913, Margrave made an examination of the said mining claims, and, finding them to be of great value and as represented by Ray, informed Walser of the facts; that Walser and Margrave failed, refused, and neglected to notify appellant of these facts, or that Margrave had approved the claims, but, on the contrary, suppressed, concealed, and withheld from appellant this information, thus preventing him from complying with the terms of the agreement as to his contribution to said joint adventure of said sum of $2,500; that appellant, at all times mentioned in the complaint, has been and still is ready and willing to do or perform all things by him to be done or performed under the terms of the agreement.

It is alleged that on or about the 18th day of April, 1913, Margrave made the first payment on the mining claims for and on behalf of the joint adventure composed of himself, Walser, Ray, and appellant, and that thereafter, on or about July 11, 1913, respondents and Ray obtained title to said mining claims for and on behalf of the members of said joint adventure and enterprise, and for the use, benefit, and in trust, share and share alike, for all of the members thereof; that on or about the date last aforesaid, Ray and respondents, for and on behalf of themselves and appellant, organized the Nevada Packard Mines Company, for the purpose of taking over the claims in pursuance of the agreement and joint adventure, and conveyed them to the company, and subsequent to the organization of said company caused to be issued to Ray, Walser, and Margrave, in consideration of the transfer, 750,000 shares of the capital stock of said company, one-fourth thereof to Ray and three-fourths thereof to respondents; that, under the terms of said agreement and joint adventure, Ray, appellant, and respondents were each entitled to one-fourth of said stock, to wit, 187,500 shares; that respondents failed to issue, or cause to be issued and delivered, to appellant said 187,500 shares of stock, but had the same issued and delivered to themselves in equal parts, and have ever since refused and do now refuse to deliver the same to appellant; that the same is of the reasonable value of $93,750.

It is further alleged that respondents have received large sums of money, the exact amount of which is unknown to appellant, as dividends, profits, and emoluments upon said 187,500 shares of stock, and that an accounting will be necessary to determine the amount thereof. In the prayer of the complaint, appellant asks to be declared the owner of the 187,500 shares of stock, and that respondents hold the same in trust for him; that they be required to deliver the same to him, and in case such delivery cannot be made, that he have judgment against them for $93,750, the value thereof; that an accounting be had of the profits or dividends, etc., received by them

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on account of said 187,500 shares of stock, and that appellant have judgment for the same; that restraining order be made and a receiver appointed.

The lower court sustained respondents' demurrer to the amended complaint, holding that it appeared therefrom that appellant had been guilty of laches in instituting his action. This appeal is taken by the appellant, Miller, but by the discussion of counsel for respondents, in their brief and in the oral argument in this court, we are confronted with a proposition resembling a cross-appeal from the order and judgment sustaining respondents' demurrer. They insist that the court erred in that part of the decision holding that the complaint stated a cause of action, if it had not been defeated by the laches of appellant appearing on the face of the complaint. We will consider this phase of the case first.

[5, 6] Counsel contend (1) that no enforceable agreement, from which a resulting trust arises, is stated in the complaint; secondly, that, conceding such an agreement to be stated, the cause of action is barred by the statute of limitation and is within the statute of frauds. We are of the opinion that the district court did not err in ruling on these questions. A joint adventure is established by the allegations of the complaint. It appears therefrom that the parties agreed to use their joint efforts to acquire the mining property in equal interest and to convey the title thereto to a corporation to be formed by them for the purpose of taking over the claims. The acquirement of the claims was the primary purpose of the agreement, and it is founded upon a consideration consisting of the mutual promises of the parties. A contract of joint adventure is sufficiently supported by a consideration growing out of the mutual promises of the parties. 23 Cyc. 454; King v. Barnes, 109 N. Y. 285, 16 N. E. 332; Botsford v. Van Riper, 33 Nev. 190, 110 Pac. 705.

The mutual promises, which formed the consideration of the agreement, and upon which the parties acted in pursuance of the enterprise to obtain title to the property, were, as stated in the complaint, appellant's promise to contribute $2,500, Margrave his services, knowledge, and experience as a mining engineer, Walser his legal services, and Ray his right to purchase the group of claims. The complaint, therefore, states the agreement of the parties; the consideration upon which it was based; the thing that was to be done in pursuance thereof, namely the acquisition of the claims and the interest of each in the subject-matter of the contract. No further averment is required to invest the arrangement alleged with all the elements of a joint adventure.

But it is asserted by counsel for respondents that the averments of the complaint at most show only a contemplated joint adventure which was never launched, so far as appellant was concerned, for the reascon that he did nothing to help the enterprise along and contributed no money for that purpose. We take another view. The joint adventure was consummated when the minds of the parties met and their mutual promises were exchanged. Appellant's agreement to contribute $2,500 and his readiness to fulfill this covenant were the financial factors of the compact, that had as much to do with the acquirement of the claims as Ray's option or Margrave's action in going upon the claims to ascertain their value. The option and the knowledge which Margrave acquired of the value of the claims would have been unavailing without the means to secure them.

[7] Appellant's promise to supply the means was an assurance of financial support arising out of the agreement, and which Margrave carried with him when he went upon the ground, and it cannot be assumed that he would have gone without such assurance. The purported value of the claims, as represented by Ray, and the desire to acquire them, brought the parties together in an agreement that charged Margrave with the duty of investigating the mining claims. When he found them to be of value sufficient in his judgment to warrant the venture, he was in duty bound to report to appellant to enable him to comply with his part of the agreement. The relationship created by the agreement of joint adventure, being fiduciary in its character, laid upon him a strict duty to deal fairly with his correlates with reference to any part of the subject-matter of the agreement intrusted to his supervision. If he had complied with his covenant in this respect, and had informed appellant of the value of the claims, as he did Walser, and appellant had then failed to contribute money in pursuance of his promise, then there would have been a failure of consideration on his part, which would have excluded him from participating in the enterprise. But under the terms of the agreement, as alleged in the complaint, he could not be foreclosed of his right to share in the property and profits of the enterprise without having an opportunity to furnish money, simply because Walser and Margrave failed to keep their covenants with him.

It appears from the averments of the complaint that appellant was at all times ready to keep his part of the agreement and contribute $2,500, but that he was prevented from so doing by the action of Walser and Margrave. A good and sufficient reason is therefore shown why appellant has not carried out his part of the joint adventure, which relieves him from any breach of the contract, by failure of consideration on his

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part. This court in Botsford v. Van Riper, cited supra, has had occasion to emphasize the nature of a trust relationship created by similar facts in the following language:

"We further find that the law is well established that the relation between joint adventurers is fiduciary in its character, and the utmost good faith is required of the trustee, to whom the deal or property may be intrusted, and that such trustee will be held strictly to account to his coadventurers, and that he will not be permitted by reason of the possession of the property or profits, whichever the case may be, to enjoy an unfair advantage, or have any greater rights in the property by reason of the fact that he is in possession of the property or profits as trustee than his coadventurers are entitled to. The mere fact that he is intrusted with the rights of his coadventurers imposes upon him the sacred duty of guarding their rights equally with his own, and he is required to account strictly to his coadventurers, and, if he is recreant to his trust, any rights they may be denied are recoverable."

[8] We know of no equitable principle arising from the facts stated that could justify Margrave, or Walser and Margrave, as the case may be, in canceling the agreement with appellant after it was discovered that the property concerning which they had entered into the agreement, was valuable. That they, or either of them, furnished the money to secure title to the property, could not work a forfeiture of his right. Appellant had not declined to furnish the money, for he had not been informed that any money was required of him to purchase or secure title to the property. Money advanced by them for such purpose would be in the nature of a loan to the joint adventure and for the benefit of all the joint adventurers.

"Money advanced by one party to a joint adventure is held to be a loan to the venture, for which the party is entitled to be reimbursed out of the proceeds of the venture; but, by reason of the advancing of such money, it does not entitle the party so advancing to any superior right as against his coadventurers." Botsford v. Van Riper, and cases cited, reaffirmed in Lind v. Webber, 36 Nev. 623, 134 Pac. 461, 135 Pac. 139, 141 Pac. 458, 50 L. R. A. (N. S.) 1046, Ann. Cas. 1916A, 1202.

Counsel for respondents cited Powell v. Mcguire, 43 Cal. 11, and Hyer v. Richmond Traction Co., 168 U. S. 471, 18 Sup. Ct. 114, 42 L. Ed. 547, to support their contention that an enforceable agreement is not stated in the complaint. It was held in these cases that an agreement to enter into a partnership cannot be enforced in a suit in equity, and that a party will be confined to an action at law for a breach of the contract. In Mann v. Bowen, 85 Ga. 616, 11 S. E. 862, cited in support of the same contention, the court adhered to the rule that an action at law lies for the breach of a contract to form a partnership.

[9] We do not question the rule stated in the cases cited, but it is a rule that is inapplicable to the case at bar, in which the complaint discloses a joint adventure. The principal distinction between a partnership and joint adventure is that in most jurisdictions, where any is regarded as existing, one party may sue the other at law for a breach of the contract; but this right will not preclude a suit in equity for an accounting. 23 Cyc. 453–461. The distinction is recognized by this court in Botsford v. Van Riper, supra, and reaffirmed in Lind v. Webber, 36 Nev. 623, 134 Pac. 461, 50 L. R. A. (N. S.) 1046, Ann. Cas. 1916A, 1202, wherein the court said:

"It is also well settled in law that one party to a joint adventure may sue the other at law for the breach of the contract, or share of the profits or losses, or a contribution for advances made in excess of his share; but the remedy at law does not preclude a suit in equity for an accounting. In this state, under our Code of Procedure, the district court in proper cases may administer both legal and equitable relief."

In Prince v. Lamb, 128 Cal. 120, 60 Pac. 689, also cited by counsel for respondents, specific performance of an alleged "grub stake" agreement was refused upon the statutory grounds of inadequacy of consideration and the unreasonableness of the contract. In the case before us there was no failure of consideration on the part of appellant, or question of its adequacy.

[10] A joint adventure is clearly alleged in the complaint, in which appellant had obligated himself to furnish the purchase price of the claims upon receiving information Margrave had agreed to give if he found the claims to be of sufficient value, and respondents' violation of their agreement in withholding this information, and appropriating appellant's stock, worked an implied trust as effectually as if appellant had actually furnished the consideration to purchase the property.

[11] Respondents insist that this action is founded upon the fraud alleged in the complaint, and is therefore barred by the three-year limitation of the statute in actions for relief on the ground of fraud. We think they are mistaken in this contention. That clause of the statute applies to actions which have their inception in fraud, and under no circumstances could be applied to a case like the one under consideration, which would not be maintainable at all, were it not for the fiduciary relationship created by the contract. Fraud is not the basis of the action. It is founded upon the agreement which created the trust relation.

True, it is alleged in the complaint that Walser and Margrave failed, refused, and neglected to notify appellant that the property was of great value and as represented by Ray, and had been approved by Margrave, and that he and Walser suppressed,

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concealed, and withheld from appellant this information, and thus prevented him from complying with the terms of the agreement and to his contribution to the joint adventure; but it is plain, from a consideration of the entire complaint, that this allegation was made to show why appellant had not contributed the sum of $2,500, as stipulated in the oral agreement, and not as the ground of action. It is a mere incident, and not the gravamen of the action. 19 Am. & Eng. Encyc. of Law (2d Ed.) p. 247.

The cause of action would be complete without the allegation of fraud, if it had been alleged that appellant had contributed the money. His excuse for nonperformance, while involving fraud on the part of Walser and Margrave, is, in effect, equivalent to an allegation of actual performance of his covenant. 9 Cyc. 724.

The case of Lang Syne M. Co. v. Ross, 20 Nev. 127, 18 Pac. 358, 19 Am. St. Rep. 337, cited by respondents to sustain their contention that the statute of three-year limitation applies in this case, is not in point. An examination of the facts of the case reveals that the cause of action alleged had its inception in fraud. In Kelley v. Boettcher, 85 Fed. 55, 29 C. C. A. 14, also referred to, false representations were made to complainants to induce them to make the conveyance. The cause of action was based on fraud and grew out of no contractual relations.

[12] In the case at bar the cause of action accrued upon respondents' breach of duty in preventing appellant from performing his contract, and excluding him from his share of the stock of the corporation, and was commenced within less than 4 years from its accrual. We think it is maintainable by reason of section 4970 of the Revised Laws of Nevada, which provides:

"An action for relief, not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued."

White v. Sheldon, 4 Nev. 280, seems to be closely in point. In that case (without going into a detail of the facts) a trust relation was created by reason of a parol agreement. The court held that the cause of action accrued when the defendant, who had succeeded one Johnson as trustee at request of plaintiff, the cestui que trust, conveyed the trust property to another party. In applying the statute of limitations, the court said:

"Thus a period of less than four years elapsed between the conveyance of Sheldon and the bringing of this action, and the plaintiff's right would not be barred by a lapse of time short of four years, for this form of action is governed by the eighteenth section of our act of limitations. None of the other sections * * * seem to cover cases of this kind."

The section referred to is section 4970 of the Revised Laws. It is true, in White v. Sheldon, the element of fraud did not enter into the transaction, but neither did it enter into the transaction under consideration, except to excuse the nonperformance on the part of appellant by reason of respondents' alleged breach of duty in withholding information as to the value of the claims, and in appropriating appellant's interest in the stock of the corporation. While the facts in the case at bar are somewhat different from White v. Sheldon, the principle involved is the same, and the same statute of limitations applies. In each case it was the understanding between the parties which gave the right of action, and a breach of duty imposed by agreement, which caused it to accrue.

[13] Under our view of the action stated in the complaint, the contention that the oral agreement alleged is within the statute of frauds, for the reason that it was to acquire an estate or interest in lands, cannot be upheld. It is well established that, where an implied trust is effectuated, the contract on which it was based, notwithstanding it was made for the purpose of acquiring an estate or interest in lands, need not be in writing. Levy v. Ryland, 32 Nev. 460, 109 Pac. 905; Hornsilver Cases, 35 Nev. 447, 464, 130 Pac. 760, 764, 134 Pac. 448, 449.

The trial court sustained the demurrer to the complaint, and it appears from the written opinion of the court that the laches of the appellant in instituting the action, apparent from the allegations of the complaint, was the ground of the ruling. As we read the opinion, the court held that, because a period of nearly 4 years had elapsed from the time appellant, if he had acted with ordinary prudence, should have discovered that respondents intended to disregard his rights, he was guilty of laches, and therefore debarred from maintaining this action. This was error, and as there is no averment in the complaint sufficient to make the ruling right, though the reasons given for it are wrong, the decision of the trial court, sustaining the demurrer and entering judgment thereon, must be reversed.

[14] Strictly speaking, laches implies more than mere lapse of time in asserting a right; it requires some actual or presumable change of circumstances rendering it inequitable to grant relief. 16 Cyc. 152. Notwithstanding some courts have applied this doctrine without any intervening element of estoppel, where an unreasonable length of time has elapsed, the rule that lapse of time alone will not constitute laches may be said to be well settled. Something must occur in the meantime in relation to the property or parties, to make it inequitable to enforce the late demand.

Chief Justice Fuller, in delivering the opinion of the court in O'Brien v. Wheelock, 184 U. S. 493, 22 Sup. Ct. 370, 46 L. Ed. 636, said:

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"The doctrine of courts of equity to withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time is thoroughly settled. Its application depends on the circumstances of the particular case. It is not a mere matter of the lapse of time, but of change of situation during neglectful repose, rendering it inequitable to afford relief."

And again in 10 Ruling Case Law, 396:

"While statements are to be found in some of the cases intimating that unreasonable delay, and mere lapse of time, independently of any statute of limitations, constitute a defense in a court of equity, the generally accepted doctrine appears to be that laches is not, like limitation, a mere matter of time, but is principally a question of the inequity of permitting a claim to be enforced; this inequity being founded on some change in the condition or relation of the property or parties."

"Mere lapse of time, not extending beyond the period fixed in the statute of limitations for the commencement of the suit, constitutes no bar to the action." Lang Syne M. Co. v. Ross, 20 Nev. 140, 18 Pac. 358, 19 Am. St. Rep. 337.

It is unprofitable to collect and cite authorities to sustain a doctrine so generally recognized by the courts.

[15] Some of the circumstances, in addition to the lapse of time, which will in equity constitute laches, are:

"The destruction of the muniments of title, the death or removal of parties, the number of innocent purchasers who may be affected, radical changes in the condition and value of the property, and its speculative character." Kelley v. Boettcher, 85 Fed. 55, 29 C. C. A. 14.

[16, 17] Any circumstances tending to obscure the truth of the matter, as the loss of witnesses through the efflux of time, may prompt a court of equity to apply the doctrine of laches. In fact, if it appears that the adverse party has lost any advantage he might have retained if the claim had been asserted with reasonable promptness, or exposed to any injury through inexcusable delay, a court of equity will not interfere to give relief to the dilatory claimant. Every case must depend upon its own peculiar circumstances.

[18] To invoke a doctrine of laches in this action sufficient averments must appear in the complaint to warrant it. A case must be made out from the complaint, and for the purposes of this decision its allegations are to be taken as true. We concur with the learned trial judge in his conclusion that, if appellant—

"had acted as an ordinarily prudent person, he could have learned in July, 1913, of the incorporation of the Nevada Packard Mines Company, and other facts which would have at least put him upon his inquiry."

Under the facts stated in the complaint, knowledge of the fact that respondents had denied his rights in the property, is imputed to him in July, 1913, when respondents organized the corporation and caused the capital stock of the company to be issued to themselves in consideration of the transfer of the claims to the company. There then appears from the complaint a lapse of time of about 3 years and 9 months from the time appellant is chargeable with knowledge that Walser and Margrave had violated their agreement, until he commenced this action on April 13, 1917, during which he asserted no claim.

[19] Aside from this lapse of time, what other element partaking of the nature of estoppel affirmatively appears from the complaint? Respondents contend that there was an enormous increase in the value of the property from mining claims that could have been purchased in April, 1913, for the sum of less than $2,500, to capital stock of the company, one-fourth of which was worth $93,750. This is hardly a conservative statement of what the complaint shows as to increase in value of the property. It fairly appears from the allegations of the complaint that the parties expected to purchase the claims for $2,500. It is also alleged that Margrave found the claims to be of great value. But, conceding that the property had advanced considerably in value, even under the rule that the doctrine of laches is peculiarly applicable in cases involving mining transactions, this fact alone will not bar a recovery.

"If property has been acquired by fraud, or in utter disregard of the rights of others, and such property subsequently becomes of great value, the person defrauded would not for that reason alone be debarred from recovering possession, even though he reaped an increment entirely disproportionate to any efforts put forth by himself." Gamble v. Hanchett, 34 Nev. 351, 126 Pac. 111.

But they say that appellant awaited the event for nearly 4 years, and, when he found that the property had increased enormously in value, now seeks to come in and share an unearned increment and deprive respondents of the fruits of their energy and enterprise. Whatever may be the actual facts of the case, it does not affirmatively appear, from the averments of the complaint, that appellant was lying in wait for favorable developments of the property to begin this action, and we cannot import such an allegation into the complaint by way of inference from other facts stated therein. As stated by the court in Lang Syne M. Co. v. Ross, supra:

"It does not affirmatively appear upon the face of the complaint in this action that, at the time of the discovery of the fraud, the plaintiff considered that the property was worthless; that it kept silent, waiting for the defendant, Ross to develop the mine; and that then, after the value of the mine had been established by his labor, expense, and hazard, the plaintiff commenced this action 'to rob him of the fruits of his industry and enterprise.' It may be that,

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upon issues of fact and proofs made upon the trial, such a state of facts may be presented. But our decision upon the questions * * * raised by the demurrer must be governed solely by the sufficiency of the allegations of the complaint. We have no right to anticipate what the evidence will be."

Aside from the increase in value of the mining property, the amount of which, whether great or small, is uncertain, no other element partaking of the nature of estoppel is presented by the pleading. Whether the increase in value is due to unusual efforts and expenditures on the part of plaintiff, or in a large measure as the natural result of a rich mine, is entirely speculative, so far as the complaint is concerned.

No loss of evidence, rights of innocent purchasers, change in relation to the parties or property, or great expenditures in the improvements thereof, or the like circumstances, which in conjunction with the lapse of time, often constitute laches, appear in the complaint, and, as observed in the foregoing case, we have no right now to anticipate the appearance of any in the pleadings or proof.

[20, 21] Besides, the statute of limitations has not run, and by reason thereof strong circumstances must exist to require the application of the doctrine of laches. The burden is on the respondents to show from suitable averments in the complaint that such circumstances exist. Kelley v. Boettcher, 85 Fed. 55, 29 C. C. A. 14.

The judgment of the district court is reversed, and the cause remanded. A reasonable time will be designated by the district court for the respondents to answer the complaint.

COLEMAN, C. J., concurs.

SANDERS, J. (dissenting). The agreement in question is made the subject of the action, and its violation the cause. The respondents are trustees ex maleficio. Pomeroy, Contracts, p. 207; Bispham, Prs. of Eq. § 92; 2 Pom. Eq. Jur. §§ 1053-1055; 1 Story's Eq. Jur. 187; Perry, Trusts, § 106. Therefore subdivision 4 of section 4967 of the Revised Laws covers the case made by the complaint.

The judgment upon this ground should be affirmed.

(54 Utah, 244)

STEED v. STEED. (No. 3330.)

(Supreme Court of Utah. April 2, 1919. Rehearing Denied May 14, 1919.)

1. DIVORCE ⟸130—EXTREME CRUELTY JUSTIFYING DECREE—EVIDENCE.

Finding of trial court that acts of cruelty of defendant wife complained of were the irresponsible acts of an insane mind *held* not so clearly against the weight of the evidence as to justify the Supreme Court in substituting another finding therefor, in view of Comp. Laws 1917, § 2995, subd. 8, according plaintiff a complete remedy.

2. DIVORCE ⟸43—INSANE PERSONS ⟸87—DEFENSES—INSANITY.

Divorce may be had from an insane defendant for a cause of action which accrued during defendant's sanity.

3. APPEAL AND ERROR ⟸1010(1)—FINDINGS—REVIEW.

In a law case the Supreme Court is bound by the trial court's finding where there is any substantial evidence in support thereof.

4. APPEAL AND ERROR ⟸1009(4)—FINDINGS—REVIEW IN EQUITY CASES.

In equity cases plaintiff is entitled to the judgment of the Supreme Court on the evidence, and, if trial court's finding is clearly against the evidence, it is the duty of the Supreme Court to make or direct findings in accordance with the evidence.

5. DIVORCE ⟸154 — DISCRETION OF CHANCELLOR.

While ordinarily, if the complaining party makes out a case under the statute, the court should grant a divorce, yet there may be conditions and circumstances under which the chancellor should exercise a sound discretion in granting or withholding relief and in determining the extent thereof.

Appeal from District Court, Davis County; A. E. Pratt, Judge.

Action by Ezra V. Steed against Hilda L. Steed. Judgment dismissing the complaint, and plaintiff appeals. Affirmed.

King, Braffet & Shulder, of Salt Lake City, for appellant.

Hancock & Barnes, of Salt Lake City, for respondent.

FRICK, J. In April, 1918, plaintiff commenced this action in the district court of Davis county against the defendant to obtain a divorce from her. Two causes of action are stated in the complaint. The second cause of action was, however, abandoned at the trial, and will receive no further notice. In the first cause of action the plaintiff alleged that he and defendant were married in 1906, that a child was born as the fruit of such marriage which then had attained the age of six years, and further alleged numerous and various acts of extreme cruelty covering a period commencing in February, 1907, and continuing up to the year 1911. It is not necessary to here set forth the various and numerous acts of cruelty alleged in the complaint. Plaintiff further alleged that on December 17, 1914, the defendant was duly adjudged insane, and that since that time she has been, and continues to be, confined in

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the state mental hospital for the insane, and that she is permanently and incurably insane. In connection with the filing of the complaint an application was also made to the district court for the appointment of a guardian ad litem for the defendant as an incompetent person. The court duly appointed a guardian ad litem who employed counsel to represent the defendant in the action. Counsel, in due time, prepared and filed an answer for the guardian ad litem in which the marriage of the respective parties and the birth of one child then living is admitted, while all the other allegations contained in the complaint are denied.

Upon these issues a trial followed, and, after finding the necessary jurisdictional facts and the birth of the child, the court found that the defendant had been guilty of various and numerous acts of extreme cruelty toward the plaintiff during the time alleged in the complaint. It is sufficient to say in that regard that the acts of cruelty found by the court are numerous, extreme, and unjustifiable. The court also found as follows:

"(6) That on the 17th day of December, 1914, the defendant was duly and regularly adjudicated by the constituted authorities of Weber county, state of Utah, to be insane, and on said date was committed to the State Mental Hospital at Provo, in Utah county, state of Utah, where she still is confined; that her insanity is incurable.

"(7) That at the time of the assaults upon the plaintiff and misconduct of the defendant hereinbefore mentioned the defendant was insane, and for some time prior thereto and ever since has been insane, and the alleged acts of cruelty so committed by the defendant were due to the mental condition of the defendant aforesaid and were the irresponsible acts of an insane mind; nevertheless they caused the plaintiff great mental distress and some bodily pain and injury."

As a conclusion of law the court found "that the plaintiff is not entitled to a divorce from the defendant" and entered judgment dismissing the complaint.

We remark that the conclusion of law and judgment are based entirely upon finding 7 aforesaid, and not upon any laches or fault on the part of plaintiff.

The plaintiff appeals from the judgment, and insists that finding 7 is not supported by the evidence, and that the court erred in making the conclusion of law, in not granting plaintiff a decree of divorce, and in dismissing the complaint.

[1, 2] Counsel vigorously assail finding 7, which we have hereinbefore copied in full. They insist that the evidence is conclusive that at least to and including the year 1910 the plaintiff was sane and morally and mentally responsible for all of her acts of cruelty toward the plaintiff. They further contend that there is no evidence to the contrary. The guardian ad litem produced no evidence at the trial. In addition to the testimony by the plaintiff in support of his charges of cruelty from lay witnesses, he also produced medical experts who testified to the physical and mental condition of the defendant. A physician called by plaintiff, who was personally acquainted with the defendant, in substance testified that she for years had been afflicted with epilepsy; that, as the doctor put it, "the nature of her disease is the physic type of mania"; that the disease was progressive; and that prior to the time that she was adjudged insane (December, 1914) she had many lucid intervals. Indeed, the doctor testified that in his judgment she was sane prior to that time; that the nature of the disease she was afflicted with was incurable; that her mental condition as well as her physical and nervous ailments were constantly progressing; and that at the time of trial she was hopelessly and incurably insane. To that effect also is the testimony of the other medical expert who testified on behalf of the plaintiff. There was also testimony that there was insanity in defendant's family on her father's side, and that she was a confirmed epileptic. Plaintiff's counsel, however, insists that under the evidence no other finding than that the defendant was sane at the time she committed the acts of cruelty is justified. They further insist that, in view of that fact, the conclusion of law to which we have referred and the judgment dismissing the complaint cannot be upheld. It is insisted that under the facts and the law applicable thereto the plaintiff is entitled to a decree of divorce. Counsel cite and rely on the following cases: Huston v. Huston, 150 Ky. 353, 150 S. W. 386; Thomason v. Thomason, 142 Ky. 176, 134 S. W. 161; Andrews v. Andrews, 120 Ky. 718, 87 S. W. 1080, 90 S. W. 581; Lewis v. Lewis (Okl.) 158 Pac. 368; Harrigan v. Harrigan, 135 Cal. 397, 67 Pac. 506, 87 Am. St. Rep. 118; Fisher v. Fisher, 54 W. Va. 146, 46 S. E. 118, 1 Ann. Cas. 251; Douglass v. Douglass, 31 Iowa, 421; Rathbun v. Rathbun, 40 How. Prac. (N. Y.) 328. They also cite 2 Bishop, Marriage, Divorce, and Separation, § 518.

In Huston v. Huston, supra, the Supreme Court of Kentucky said:

"While it is true that neither a wife nor a husband may obtain a divorce from the other on the ground of insanity, or for acts committed during such insanity (Pile v. Pile, 94 Ky. 308 [22 S. W. 215]), it is, as claimed by counsel for appellant, the well-settled law of this state that a divorce may be obtained for acts occurring prior to the insanity and constituting cause for divorce, and that the mere subsequent insanity of the defendant will not defeat plaintiff's right to a divorce, if it existed when the defendant became insane."

In Harrigan v. Harrigan, supra, the Supreme Court of California held "that divorce may be had from an insane defendant

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for a cause of action which accrued during the sanity of the defendant." All of the other cases cited fully support the law as it is stated in the excerpts quoted from the cases from Kentucky and California.

In 2 Bishop, Marriage, Divorce, and Separation, the author, in section 518, says:

"Divorce being a civil proceeding, and it being established practice in the civil department of our law to maintain suits against insane parties the same as against sane ones, there can be no just ground for excepting divorce cases. Both in reason and authority insanity may excuse an act otherwise unlawful, but where it does not it is no defense against the injured person's claim for redress. To deny the law's justice to the sane one because of the other's insanity would be to cast in part on the former the burden which God had laid wholly on the latter. Divorce, where there is cause for it, is the plaintiff's right. If the defendant were sane, he could not prevent it; he has no election. Therefore it is not otherwise when he is insane."

It is not necessary to multiply cases or authorities, since counsel for the guardian ad litem concede that the excerpts we have quoted above correctly reflect the law, and that, if plaintiff's counsel are right in the contention that finding 7 is not supported by the evidence, plaintiff should have been granted the relief prayed for in his complaint. They contend, however—and the district court, it seems, agreed with the contention—that if the evidence is considered as a whole, then finding No. 7 is not only justified, but is the only legitimate conclusion to be deduced from all the facts and circumstances before the court. In that connection they assert that very many of the acts of cruelty testified to by the several witnesses are of such a character, that is, were so cruel, so wicked, and so unjustifiable, that no other conclusion is permissible than that they were the manifestations of an insane and disordered mind; in other words, that in view of the conditions and acts described by the witnesses, it is manifest that defendant's conduct and acts could only be the result of a greatly diseased and disordered mind. While counsel for the guardian ad litem have referred us to no court decisions, they have copiously quoted from Peterson & Haines' text-book on Legal Medicine and Toxicology, from Spratling, Epilepsy and Its Treatment, and from Savage's Dictionary of Psychological Medicine, all of which authorities may be said to, at least in a large measure, support counsel's contention.

[3-5] If this were a law case, and there were any substantial evidence in support of the court's finding, we under the uniform holdings of this court, would be bound thereby. This is an equity case, however, and plaintiff is entitled to our judgment on the evidence. If, therefore, the court's finding is clearly against the evidence, it is our duty to make or to direct findings in accordance with the evidence. This, it must be remembered, however, is a divorce proceeding in which the state or society is interested. In such cases the welfare of one or the other of the parties to the proceeding, as well as that of innocent children, may be, and usually is, involved. While ordinarily, if the complaining party makes out a case under the statute, the court should grant a divorce, yet there may be conditions and circumstances under which the chancellor should exercise at least a sound discretion in granting or withholding relief and in determining the extent thereof. Under such conditions the facts and circumstances of the particular case should be permitted to control the chancellor's conclusions. The case at bar in some of its features may be said to be unique, if not in a class by itself. In view of that fact we have had some difficulty in determining the nature, character, and extent of the relief that should be granted in this case, if any. While, if we were controlled by what appears from the face of the record, we should feel inclined to reverse the judgment and to grant plaintiff the relief he seeks, yet in this, as in most cases, there are many things that transpire at the trial which cannot be correctly reflected in cold print. Moreover, in this case our statute (Comp. Laws 1917, § 2995, subd. 8) affords the plaintiff a full and complete remedy by commencing an action under the provisions of that section. In such an action the state will be represented by the county attorney and the defendant by a guardian ad litem, and the best interests of the insane spouse, as well as that of all interested in the controversy, can be safeguarded and preserved. We have therefore, with some reluctance and with much hesitation, arrived at the conclusion that in view of all the facts and circumstances appearing in this case, the finding of fact which is complained of is not so clearly against the evidence as to necessarily require us to substitute another finding therefor. Nor, in view of all the facts and circumstances, are the conclusions of law and judgment so clearly wrong as to authorize us to set them aside in a case of this kind. We feel constrained to hold that the district court had a right to exercise some discretion in the matter, and that it exercised that discretion wisely. Were it not for the humane provisions of section 2995 aforesaid, under which complete justice may be done without invading or disregarding the rights and best interests of all concerned in this most unfortunate family drama, we should long hesitate before affirming the judgment. In view, however, of what has been said, we do not feel justified in reversing the judgment, and hence it should be, and accordingly is, affirmed.

CORFMAN, C. J., and WEBER, GIDEON, and THURMAN, JJ., concur.

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(54 Utah, 443)

CHADWICK v. BENEFICIAL LIFE INS. CO. (No. 3333.)

(Supreme Court of Utah. May 8, 1919.)

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1. EVIDENCE ⟸222(2)—ADMISSIONS—ACTION ON LIFE POLICY.

In beneficiary's action on life policy, where insured sought to avoid policy upon ground of false statements by insured in application as to his health and consultation with physicians, evidence of admissions by beneficiary as to husband's health and consultation with physicians was admissible.

2. WITNESSES ⟸211(1)—CONFIDENTIAL RELATIONS—PHYSICIAN AND PATIENT.

Comp. Laws 1917, § 7124, subd. 4, prohibiting physicians from testifying to information acquired attending patient which was necessary to enable him to prescribe or act for patient, without patient's consent, does not preclude physician from testifying merely as to fact of having been consulted.

3. WITNESSES ⟸211(2)—CONFIDENTIAL RELATIONS—PHYSICIANS—AUTOPSY.

Physician's testimony as to result of an autopsy is not incompetent, under Comp. Laws 1917, § 7124, subd. 4, prohibiting physicians from testifying without consent of patient, as to information acquired in attending patient necessary to enable him to prescribe or act for patient.

4. WITNESSES ⟸208(1)—PRIVILEGED COMMUNICATIONS—PHYSICIAN AND PATIENT.

Claim of privilege under Comp. Laws 1917, § 7124, subd. 4, prohibiting physician from testifying to information acquired in attending patient, which was necessary to enable him to prescribe or act for patient without patient's consent, must be brought within clear meaning and spirit of the statute, being a statutory privilege not existing at common law.

5. TRIAL ⟸139(1)—DIRECTED VERDICT.

If there is any testimony which the jury, as a matter of law, should consider in order to determine the question of liability, the court has no right to direct a verdict.

6. INSURANCE ⟸646(3)—LIFE INSURANCE—MISREPRESENTATIONS—BURDEN OF PROOF.

In action on life policy, defended on ground that insured in his application misrepresented condition of his health, insurer has burden of proving that answers were not only untrue, but that insured knew or should have known them to be untrue.

7. EVIDENCE ⟸155(1)—WHOLE OF CONVERSATION.

In action on life policy, defended on ground of false statements by insured in his application as to his condition of health and consultation of physicians, statements by beneficiary to insurer's agents, following death of insured, that questions shown by application had not been asked insured, and that insured had not made the answers appearing therein, were admissible, being part of a conversation between plaintiff and defendant's witnesses, which conversation was solicited by them.

8. INSURANCE ⟸655(2)—LIFE POLICY—DEFENSES.

In action on life policy, defended on ground that insured had made false statements in answer to questions in application as to condition of health and consultation of physician, plaintiff could prove that no such questions were asked or answers made.

9. INSURANCE ⟸256(2)—LIFE INSURANCE—FALSITY OF REPRESENTATIONS.

In view of Comp. Laws 1917, § 1154, subd. 3, false statements and answers of insured will avoid policy only if insured knew, or should have known, that statements were false.

10. TRIAL ⟸139(1)—JURY QUESTION.

The probative force of evidence is for the jury.

11. INSURANCE ⟸668(7)—LIFE INSURANCE—FALSITY OF REPRESENTATIONS—JURY QUESTION.

In action on life policy involving issue of whether insured knew, or had reason to believe, that he was afflicted with a disease which tended to prejudicially injure his health and impair his longevity, at the time of making his application, wherein he represented himself to be in good health, evidence *held* sufficient to take case to jury.

Appeal from District Court, Weber County; J. D. Call, Judge.

Action by Maud Chadwick against the Beneficial Life Insurance Company. Judgment for defendant on a directed verdict, and plaintiff appeals. Reversed with directions.

A. G. Horn, of Ogden, for appellant.

Young & Young, of Salt Lake City, for respondent.

THURMAN, J. Plaintiff is the widow of J. Charles Chadwick, deceased, and beneficiary of a policy of insurance on his life. She brought this action to recover from defendant the amount of the insurance in the sum of $2,000. The complaint is in the usual form. The answer of the defendant admits the allegations of the complaint, but in substance alleges that the deceased in his application for insurance made certain false and fraudulent statements and answers to questions propounded to him by the medical examiner at the time deceased made his application, and for this reason defendant prays that the action be dismissed.

The case was tried to a jury. The court directed a verdict for the defendant and judgment was entered thereon. Plaintiff appeals. The errors assigned are the admission of certain evidence over plaintiff's objection, and the order of the court directing a verdict.

The application for insurance purports to contain the following questions by the examiner, and answers of deceased:

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"Q. Give name and address of physician last consulted. A. None. Q. Are you in good health as far as you know or believe? A. Yes."

During the course of the trial defendant offered in evidence the testimony of two witnesses, agents employed in its service, as to certain statements alleged to have been made by plaintiff to them shortly after the death of deceased. The statements related to the health of the deceased previous to the issuance of the policy, and also as to whether defendant was liable in view of the questions and answers above quoted. Plaintiff objected to the testimony on the grounds that it was irrelevant, incompetent, and improper and in particular that it was not competent testimony on the question of fraud. The objection was overruled. Exception was taken to the testimony of each witness, but as their testimony is substantially the same the exceptions will be treated as one, and simultaneously disposed of. The substance of the testimony, as far as the same is material here, shows that these witnesses, Romney and Boothe, visited plaintiff at Afton, Wyo., the town in which she resided, shortly after her husband's death, and solicited and procured an interview with her in the presence of her mother and a brother of deceased. The conversation related to the condition of her husband's health for two or three months next previous to his application for the policy, and also as to whether he had consulted a physician during the same period of time. It appears from the testimony that deceased had consulted one or more physicians during the time referred to, and had been treated by them for a pain in his back supposed to be rheumatism. The testimony further shows that plaintiff stated in the conversation that her husband had been a big, strong, and vigorous man until March of that year (1916), and that he had then begun to complain of pains in his back that interfered with the performance of his manual labor. He consulted a physician, Dr. Reese, who diagnosed the case and thought it was rheumatism. Other statements purporting to have been made by her appear in the testimony, but for the purpose of disposing of this exception the above is sufficient.

[1] As the plaintiff is the beneficiary of the policy and entitled to the exclusive enjoyment of the benefits that may be derived therefrom, any admissions made by her as to the health of her husband and his consultation with physicians, under the issues presented, were clearly admissible. The objection to the testimony was properly overruled.

[2] Dr. Byron Reese, the defendant's physician at Afton, was sworn as a witness for defendant, and asked as to whether he had been consulted by deceased prior to his application for insurance and answered, "Yes." He was then asked if he had been consulted on more than one occasion and over the objection of plaintiff was permitted to answer that he had. The ground of the objection was that the witness was prohibited by statute from answering. Comp. Laws Utah, 1917, § 7124, subd. 4, prohibits physicians, without the consent of their patients, from testifying in a civil action as to any information acquired in attending a patient which was necessary to enable him to prescribe or act for the patient. The question asked did not call for the disclosure of such information, but was limited entirely to the fact as to whether he had been consulted by deceased. It was not within the statute, and under the issues the testimony was properly admitted.

Respondent cites the following cases: Deutschmann v. Third Ave. Ry. Co., 87 App. Div. 503, 84 N. Y. Supp. 887; Becker v. Metropolitan Life Ins. Co., 99 App. Div. 5, 90 N. Y. Supp. 1007; Patten v. United Life & Acc. Ins. Ass'n, 133 N. Y. 450, 31 N. E. 342; Nelson v. Nederland Life Ins. Co., 110 Iowa, 600, 81 N. W. 807; Rhode v. Metropolitan Life Ins. Co., 129 Mich. 112, 88 N. W. 400; Briesenmeister v. Knights of Pythias, 81 Mich. 525, 45 N. W. 977; Cooley v. Foltz, 85 Mich. 47, 48 N. W. 176; Brown v. Metropolitan Life Ins. Co., 65 Mich. 306, 32 N. W. 610, 8 Am. St. Rep. 894; Sovereign Camp, Woodmen of World, v. Grandon, 64 Neb. 39, 89 N. W. 448; Price v. Standard Life Ins. Co., 90 Minn. 264, 95 N. W. 1118; 3 Cooley's Briefs on Insurance, 2168; 40 Cyc. 2386; 23 Am. & Eng. Ency. Law, 87; Chamberlayne, Ev. 5306, 5307; Wigmore, Ev. § 2384.

[3, 4] The same witness later in his examination, against the objection of plaintiff, was permitted to testify that he performed an autopsy on the body of the deceased a day or two after his death, and found that he had died of tuberculosis of the spine. He testified also as an expert, in substance, that the disease and conditions were such that the deceased would know he was not in good health for 2½ months before his death. As the policy was applied for about the last of May and the deceased died on the 13th of August next following, this testimony was elicited manifestly for the purpose of showing that the deceased must have known he was afflicted with disease when he applied for insurance. The statute above referred to was invoked and relied on in support of this objection. The grounds of the objection, in our opinion, are untenable from every point of view. The privilege claimed does not exist at common law. It was conferred by statute. In order to be available the claim of privilege must be brought within the clear meaning and spirit of the statute. Just how information acquired by means of an autopsy can be said to have been acquired to enable the

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physician to prescribe or act for the patient presents to our minds an insoluble question. When the patient is dead he is no longer a patient. The only functionaries that can thereafter be said to act for him are the undertaker and the gravedigger, and as to them the statute is silent. If it had been necessary for the witness to supplement the information acquired at the autopsy by information he acquired during his attendance upon the patient, in order to determine the cause of his death, a different question would be presented. But this hypothesis was excluded by other questions propounded to the witness. This exception should not prevail. Harrison v. Sutter St. Ry. Co., 116 Cal. 156, 47 Pac. 1019; 40 Cyc. 2388; Carmody v. Capitol Traction Co., 43 App. D. C. 245, Ann. Cas. 1916D, 706.

[5] At the close of the testimony, on motion of defendant, the court directed the jury to find for the defendant no cause of action. This order of the court is assigned as error, and is the most serious question presented for our determination. If there was any testimony which the jury as matter of law should have considered in order to determine the question of liability, the court had no right to direct a verdict.

[6, 7] The issuance of the policy by the defendant was admitted. The burden was on the defendant to void the policy by proving that it was procured by fraud. It was not sufficient merely to prove that the deceased made false answers to questions propounded by the medical examiner. It was incumbent upon defendant to prove that the answers were not only untrue, but that the deceased knew or should have known them to be untrue. The first question presented in this connection is, Were the purported answers of the deceased to the questions propounded in fact made? This is one of the issues in the case. The witnesses Romney and Boothe both testified that in their conversations with plaintiff, heretofore referred to, she stated to them that deceased, before his death, denied that these questions had been asked him, or that he had made the answers which appear in the application. This came out as a part of the conversation between plaintiff and defendant's witnesses, which conversation was solicited by them. It stands in the record as the statement of one of the parties to the policy agreement. However slight may be its value as testimony for plaintiff, it is, nevertheless, competent because of the manner in which it was brought into the case.

[8] The evidence is competent for another reason. In this case a question of good faith is involved. Admitting the fact to be true that deceased subscribed his name to the document in which the questions and answers appear, and admitting that it is presumed he did so intelligently and with full knowledge of its contents, yet it must be borne in mind that after all it is only a presumption. There is nothing on the face of the document affirmatively indicating that the deceased actually read it or heard it read, either in whole or in part, and the medical examiner, for some reason not appearing in the record, was not called as a witness. There is therefore, aside from the presumption referred to, a complete hiatus in the evidence as to whether or not the document was in fact read by the deceased or read to him by some one else before he subscribed his name. If he signed it without reading it, or hearing it read, or if it was read to him, omitting the questions and answers in dispute, certainly the beneficiary of the policy, in a suit to recover the benefits, should, in answer to a charge of fraud in making the answers, be permitted to prove if she can, that in fact no such questions were asked or answers made. The question of good faith on the part of the insured by the defendant's answer is made the very gist of the controversy. As a matter of pleading it is made an essential element of the defense. The insured is charged with willful and deliberate fraud, in that at the time he made his application for the policy he was not only afflicted with the fatal malady of which he afterwards died, but that at that time he knew he was so afflicted, and had known it for a long time prior thereto. The first, second, and third paragraphs of the answer set forth the theory of defendant's defense, and contain the substance of the provisions of the policy upon which defendant relies. A literal quotation of these allegations at this point will therefore serve a double purpose:

"(1) That the said policy of insurance was issued by this defendant and accepted by said Chadwick on the following express condition and agreement contained in said policy and made part of said contract of insurance, to wit, that the statements and answers contained in the application for insurance and in answer to the medical examiner of the defendant company, and on the faith of which said policy was issued, were in all respects true, and that no information had been withheld touching the past or present state of health of the applicant with which the defendant company should have been acquainted; and upon the further condition, to wit, that the answers and statements so made in said application and to the medical examiner, together with the declaration contained in the said application form, should constitute the application, and be the basis of the contract between said Chadwick and the defendant company.

"(2) That the said Chadwick violated the conditions contained in said application form, and on faith of which the said policy of insurance was issued, in that he stated therein that he was in good health at the time of making application for insurance to the defendant company; and that, further, the said Chadwick, in answer to question No. 11, submitted to him

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by the medical examiner of the defendant company, 'Are you in good health so far as you know or believe?' said insured answered 'Yes,' whereas the said Chadwick was at the time, and had been for some time prior to applying for insurance with the defendant company, suffering with tuberculosis of the spine, a disease which tends to shorten life, and from which the said Chadwick, in fact, died on or about the 13th day of August, 1916; and that at the time of applying for said insurance with the defendant company the said Chadwick well knew that he was so suffering from said disease, and that he had been suffering therewith for some time prior to applying for insurance with the defendant company.

"(3) That the said Chadwick further violated the conditions contained in said contract of insurance, in that in the statement made to the medical examiner of the defendant company, and on faith of which said policy of insurance was issued, in answer to question No. 6 contained therein, 'Give name and address of physician last consulted,' he answered 'None,' whereas, in fact, within the space of a few weeks prior thereto he had consulted doctors at Afton, Wyo., and at Ogden, Utah, in regard to the said disease of tuberculosis of the spine with which he was at such time afflicted and from which he died; further, that while in the care of said physicians he was for some time in a plaster of paris cast for the treatment of said disease."

In addition to this, in its brief in summing up its conclusions, the defendant announces what it declares to be the final test, and emphasizes the declaration:

"The final test in a question of this kind is as to whether or not there has been any evasion, fraud or suppression of material facts, and there must be absolutely good faith in the conduct of the insured."

In support of this contention appellant cites Farragher v. Knights and Ladies of Security, 98 Kan. 601, 159 Pac. 3.

We would not be justified in occupying so much time and space in defining the real issue presented by appellant, about which there is no dispute between the parties, were it not for the fact that this precise question has never before been presented to this court, and concerning which there is a sharp conflict among the authorities. Respectable authority can be found maintaining the view that false statements made and false answers given by the insured in his application for insurance concerning matters material to the risk will void the policy irrespective of the question of good faith or honest belief on the part of the insured. The following cases in support of that doctrine have been called to our attention: Ætna Life Ins. Co. v. France et al., 91 U. S. 510, 23 L. Ed. 401; Jeffries v. Life Ins. Co., 22 Wall. 47, 22 L. Ed. 833; Kasprzyk v. Metropolitan Life Ins. Co., 79 Misc. Rep. 263, 140 N. Y. Supp. 211. The first two of these cases seem to be controlled by the common-law rule, in which the statements and answers of the insured in applying for insurance are treated as warranties, and the policy voided unless the statements and answers are true. The New York case, however, was decided under a statute substantially the same as ours. Comp. Laws Utah 1917, § 1154. This section provides that all policies shall contain:

"* * * Subd. 3. A provision that the policy shall constitute the entire contract between the parties, and that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties."

The opinion in the New York case, it must be admitted, is exceptionally strong and substantially in point, especially in view of the similarity between the statutes of New York and Utah as above quoted. Later cases in the same court reaffirm the doctrine, but the opinions are by a divided court, and consequently tend to show a weakening as to the doctrine first announced. Many other authorities no doubt could be cited in support of the doctrine announced in these cases, but those already cited and the authorities and cases cited in the opinions will sufficiently illustrate the position taken by those who maintain that view of the question. But as we have already shown when stating defendant's theory of the case, the issue here presented by defendant is that the insured not only made false statements respecting his health at the time of applying for insurance and false answers relating thereto, but it is alleged that at that very time he knew that they were false. In fact the implication is strong to the point that the insured, with intent to deceive and mislead the insurer, made false and untrue statements for the purpose of procuring insurance to which he was not entitled, thereby perpetrating a fraud upon the defendant. While in adopting this theory of the case the defendant assumed a greater burden than would have been necessary if it had adopted a theory within the principle of the cases above cited, we are nevertheless of the opinion that appellant's conception of the law under which the case should be treated is correct.

[9] In view of our statute and the cases we shall hereafter cite we are inclined to the view that in a case of this kind, where an insurance company relies upon false statements and answers of the insured as a defense against an action on the policy, it must not only allege, as the defendant has done in this case, that the statements and answers are untrue, but also that the insured knew or should have known them to be untrue at the time he made them. Not only this, but as a necessary corollary in judicial proceedings the truth of such allegations should be substantially established at the trial. The following well-considered cases support this view: Wheelock v. Home Life Ins. Co., 115

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Minn. 177, 131 N. W. 1081; Lynch v. Insurance Co., 150 Mo. App. 461, 131 S. W. 145; Moulor v. American Life Ins. Co., 111 U. S. 335, 4 Sup. Ct. 466, 28 L. Ed. 447; Mutual Life Ins. Co. of New York v. Hilton-Green, 241 U. S. 613, 36 Sup. Ct. 676, 60 L. Ed. 1202. In the Minnesota case just cited the statute was the same as ours. Fraud was alleged by defendant, in that the assured made false answers to certain questions asked him upon his application for insurance. He procured the insurance in February, 1910, and died in April of the same year. Defendant proved that the insured had made false answers, but beyond that made no offer or attempt to show fraudulent representations or fraudulent concealment. The proof of fraud being insufficient, the trial court directed a verdict for plaintiff. On appeal the judgment was affirmed. In the Missouri case the statute was somewhat dissimilar to ours, and for that reason it is not claimed that the case is exactly in point. Nevertheless it is illuminating and instructive on one or more questions involved in the case before us. The opinion in the Moulor Case is exceedingly strong. It was written by Mr. Justice Harlan, of the United States Supreme Court, and it not only determines the question that statements or answers made by the insured on application for insurance must be proven to be false and known or should have been known to him to be false, but it also decides questions pertaining to the proper interpretation of provisions contained in policies of insurance and applications therefor. In view of the high standing of that court and the importance of the questions here presented it will be of interest to the reader if we quote in full two paragraphs of the opinion, one in which the real issues are stated, and the other in which the court declares the law. Speaking of instructions to the jury given by the trial court the opinion reads:

"Referring to the seventh question in the application, the court—after observing that the answer thereto was untrue, and the policy avoided, if the insured had been, at any time, afflicted with either of the diseases last referred to—instructed the jury: 'It is of no consequence, in such case, whether he knew it to be untrue or not; he bound himself for its correctness, and agreed that the validity of his policy should depend upon its being so.' Again: 'That he, the insured, did not know he was then afflicted is of no importance whatever, except as it may bear upon the question, Was he afflicted? If he was, his answer (for the truth of which he bound himself) was untrue, and his knowledge, or absence of knowledge, on the subject, is of no consequence.' Further: 'You (the jury) must determine whether the insured was at any time afflicted with either of the diseases named. If he was, his answer in this respect, was untrue, and notwithstanding he may have ignorantly and honestly made it, the policy is void, and no recovery can be had upon it.' To so much of the charge as we have quoted the plaintiff excepted."

Then, as to the law pertinent to the issues, in summing up the court says:

"If it be said that an individual could not be afflicted with the diseases specified in the application, without being cognizant of the fact, the answer is that the jury would, in that case, have no serious difficulty in finding that he had failed to communicate to the company what he knew, or should have known, was material to the risk, and that, consequently, for the want of 'fair and true answers,' the policy was, by its terms, null and void. But, whether a disease is of such a character that its existence must have been known to the individual afflicted with it, and, therefore, whether an answer denying its existence was or not a fair and true answer, is a matter which should have been submitted to the jury. It was an erroneous construction of the contract to hold, as the court below did, that the company was relieved from liability if it appeared that the insured was, in fact, afflicted with the diseases, or any of them, mentioned in the charge of the court. The jury should have been instructed, so far as the matters here under examination are concerned, that the plaintiff was not precluded from recovering on the policy, unless it appeared from all the circumstances, including the nature of the diseases with which the insured was alleged to have been afflicted, that he knew, or had reason to believe, at the time of his application, that he was or had been so afflicted."

We regard the case as practically decisive of the particular questions we are now concerned with.

In the Mutual Life Case, which was decided in favor of the defendant company, the opinion is by Mr. Justice McReynolds, of the United States Supreme Court, and as far as the questions under review are concerned it reaffirms the doctrine announced in the Moulor Case which we have just considered. The first paragraph of the syllabi reflects the opinion of the court on the point in question:

"Material representations, in an application for life insurance, which are incorrect, *if known to be untrue by the assured when made*, and nothing else appearing, invalidate the policy issued by the insurer relying on such representations, without further proof of actual conscious design to defraud." (Italics ours.)

These cases illustrate the conflicting views of many of the courts respecting this question, which we consider one of the most important relating to the law of insurance. Our statute above quoted says that "all statements made by the insured shall in the absence of fraud be deemed representations and not warranties," and we see no reason to hold that the statute does not mean exactly what it says.

In that view of the case we are of the opinion that in order to void a policy on the grounds of false statements of the insured it is incumbent upon the insurer to

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both allege and prove actual fraud on the part of the insured as contemplated in defendant's theory of defense in the instant case. Besides this, in our opinion, the cases supporting this view, examples of which we have furnished, are more in accord with reason and justice than those holding the opposite view.

As before suggested this precise question has not hitherto been passed upon by this court. The cases of Bedmarek v. Brotherhood of American Yeomen, 48 Utah, 67, 157 Pac. 884, and Witherow v. Mystic Toilers, 49 Utah, 177, 161 Pac. 1126, cited by appellant, have very little, if any, bearing upon the question before us. They are enlightening, however, upon the questions there presented to the court.

This brings us to a consideration of the evidence for the purpose of determining whether or not the trial court was justified in directing a verdict for defendant.

Under the issues made and the authorities referred to, assuming the deceased made the statements and answers relied on by respondent, the controlling question is, did the deceased in good faith believe he was afflicted with only a temporary ailment, or did he, on the other hand, know, or have reason to believe, that he was afflicted with a disease which tended to prejudicially influence his health and impair his longevity? If the former, the statement, even if untrue, would not as matter of law void the policy; if the latter it would. The testimony introduced by respondent tended strongly to show that the deceased was afflicted with some physical ailment as early as March, 1916, over two months before he applied for insurance; that he was in frequent consultation with a physician, and was receiving medical attention; that he complained of pain in his back, and electric treatment was applied; that he was advised by the physician to come to Utah for medical advice; that he came to Ogden and consulted one or more physicians; that while there he applied for the insurance in question, and made the statements and answers which respondent relies on as a defense. It was shown by the autopsy that deceased died of tuberculosis of the spine, and in the opinion of the physician the conditions were such that deceased must have known that he was not in good health at the time the policy was applied for. It must be admitted that the evidence tended strongly to support respondent's contention, but it did not pass entirely unchallenged. The testimony on behalf of plaintiff tended to show that the deceased, who had previously been in good health and was strong and vigorous, about March, 1916, became afflicted with a pain in his back; that it was supposed to be rheumatism, in fact was so considered by the company physician who treated him; that up to the time he went to Ogden he had been attending to his farm work and logging in the canyon. Plaintiff testified that she went with deceased on one occasion to the doctor; that she did not realize her husband was seriously ill until in June, 1916; that when he went to Ogden it was not for the purpose of consulting physicians, but merely on a visit; that when he returned in July he was in a plaster of paris cast.

[10] The depositions of eight witnesses, all residents of Afton, Wyo., and neighbors of deceased in his lifetime, were read in behalf of plaintiff. Each of them testified he had known deceased intimately during his lifetime. Several of them had seen him almost daily for several years previous to his death. None of them ever knew of his being sick or attended by a physician until June, 1916, or ever knew of his being unable to do his work, which was farming. The testimony of these witnesses was of a negative character. Its probative force is for that reason limited, but that goes to the weight of the evidence only, and was therefore a question for the jury.

[11] It thus appears there was some substantial evidence before the court and jury to the effect that prior to March, 1916, the deceased was a strong, able-bodied man, capable of logging in the canyon and working on his farm; that in March he complained of pain in his back and consulted Dr. Reese, who treated him for rheumatism; that he still continued to carry on his work; that he went to Ogden on a visit, and when he returned in July he was incased in a plaster of paris cast. There is not a suggestion in any of the evidence that the deceased had reason to believe he was afflicted with anything more than rheumatism until after the policy of insurance was issued, and this affliction was of recent origin. These considerations, together with the testimony of eight of deceased's neighbors, who were intimately acquainted with him for several years before his death and never knew him to be sick or unable to do his work or to consult a physician in regard to his health prior to June, 1916, are sufficient in themselves to present a serious question as to whether or not the deceased, at the time he applied for insurance, believed or had reason to believe that he was afflicted with anything more than a temporary ailment. The same rule must be applied in considering the negative answer of deceased as to the name and address of the physician last consulted. The uncontradicted evidence shows that Dr. Reese, whom the deceased consulted, treated him for rheumatism before he went to Ogden. There is no evidence that he was treated for anything else by any other physician either in Wyoming or

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Utah prior to his application for insurance. In fact there is no evidence that prior to making his application he consulted any physician at all except Dr. Reese at Afton, Wyo. Hence it cannot be contended as matter of law that deceased knew or had reason to believe he was afflicted with anything more than a temporary ailment at the time he applied for insurance. Everything considered, the court is of the opinion the case was one for the jury, and that the trial court erred in directing a verdict for the defendant.

Inasmuch as an order will be made granting a new trial, and in view of the fact that plaintiff's counsel vigorously contended in the brief and argument of the case that plaintiff was entitled to a directed verdict in her behalf, it is pertinent to remark that such contention is wholly without merit. The evidence in the record is amply sufficient to sustain a verdict for defendant if the case had been submitted to the jury, and the jury had so found.

The judgment is reversed, with directions to the trial court to grant appellant a new trial. Costs of appeal to be taxed against respondent.

CORFMAN, C. J., and FRICK, WEBER, and GIDEON, JJ., concur.

(20 Ariz. 460)

McCARTHY v. PAMSETGAAF, Inc. (No. 1692.)

(Supreme Court of Arizona. June 14, 1919.)

1. APPEAL AND ERROR ⟸907(3)—PRESUMPTIONS.

On record consisting of judgment roll only, the directed verdict must be by the Supreme Court presumed correct, in the absence of the oral testimony in the case.

2. NEW TRIAL ⟸105 — NEWLY DISCOVERED EVIDENCE—IMPEACHING.

Verdict having been directed for defendant for plaintiff's failure to establish a prima facie case, newly discovered evidence, to be sufficiently material to warrant granting new trial under Civ. Code 1913, par. 584, must be of a nature to supply the necessary absent elements of plaintiff's case, and not merely such as to establish, however conclusively, that defendant made contradictory or even purposely false statements.

Appeal from Superior Court, Yavapai County; George H. Crosby, Judge.

Action by Frank M. McCarthy against Pamsetgaaf, Incorporated. From judgment for defendant, plaintiff appeals. Affirmed.

Frank M. McCarthy and J. E. Russell, both of Prescott, for appellant.

Anderson & Ellis and Robert E. Morrison, all of Prescott, for appellee.

CUNNINGHAM, C. J. The oral testimony as taken by the court reporter at the trial was not made a part of the record, and was stricken on motion for the reasons that the appellant failed to notify the appellee of the filing of the reporter's transcript with the clerk of the said court, and also because the said transcript did not remain on file for 20 days after filing, and also because the trial judge did not certify to the correctness of the transcript filed. Therefore such transcript became no part of the record in this court.

It follows that the record on this appeal consists of the judgment roll only. The appellant suggests that, upon consideration of the said record, the matter of the admissions contained in the amended answer were sufficient to make out a case requiring submission to the jury, and the order refusing a new trial on the showing made by appellant on the grounds of newly discovered evidence, is open for review. Otherwise stated, the appellant contends that the admissions of fact contained in the amended answer are sufficient to constitute a prima facie case for plaintiff, and that the court abused its discretion in refusing a new trial on the showing made of newly discovered evidence.

If the defendant's amended answers contained admissions of facts on all issues which are essential to the plaintiff's recovery, and left no vital issue for trial, then one proper course of procedure was for the court to grant a motion for judgment for plaintiff on the pleadings, or, if a jury had been sworn before the matter was called to the court's attention, then the same results would follow from an order directing a verdict for the plaintiff. In either case, the admission in the answer must be admission of all the facts essential to a recovery by the plaintiff, and in legal effect no dispute of an essential fact must remain.

The plaintiff alleges, among other things, in paragraph IV as follows:

"On the 9th day of February, 1915, plaintiff being afflicted with incipient pulmonary tuberculosis, upon the representations made by defendant that it would carefully, properly, skillfully, and competently treat and care for him and furnish to him all things necessary, including careful, skillful, and competent physicians and surgeons and nurses to effect a cure, entered the sanitarium of defendant at Prescott, and in consideration of the sum of $30 per week to defendant by plaintiff paid, the defendant undertook and agreed to and with plaintiff that it would furnish to him all things necessary and required to cure him of all diseases with which he might be afflicted during all of the time he remained in said sanitarium, and particularly agreed to furnish careful, skillful, and competent physicians and surgeons and medical attention in the treatment and cure of all acute diseases plaintiff had or might develop

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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during all the time he remained in said sanitarium."

Under this contract, the plaintiff alleges that his physical health improved until September 10, 1915, when plaintiff began to suffer intense pain, and the defendant negligently and carelessly refused to make a careful or proper or any diagnosis of plaintiff's case, although then and there requested and demanded by plaintiff so to do, but, without proper examination of plaintiff, stated "there was no malady affecting him, and that such pains would readily pass and cause no further annoyance to plaintiff."

On October 10, 1915, the defendant called Dr. H. T. Southworth, a careful, competent, and skilled physician and surgeon, for his examination of plaintiff, but no examination then took place. On October 20, 1915, it seemed necessary to have a serious surgical operation performed on plaintiff to remove the vermiform appendix. Plaintiff advanced the necessary fees for that purpose. On said 20th day of October, 1915, plaintiff was removed to a proper hospital, and on said date at said hospital the said surgical operation was performed by skillful and capable surgeons and their competent assistants; that such operation was a successful one in fact, and plaintiff's physical condition improved until November 5, 1915, when the defendant began to administer to the plaintiff the "sun cure" as a proper remedy to cause the expeditious healing of the wound remaining from the said surgical operation.

The plaintiff continued to take the said sun cure treatment as administered by defendant from the said 5th day of November, 1915, to the 29th day of February, 1916, when the plaintiff left the defendant's sanitarium and severed his relation with defendant and entered the Mercy Hospital; that under the said sun cure treatment imposed by the defendant the plaintiff's physical condition grew steadily worse, and plaintiff, from such treatment, suffered severe physical pain and injury to his health, and that said course of treatment was wholly improper, unscientific, and not reasonably adapted to plaintiff's needs, which defendant ought to have known. The plaintiff claims damages for his sufferings from September 10 to October 20, 1915, because the defendant failed to render the proper treatment for his ailments, in violation of the contract; also, plaintiff claims other damages for injuries resulting to the plaintiff from the "sun cure" treatment administered to plaintiff improperly, and plaintiff claims a recovery of fees and expenses paid by him during the time of his relation with the defendant and proximately resulting from such relation.

The defendant, answering:

"Admits that on said date [9th day of February, 1915] defendant undertook to treat plaintiff in its usual manner for the said disease. Denies that defendant ever undertook or agreed to and with plaintiff that it would furnish to him all things necessary and required to cure him of all diseases with which he might be afflicted during all of the time he remained in said sanitarium, and denies that it ever particularly agreed, or in any way agreed, to furnish any physicians and surgeons, and medical attention, in the treatment of all or any acute diseases that plaintiff had or might develop. Denies that it was the duty of defendant to furnish physicians and surgeons for the treatment of plaintiff for any affliction other than that of tuberculosis. Denies that defendant was negligent or careless in any respect toward plaintiff. Denies that defendant refused in any respect to give plaintiff the treatment and care requisite to him and to his case."

The defendant further denies that it had any connection with the operation performed on plaintiff, and alleges that plaintiff employed Dr. Southworth and Dr. Looney to and they did perform such operation under their employment. The defendant denies that plaintiff suffered pain and mental anguish between September 10, 1915, and October 20, 1915, caused from any negligence or carelessness of defendant. The "defendant alleges that the plaintiff was not suffering from acute appendicitis." The defendant—

"denies that it acted wrongfully or carelessly, and alleges that it gave every proper care and attention to plaintiff. * * * Defendant alleges that it gave plaintiff proper and careful medical treatment for his malady, to wit, tuberculosis, and defendant alleges that said Dr. Flinn carefully observed all symptoms of plaintiff, and called in to examine plaintiff, and to consult with Dr. Flinn, a competent surgeon, as soon as same became necessary. Defendant alleges that it gave plaintiff proper, careful, and skillful treatment in every respect whatsoever, and denies that plaintiff continued to grow worse, and denies that he suffered and continued to suffer great physical pains and torments and mental anguish up to the time of said operation."

The complaint and the answer are both open to be criticized because neither is a concise statement of the facts constituting the plaintiff's cause of action or the defendant's grounds of defense. The complaint is a prolix narrative of evidence, informing the court of the history of plaintiff's afflictions and his relation with the defendant with regard thereto, and it does contain direct allegations of fact, interspersed in the narration of evidence, which, when segregated, amounts to setting forth the relation of patient and physician, and the duties and liabilities resulting therefrom, and a violation of such duties by the defendant as the plaintiff's physician. The answer, in a number of ways, admits the relation of patient and physician, and denies the violation by it of the duties such relation imposes on the physician. The essence of plaintiff's cause of action is the wrong done him by the defend-

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ant's failure to discharge its duty owing plaintiff. Strange to say that, with the answer pregnant with a litter of negatives, as the plaintiff charges on this appeal, yet the defendant persisted to the end that it performed its legal duty to the plaintiff.

[1] With such issues joined, the plaintiff could not recover until he produced evidence sustaining the material allegations of his complaint prima facie establishing defendant's duty owing to plaintiff, and defendant's failure to perform that duty. This burden the plaintiff has failed to sustain, as appears from the judgment, and the admissions contained in the defendant's answer did not dispense with the necessity of evidence of defendant's failure to perform its duty to plaintiff. The directed verdict must be, by this court, presumed to be correct, in the absence of the oral testimony in the case.

[2] The other question, viz. whether the lower court erred in denying motion for a new trial on the showing made by appellant on the grounds of newly discovered evidence, remains to be noticed. Paragraph 584, C. C. Ariz. 1913, is as follows:

"A verdict, decision or judgment may be vacated and a new trial granted, on motion of the aggrieved party, for any of the following causes materially affecting his rights: * * * (4) Material evidence, newly discovered, which with reasonable diligence could not have been found and produced at the trial."

The judgment entered recites that in disposing of defendant's motion for a directed verdict:

"The court held that plaintiff had failed to establish a prima facie case, and that the jury should be directed to return a verdict in favor of the defendant and against the plaintiff. Whereupon, and under the direction of the court, the said jury duly returned into court its verdict finding the issues in said cause in favor of said defendant and against said plaintiff, which said verdict was duly recorded by the clerk," etc.

The appellant, in his motion for a new trial, alleged that material evidence had been discovered since the trial. The evidence relied upon as material consists of a telegram dated October 20, 1915, from the president of defendant corporation to a Dr. Frederick Epplen, and two letters written by the said president to the said doctor. The telegram is a report to the doctor on the operation, necessity for the operation, and condition of the patient, the plaintiff, at the time the telegram was sent. The letter first in order confirms the telegram and reports the patient's condition more in detail. Such letter closes with the statement:

"I thought it better to advise you by wire, as I did not have the address of his relatives, and I wished you and them to know of his quite serious condition. I will write you soon again regarding the progress of the case."

The second letter is dated October 28, 1915, and is another report of plaintiff's condition at the time. The letter refers to certain charts also, sent to Dr. Epplen as giving further information of plaintiff's condition at that date. The said telegram and letters, appellant claims, contain statements contradicting other statements made by Dr. Flinn to plaintiff, and for such reason the evidence is material.

It is too clear for argument that, whenever the court directed a verdict for the defendant because the plaintiff failed to produce evidence sufficient to establish a prima facie case, evidence newly discovered, to become material, must be of a nature to supply the necessary facts absent from the record, which facts were necessary to make a prima facie case, and evidence newly discovered which establishes in the most conclusive manner possible that the defendant has made contradictory, inconsistent, and purposely false statements, is not material, but, on its face, becomes evidence of immaterial matters. The kind of evidence plaintiff must have discovered, to be of benefit, should have been evidence of facts supporting his complaint as tending to establish his alleged cause of action. He could not overcome the absence of facts necessary to his recovery by proving conclusively that defendant and its president were unworthy of belief.

The trial court committed no error in refusing a new trial upon the grounds of newly discovered evidence. The evidence discovered would be immaterial if offered on the trial, where, as here, the plaintiff's evidence failed.

We have carefully examined the judgment roll for fundamental error, and finding no reversible error, the judgment must be affirmed.

ROSS and BAKER, JJ., concur.

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(20 Ariz. 400)

GILA LAND & WATER CO. v. PAGE et al. (No. 1658.)

(Supreme Court of Arizona. May 21, 1919.)

1. LANDLORD AND TENANT ⟸290(2) — UNLAWFUL DETAINER — RIGHT OF ACTION—STATUTE.

Civ. Code 1913, par. 1552, gives no right of action for the possession of leased premises in an unlawful detainer action until the date on which the rent becomes due is determined, either from the face of the lease, or from evidence otherwise, and such rent remains unpaid for five days.

2. CORPORATIONS ⟸428(11) — NOTICE THROUGH PRESIDENT—INTEREST OF OFFICER.

A land and water company, which leased to a partnership, is chargeable with notice of the agreement between the two partners, one of whom represented it in the forming of the agreement; he being both a party to the agreement and the president of the company.

3. CORPORATIONS ⟸428(11)—NOTICE TO PRESIDENT AS AFFECTING COMPANY—LEASE AND PARTNERSHIP AGREEMENT—PROVISIONS.

A company, which leased to a partnership composed of its president and another person, is charged with knowledge of stipulations of the lease contract and the partnership agreement.

4. LANDLORD AND TENANT ⟸43—LEASE TO PARTNERSHIP—CONSTRUCTION.

Lease by a land and water company to a partnership, composed of its president and another, *held* to have constituted the president the principal debtor to the company, with its assent; the other partner being given no room to act, other than to operate the leased land successfully, the president of the company being business agent of the firm and principally looked to for payment of rent.

5. LANDLORD AND TENANT ⟸46—LEASE — TIME OF PAYMENT OF RENT — ESSENCE OF AGREEMENT.

Time of payment of rent, at dates mentioned in lease by land and water company to a partnership composed of its president and another, *held* not of the essence of the agreement, in view of proper construction of lease as primarily selecting the president to pay rent, giving the other partner no room to act, other than to operate leased land.

6. LANDLORD AND TENANT ⟸291(13)—PAYMENT OF RENT—CONTINUANCE — AVOIDANCE OF FORFEITURE—SUFFICIENCY OF EVIDENCE.

In action of unlawful detainer by land and water company, against a partnership composed of its president and another, evidence *held* to justify finding that payment of rent on January 1, 1918, was unnecessary to a continuation of the lease, and that operation of continuance of rent secured by president partner avoided a forfeiture.

7. PARTNERSHIP ⟸158—EXTENSION OF TIME —RIGHT OF FIRM.

Where a land and water company leased to a partnership composed of its president and another, the president being financial manager of the firm, and primarily liable for rent, while the partnership was secondarily liable, an extension of time for payment of rent, granted to the president, inured to the benefit of the firm, and the president's attempt to surrender the lease to the disadvantage of his partner's rights, and to direct the lessor company to reenter and dispossess him, was a fraud on such other partner, in which the lessor company cannot be permitted to succeed in its action for unlawful detainer.

8. LANDLORD AND TENANT ⟸291(12)—UNLAWFUL ENTRY AND DETAINER—EVIDENCE.

In action of unlawful detainer, evidence as to shortage of water furnished by the lessor company to the leased land, and as to damages to crops, etc., *held* admissible, because of the inquiry as to the amount of rent the lessor could recover, if it recovered the premises, having no bearing on the issue of re-entry and possession.

9. APPEAL AND ERROR ⟸1052(7)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In forcible entry and detainer, plaintiff landlord cannot be injured by admission of evidence as to amount of rents, if it recovered possession, where judgment went against it on issue of possession.

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

Action by the Gila Land & Water Company, a corporation, against C. E. Page and L. A. Brown, copartners doing business under the firm name and style of Brown & Page. From a judgment for defendants, and from an order refusing a new trial, plaintiff appeals. Affirmed.

The appellant commenced this action, alleging that it, as a corporation, on the 1st day of February, 1917, by written instrument, "let, leased, and rented unto the said defendants the following described real estate, situate in Maricopa county, Arizona, to wit," describing the lands, amounting to 440 acres, more or less, "together with all water from the Buckeye canal necessary to properly irrigate all the crops to be grown on said premises." The term of lease is alleged to have been for "two years from the 1st day of February, 1917," and the rental therein agreed to be paid by the defendants was the sum of $11 per acre per annum, payable annually, commencing on the 1st day of January, 1916; and it was also provided in said lease that the said defendants should pay to the plaintiff the further sum of $2,718, to be paid in installments as follows:

"$1,000 to be paid on July 1, 1917, and $1,718 to be paid December 1, 1917, and that in the event that any or all of the above amounts should be and become due and unpaid that said lease should terminate, and that the plaintiff thereupon should have the right to immediately re-enter the said premises and resume possession thereof and to remove all persons therefrom."

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The plaintiff alleges, in substance:

"V. That on the 12th day of January, 1916, long after the said amount specified became due and unpaid, and after the termination of the time when said premises were so let to them, by reason of their permitting said rental and other installment to be and become due and unpaid, and after demand for such payment, the plaintiff made demand in writing upon the defendants for the possession of the said premises, said plaintiff being entitled to the possession thereof under said agreement of lease, and notwithstanding which said written demand, so made as aforesaid, and the facts herein stated, the said defendants willfully and without force do still hold the said lands and real property, and refuse to deliver the same and the possession thereof to the plaintiff, or to permit plaintiff to re-enter and take possession of the said premises."

C. E. Page, in behalf of the partnership, demurs to the complaint for failure to state sufficient facts, denies the execution of the lease mentioned in the complaint, admits that they are in the actual possession of the premises and alleges that such possession is lawful, denies that they are in arrears for rent, or that they are indebted in any amount to the plaintiff; sets forth breach of conditions of the lease by the plaintiff, and resultant damages to the defendants, and hence a counterclaim; also a counterclaim for betterments expended on the premises as a set-off, and payment of $1,200 on account of rents.

The cause was tried to the court with a jury. The jury returned its verdict of not guilty. The plaintiff moved for a judgment notwithstanding the verdict, which motion was denied. The plaintiff moved for a new trial, which was also denied. The court rendered its judgment for the defendants, from which judgment, and from the order refusing a new trial, plaintiff appeals.

J. E. Morrison, of Phœnix, for appellant.

Hawkins & Anderson and J. P. Lavin, all of Phœnix, for appellees.

CUNNINGHAM, C. J. (after stating the facts as above). The appellant bases its right to recover the possession of the premises described in the complaint upon the failure of the defendants to pay rent for five days after the same became due and payable, as provided in a written lease theretofore existing between the plaintiff and the defendants. The plaintiff evidently relied upon paragraph 1552, R. S. A. 1913, giving its right of action, and upon a violation of the terms of the lease as its right to re-enter the leased premises for the nonpayment of said rent or violation of said lease.

Under the evidence and the conceded facts, the lease involved in this case is evidenced by two separate papers, one in form of a lease from Gila Land & Water Company to Brown & Page, signed only by L. A. Brown as president, and by W. G. Hubbard, as secretary of said corporation. The other paper is in form a partnership agreement between L. A. Brown and C. E. Page, by the terms of which Brown contributed the lease and Page agreed to contribute his time and skill as a farmer, etc. The terms of the lease which Brown agreed to contribute to the partnership stock are the same, with slight exceptions, as the terms set out in the lease unsigned by the lessees. The evidence is without conflict tending to show that the Gila Land & Water Company required Page to take L. A. Brown into a special partnership as a condition precedent to leasing this land. Brown was accepted as Page's partner, so that the plaintiff would be assured of its rent. It looked to Brown for its rent, and he was looked upon as the responsible party.

[1] Of course, this is an unlawful detainer action, arising from defendants' alleged failure to pay rent as stipulated. The right to re-enter is denied, and hence the right of action occurs. Before the plaintiff can recover, in this kind of summary proceeding, he must allege and prove that the defendant is unlawfully holding the premises after all his rights under the lease have terminated. The exact amount of rent and the exact date the rent is payable must be determinable from the evidence. Until the date upon which the rent becomes due is determined, either from the face of the lease or from evidence otherwise, and remains unpaid for five days, the statute (paragraph 1552, supra) gives no right of action for the possession.

The appellant assigns error in eleven separate paragraphs, and states as follows:

"The entire matter hinges upon the construction of the lease, and whether the appellant could be charged with the result of a shortage of water occasioned by acts, occurrences, and conditions beyond its control, and which it could not possibly have avoided."

The "lease"—the paper signed by the Gila Land & Water Company—purports to lease 440 acres of land in Maricopa county, "together with all water from the Buckeye canal necessary to properly irrigate all crops to be grown on the said premises," to Brown & Page, copartners,

"for the term of two years from the 1st day of February, 1917, for the annual rental of eleven dollars per acre, to be paid on or before the 1st day of January, 1918, and the further payment of the sum of two thousand, seven hundred and eighteen dollars, to be paid as follows: One thousand dollars to be paid on or before the 1st day of July, 1917, and the balance, to wit, seventeen hundred and eighteen dollars, to be paid on or before the 1st day of December, 1917.

"And it is further agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, that it shall be lawful for the said party of the first part to re-enter said premises and remove

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all persons therefrom. And the said party of the second part does hereby covenant, promise, and agree to pay the said party of the first part the said rent in the manner hereinbefore specified. * * *"

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The articles of partnership between L. A. Brown and C. E. Page, of the terms of which the Gila Land & Water Company are chargeable with full knowledge, because, under the evidence, no lease would have been granted in the absence of a partnership satisfactory to the Gila Land & Water Company, are dated the 26th day of January, 1917, and recite that:

"Whereas, the said C. E. Page has heretofore entered into negotiations with L. A. Brown and W. C. Hubbard and James Ovens, joint owners of the real property hereinafter described, for the lease of said property; and whereas, by reason of the inability of the said C. E. Page to comply with the requirements of the said Brown, Hubbard and Ovens, said negotiations failed of success; and whereas, the said C. E. Page is desirous of securing a lease on said premises for the purpose of growing, among other things, a crop of cotton thereon; and whereas, the said L. A. Brown, by reason of his relations with the said Hubbard and Ovens, is able to secure advantageous terms of lease of said premises, and whereas, the said L. A. Brown, by reason of his business connections, is in a position to finance, and will finance when necessary, the partnership hereinafter formed:

"Now, therefore, the said parties above named have agreed, and do by these presents agree, to become partners together under the firm name of Brown & Page in the business of general farming, and their copartnership to commence on the date of the execution of this agreement and to continue until the 1st day of February, 1919. And in consideration thereof the said L. A. Brown covenants and agrees with the said C. E. Page to procure in behalf of Brown & Page a lease from the owner or owners thereof, for a period of two years ending the 1st day of February, 1919, of the following described premises situated in Maricopa county, to wit. * * *"

There follows a description in exact words and figures as contained in the said lease, supra. Following the description of the property is the following:

"At and for the annual rental of eleven dollars an acre on the following terms and conditions: The said rental to be paid on or before the 1st day of January of each year of said lease, beginning with the 1st day of January, 1918, and the further payment of the sum of two thousand seven hundred and eighteen dollars, to be paid as follows: one thousand dollars to be paid on or before the 1st day of July, 1917, and the balance, to wit, seventeen hundred and eighteen dollars, to be paid on or before the 1st day of December, 1917."

Thereafter follow stipulations pertaining to the partnership matters among themselves, but which are immaterial to the present inquiry. The parties to be charged, L. A. Brown and C. E. Page, did not sign the formal lease, but they did sign the partnership agreement. The Gila Land and Water Company signed the lease, and, while it did not sign the partnership agreement, it required the identical partnership to be formed. Hence the Gila Land & Water Company is estopped in justice from requiring terms of lease, other than such terms as are set forth in the partnership agreement. The plaintiff corporation had a right to re-enter and take possession of the leased premises for nonpayment of the rent for five days, under authority of paragraph 1552, supra, whether a clause to that effect was absent from the lease or not. The plaintiff, in its complaint, bases its right to re-enter upon defendants' failure to pay rent, and their refusal to deliver possession. The inquiry is vital, therefore: Had defendants failed for five days to pay rent as stipulated in the lease, on the 12th day of January, 1918, when plaintiff demanded possession in writing?

Brown testified that he is president of the plaintiff corporation, and as such signed the said lease in behalf of the corporation. He testified that he did not know the exact amount of rent due under that lease. He said:

"I think it (rent due) is about $6,000; the company looked to me for the payment of that rent; they notified me several times, but on account of my illness, I presume, they did not push me as hard as they would have, and I asked them for a continuance on account of expecting our crops to come out and pay it all right by the first of the year; at that time I discovered that they would not be able to pay anything, and so I notified the company."

Hubbard, as a witness for plaintiff, and plaintiff's secretary, testified, among other things, that the company looked to Brown for the rent. After saying that the company "in a way" looked to Brown for the rent, the witness said:

"I looked to Brown, and when Brown was sick I looked to Page. * * * I wasn't acquainted with Page personally. I never met Mr. Page, except that one day; * * * prior to the agreement * * * I offered to let Page have it [the land on a lease], but not until he took a man in I knew was responsible. Brown was my partner at that time, and one of the owners of the land. I am secretary of the corporation, and Mr. Brown is president. * * *"

Page testified with respect to the payment of the rent as follows:

"I never heard that this water company had anything to do with the land. In paying the rent I sent the hay by Mr. Brown's orders, and billed the hay to the parties he ordered me to bill it to. * * * Mr. Brown and Hubbard and Ovens are the only ones I knew. * * *"

[2-4] The corporation required Page to take a partner into the lease with him who was, to the satisfaction of the corporation,

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responsible; that is, financially able to meet the obligations imposed by the lease. Brown met the requirements, and the lease was granted to Brown and Page on the financial responsibility of Brown. The company is chargeable with notice of the partnership agreement between Brown and Page, for the reason that Brown represented the corporation in the forming of such agreement, and he was both a party to the agreement and the president of the corporation. As a consequence of plaintiff's full knowledge of the terms of the partnership agreement, plaintiff is charged with knowing that such lease contained the following clause:

"And in consideration hereof, the said L. A. Brown covenants and agrees with the said C. E. Page to procure in behalf of Brown and Page a lease * * * for a period of two years ending on the 1st day of February, 1919, of the following described premises," etc.

And that the following clause also appears in said lease:

"Whereas, the said L. A. Brown, by reason of his business connections, is in a position to finance and will finance, when necessary, the partnership hereinafter formed."

The partnership term commenced and ended with the lease term. All parties are charged with knowing that a termination of the lease by any means would relieve Page from his obligation to retain Brown as a partner, and a termination of the partnership would relieve the corporation from its obligation to lease to Page. Brown assumed the position of principal debtor to the corporation with the assent of the corporation, and the condition precedent imposed no other alternative on Page. Page was given no room to act, other than to operate the farm successfully. Brown was business agent for the partnership, and was principally looked to for payment of the rent.

[5] With this manifest construction placed upon the lease, the time of payment of rent at the dates mentioned in the lease is not of the essence of the agreement. Brown's failure to pay the $1,000 on July 1, 1917, and his failure to pay the $1,718 on the 1st day of December, 1917, is not a failure to pay rent. This is manifest from the plain words of the lease, which words are as follows:

"* * * For the term of two years from the 1st day of February, 1917, for the annual rental of eleven dollars per acre, to be paid on or before the 1st day of January, 1918."

A further payment is required to be made, $1,000 on July 1, 1917, and $1,718 on December 1, 1917. The evidence explains this further payment clause. Page said that the rental price was $11 per acre. "We were to take up the $2,800." On cross-examination he said:

"I don't think I testified that the $11 rental and the other two installments of money to be paid were mentioned in the partnership agreement. I don't remember that I testified that the $11 rent and the $1,000 rent and the $1,800 rent were in the partnership agreement. I had reference to $11 an acre that we were to pay rent. We were to pay $2,800 that Mr. Millage was behind with them."

No testimony denies that statement of Page. The "further payments" required of Brown and Page were not understood as payments of rent, but the amount to be paid was an amount owing the company by Millage, a former tenant, and required to be paid as a consideration for the grant of the lease.

The record contains some evidence tending to prove that Hubbard refused to permit Brown to pay rent, and so informed Page; that Brown refused to pay rent, and Hubbard refused to accept payment of further rent, in order to terminate the lease and remove Page from the land, so that the company could make another and a more profitable disposition of the land. Defendants' Exhibit 3, a telegram signed by Brown and delivered to Page on January 2, 1918, says:

"Have wire from Hubbard saying you have refused to pay rent and would not leave the place without seeing me. We are going to sell and I want to give them possession at once. Wire me when you will get off. Don't force me to come back."

After Brown sent this wire, Brown testifies as follows:

"* * * The company looked to me for the payment of that rent. They notified me several times, but on account of my illness, I presume, they did not push me as hard as they would have, and I asked them for a continuance on account of expecting our crop to come out and pay it all right by the first year. At that time I discovered that they would not be able to pay anything, and I so notified the company. I was then in California. I came from California to see Mr. Page about the payment of rent. I put the matter squarely up to him, that we had to pay the rent or else we were going to lose the property."

[6] From this state of the evidence, the jury are justified in finding, as a fact, that the payment of rent on January 1, 1918, was unnecessary to a continuation of the lease, but the operation of Brown's continuance of rent avoided a forfeiture; that it was not the failure to pay rent that caused the desire to remove Page and dispose of his lease, but that it was because, as Brown stated in his wire of January 2, 1918, they had a chance to sell and Brown wished to surrender the lease to the company. Brown waived the extension of time for payment of the rent on January 1, 1918, and offered to surrender the possession, not because the rent was not paid, but because the corporation could sell the land to advantage.

[7] The only issue triable was whether the lease had terminated because of the failure of the lessees for five days after the 1st day of

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January, 1918, to pay the rent, and the uncontradicted testimony is that the company had extended Brown's time for payment of rent and ceased to look to Brown for rent, and upon Brown's suggestion commenced to look to Page only for rent. The extension of the time for the payment of rent, granted to Brown, inured to the benefit of the partnership. Brown was the person primarily liable to the company under all of the evidence, and the partnership was secondarily liable; that is, the partnership was liable after Brown failed to pay. When his time for payment was extended, the partnership was not bound to pay the rent during the time the payments were so suspended, and Brown's attempt to surrender the lease, to the disadvantage of Page's rights, and direct the corporation to re-enter and dispossess Page, is a fraud on his partner, Page, and the corporation, being a party to such unjust attempt to dispossess Page, cannot be permitted to succeed by a court of justice.

The jury's verdict of "not guilty" is right, and based upon evidence almost, if not entirely, free from conflict. The plaintiff has wholly failed to show a termination of the lease by failure of the tenants to pay the rent as required by the changed terms of the lease. The judgment follows the verdict, and adjudges the defendants not guilty of an unlawful detainer of the premises described in the complaint and in the judgment. The defendants are adjudged their costs, amounting to $130.

[8] The appellant's assignments of error, not disposed of above, have reference to matters connected with the duty of one partner to the other, and of the duty of the lessor plaintiff to keep covenants of its own, such as the payment by it of the water rates, the damage to the crops because of shortage of water, and such like matters. The tenth assignment about covers all of the questions raised. It is as follows:

"The court erred in denying appellant's motion for judgment notwithstanding the verdict, for the reason that the uncontradicted testimony in the case showed that appellees had not paid all of the rent and sums required by the lease, and that all evidence showing or tending to show any failure of consideration, and the amount of loss sustained by the appellees thereby, was not properly and lawfully admitted in evidence, and that being the only defense, and the other facts sustaining the judgment in favor of appellees having been clearly shown by uncontradicted and overwhelming proof, and not denied, and the only testimony properly introduced in the case sustaining the allegations of appellant's complaint, the motion should have been granted."

[1] Without taking into consideration the apparently confusing statements in the said assignment, we are able to concede that all matters concerning the shortage of water and the damages to crops resulting from such shortage, and the expenditures of all kinds could become material in this kind of case only when the matter of the right of the plaintiff to re-enter is established, and the question of plaintiff's rent and the amount recoverable is before the court. In this case one of the issues presented was the amount of money the plaintiff was entitled to recover from the defendants in the event plaintiff was entitled to recover the possession. Such evidence was admissible at the trial, because of the inquiry of the amount of rent plaintiff could recover, in the event he recovered possession of the premises. The evidence had no bearing upon the issue of plaintiff's re-entry and possession. Under the judgment appealed from, a judgment denying the plaintiff's right to possession plaintiff is not injured in the remotest degree by evidence tending to establish the amount of rent recoverable by the plaintiff, had plaintiff been adjudged entitled to recover possession of the premises.

On the whole record, the evidence fairly sustains the verdict, the verdict is responsive to the issue tried; the judgment follows the verdict, and is therefore responsive to the pleadings.

According to the terms of the lease, the time has arrived—February 1, 1919—for final adjustment of the accounts, both of the corporation and of the partnership, and of the partners inter alia. This judgment is determinative of the fact that the lease did not cease on the failure to pay rent prior to January 12, 1918. What may have transpired since that date is not involved in this case as a matter of course.

I find no reversible error in the record. The judgment is affirmed.

ROSS and BAKER, JJ., concur.

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(20 Ariz. 466)

DEY v. HILL. (No. 1707.)

(Supreme Court of Arizona. June 14, 1919.)

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1. WORK AND LABOR ⟸29(2)—QUANTUM MERUIT—CONTRACT PRICE.

In action on quantum meruit for reasonable value of services rendered under a contract, recovery cannot be had for a greater amount than the contract price.

2. APPEAL AND ERROR ⟸171(3)—THEORY OF CASE—PLEADINGS.

Generally a party is bound in the appellate court as to the nature and form of the action or proceeding by the theory on which the pleadings were construed and the action or proceeding was tried in the court below.

3. ATTORNEY AND CLIENT ⟸166(1)—ACTION FOR COMPENSATION—EVIDENCE—ABANDONMENT OF WRITTEN CONTRACT.

In action by attorney having written contract with client specifying compensation for reasonable value of services, evidence *held* to show abandonment of written contract.

4. ATTORNEY AND CLIENT ⟸167(3)—ACTION FOR COMPENSATION — WRITTEN CONTRACT — REASONABLE VALUE OF SERVICES.

In attorney's action for reasonable value of services performed, tried on theory that client was indebted therefor, instead of on a written contract entered into between the parties specifying compensation, where there was evidence tending to show that such contract had been abandoned and a new contract entered into, court did not err in submitting case upon theory that client was liable for reasonable value of services.

5. TRIAL ⟸213—SUBMISSION OF ISSUE—REQUEST.

Where attorney having had written contract with client sued for reasonable value of services, and case was tried on such theory, and evidence introduced tending to show that contract had been abandoned, client cannot complain of court's failure to submit question of whether contract had been abandoned, upon his failure to make request therefor.

Appeal from Superior Court, Pima County; S. L. Pattee, Judge.

Action by Ben C. Hill against Richard V. Dey. Judgment for plaintiff and defendant appeals. Affirmed.

Frank E. Curley, of Tucson, for appellant.
Ben C. Hill, of Tucson, for appellee.

ROSS, J. Appellee, who is a practicing attorney in the courts of the state, sued for professional services rendered appellant between January 19, 1917, and March 23, 1918, alleging their reasonable value to be $7,000, of which he had been paid $4,000, leaving a balance due him of $3,000. The appellant's answer admits the services were rendered him as alleged, but denies they were of the reasonable value of $7,000 or of any value in excess of $4,000, and denies any indebtedness whatever. The case was tried before the court and a jury, and a verdict and judgment for the full amount demanded was the result.

The appeal raises but one question, the correctness of an instruction on the measure of damages. The only issue made by the pleadings was the reasonable value of the services rendered by appellant. The case throughout was tried and submitted on that theory. Appellee testified to the character, amount, and value of his services, and introduced other testimony of their value. The value so established ranged from $7,500 to $10,000, $3,500 of which was credited to what is hereinafter designated as the Laurel Canon case. The appellant chose to rest upon the case made by appellee, and introduced no evidence. In the course of appellee's testimony, who was the only witness to the fact of his employment and the amount and kind of services he had rendered, it developed that the relation of attorney and client was originally established by a written contract in the form of a letter from appellee to the agent of the appellant, the letter being dated January 19, 1917. The letter reads:

"In re Richard V. Dey v. Laurel Canon Mining Co. I hereby confirm my oral proposition regarding employment in the above-entitled matter. I will undertake the work necessary in this matter in the trial court, and take charge of the preparation of the case for trial, for a fee of $300.00 and necessary traveling expenses. It is expressly understood that this fee shall not cover any work in the Supreme Court, in the event an appeal is taken by either party to the suit."

The effect of this contract upon the amount appellee was entitled to recover was not raised by the answer, nor did the appellant request any instruction as to its effect, and accordingly the court instructed the jury to find the reasonable value of all the services rendered by appellee to appellant.

It was after an adverse verdict and upon his motion for a new trial that appellant first raised the point that the contract price was the highest measure of damages recoverable, and that the jury should have been so instructed. In support of his position, he invokes the well-settled law that permits a party to a fully executed contract to sue on quantum meruit, and to recover for his services their reasonable value, but in no event more than the contract price. 40 Cyc. 2853; Cunningham v. Elvins (Mo. App.) 194 S. W. 515; Daniels v. McDaniels, 184 Mo. App. 354, 171 S. W. 14; Owen v. Hadley, 186 Mo. App. 1, 171 S. W. 973.

[1] If the express contract set forth above was not subsequently modified or abrogated and another contract substituted for it, the point made by appellant is well taken. But if after appellee entered upon the perform-

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ance of the written contract the parties, either expressly or by implication arising from their actions and conduct, abandoned it for other and different arrangements, his exceptions are without merit.

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[2] As tending to show that the written contract was not intended to be adhered to, either as to the compensation therein stated or as to the amount and kind of services to be rendered by appellee, we would suggest: (1) That the pleadings are silent as to any written contract fixing appellee's compensation. The complaint alleges a cause of action for the reasonable value of appellee's services between the dates of his employment, fixing it at $7,000. The answer fixes the reasonable value of appellee's services at $4,000 and no more. The case was tried upon the theory that the reasonable value of appellee's services was the only issue, and the court charged the jury upon that theory without any protest or request from appellant indicating dissatisfaction with the instruction.

"As a general rule, a party is bound in the appellate court, as to the nature and form of the action or proceeding, by the theory on which the pleadings were construed and the action or proceeding was tried in the court below." 3 C. J. 723, § 620; Copper State Mining Co. v. Kidder, 20 Ariz. —, 179 Pac. 641.

[3] While action under this rule might not go to the extent of abrogating the agreed price for appellee's services and permit a recovery for a larger sum, it does, however, tend to show that appellant did not intend to hold appellee to that compensation, and we think we are authorized to treat it as some evidence of the abandonment of the written contract. (2) But besides, "the theory on which * * * the action or proceeding was tried in the lower court," the testimony on behalf of appellee tended to show that the written contract was by the parties abandoned and another contract substituted for it.

Appellee testified: That he "had been employed to represent the defendant, Dey, generally in the state of Arizona and in connection with certain litigation in which said Dey was and thereafter became involved. (By this language appellee conveys the idea that his whole service was to be compensated for as one contract.) That under such employment substantially all of his time was devoted to the business and litigation of said Dey, from January 19, 1917, to March 23, 1918," and that part of the services for which he was suing were services rendered in the preparation and trial of the Laurel Canon case; that on about March 5, 1917, appellant authorized him to appoint Richard W. Sprague, an attorney of Tucson, to assist in preparing a motion for a new trial in the Laurel Canon case, and in the preparation of other suits about to be brought; that on March 15th he wired appellant that he had been unable to make satisfactory arrangements regarding his fees or the employment of Sprague with appellant's agent, "and that, on account of the mix-up and condition of affairs at that time, he would expect an immediate payment of $1,000, to apply on general fees in all matters"; that on March 16, 1917, appellant wired him the $1,000, and placed him in "sole charge of all matters"; that in conversation with Dey in September, 1917, in New York, "it was agreed between himself and Mr. Dey that no definite fee should be agreed upon for the amount of work required of him, but that the charge should be reasonable in view of all work eventually required of him," he to pay Sprague's fee.

This testimony stands uncontroverted, and tends to support the theory on which the case was tried and submitted, to wit, that the first or written contract concerning appellee's fee for services in the Laurel Canon case was abandoned, and that there was substituted for it a contract that appellee should be paid the reasonable value of his services in that case and in all other matters. In other words, in view of the accruing of other litigation and legal business, after the contract of January 19th, so that practically all of appellee's time was occupied and would be occupied in caring for it, the whole of appellee's services, including the Laurel Canon case, would be paid for on the basis of their reasonable value. Other contingencies having arisen after the first contract, it is conceivable that the parties concluded the terms of their agreement as originally made were not fair and just, and that a more equitable arrangement would be not to pay for the services in piecemeal at a fixed price agreed upon in advance, but to consider them all together as a running account to be settled at their reasonable value when the services were ended or the relation of attorney and client severed. Payments were made appellee as upon a general running account, $1,000 at a time, amounting to $4,000, and no request that same or any part thereof be applied on the contract of January, 1917, although that was due, if the contract was not abandoned, before any other item of service was due.

[4, 5] In view of the evidence and the theory upon which the case was tried, we conclude the court committed no error in submitting to the jury the determination of the reasonable value of appellee's services. While it may not be clear that there was a substitution of contracts so that the court could so decide as a question of law, the conduct of the trial, the action of the parties under the contract, and the testimony all point in that direction. The appellant was perhaps entitled to an instruction, if he had so requested, submitting the question as to whether the first contract was abandoned and another substituted for it, but having

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wittingly or unwittingly stood by without requesting such instruction, he ought not now to be permitted to complain. In the face of the evidence, it cannot be said that the court erred in not peremptorily directing the jury, without any request, that the measure of damages for services in the Laurel Canon case was the sum fixed in the contract of January 19th, because there was substantial evidence tending to show that that contract had been abandoned and other arrangements made.

The substitution of contracts is not a novelty to the law. It may happen in several ways; as by express agreement, by implication, or where the terms of the second contract cover the terms of the first and include new terms. Arizona-Parral Mining Co. v. Forbes, 16 Ariz. 395, 146 Pac. 504.

Finding that no prejudical error was committed, the judgment is affirmed.

CUNNINGHAM, C. J., and BAKER, J., concur.

(20 Ariz. 471)

EMPIRE-ARIZONA COPPER CO. et al. v. SHAW. (No. 1706.)

(Supreme Court of Arizona. June 14, 1919.)

1. BILLS AND NOTES ⟸404(2) — PRESENTATION OF CHECK—STATUTE.

By Negotiable Instrument Law, a check must be presented for payment within a reasonable time after its issue, although not at the earliest opportunity, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.

2. BILLS AND NOTES ⟸526 — PRESENTATION OF CHECK FOR PAYMENT — SUFFICIENCY OF EVIDENCE.

In an action against the drawers of a check, evidence *held* to sustain the trial court's finding that plaintiff payee presented the check to the bank on which it was drawn for payment within a reasonable time after its issue.

3. APPEAL AND ERROR ⟸1011(1)—REVIEW—FINDING ON CONFLICTING EVIDENCE.

A conclusion of fact reached by the trial court on conflicting evidence will not be disturbed by the Supreme Court.

4. BILLS AND NOTES ⟸537(7) — PRESENTATION OF CHECK FOR PAYMENT—QUESTION OF FACT.

Whether plaintiff, payee of a check, presented it for payment to the bank on which it was drawn within a reasonable time under the circumstances *held* a question of fact.

5. BILLS AND NOTES ⟸400 — LIABILITY ON CHECK.

The drawers of a check were liable to the payee where he within reasonable time presented it for payment to the bank on which it was drawn, and the bank requested him to return later for payment, as it was short of cash; the payee then going elsewhere and depositing the check for collection when the drawee bank had become insolvent.

6. PAYMENT ⟸22—CHECK — ACCEPTANCE AS PAYMENT.

A debt was not paid, by the issuance by the debtors of a check to the creditor unless as a fact the creditor accepted the check as final payment.

7. BILLS AND NOTES ⟸400—DELAY IN PRESENTING CHECK.

From the facts that when debtors drew a check for the debt and delivered it to the creditor they had funds in bank sufficient in amount to pay the check, but the debtor did not seek to collect it through another bank until the drawee bank had become insolvent, no inference can be drawn that the debtors suffered a loss because of the creditor's unreasonable delay in presenting the check for payment so as to release them from liability on the check to him.

Appeal from Superior Court, Yavapai County; John J. Sweeney, Judge.

Action by R. W. Shaw against the Empire-Arizona Copper Company and the Empire-Arizona Consolidated Copper Company. From judgment for plaintiff and an order refusing new trial, defendants appeal. Affirmed.

Clark & Clark, of Prescott, for appellants.
A. H. Favour, of Prescott, for appellee.

CUNNINGHAM, C. J. The appellee performed services as a miner for the appellants in and about the sinking of a certain mining shaft on the mining properties of appellants. On the 31st day of May, 1917, the appellee and appellants determined and agreed that appellants owed to appellee the sum of $218.39, and therefore delivered to appellee a check drawn on the Commercial Bank of Parker, at Parker, Ariz. On the 1st day of June, 1917, appellee. R. W. Shaw, presented the check to said bank for payment. At the time the check was so presented for payment, the appellants had an account with said bank and a fund sufficient in amount to pay said check.

The check was not paid by the bank, and the parties do not agree as to the reason why the check was not paid at the time it was presented. The payor of the check, Commercial Bank of Parker, became insolvent and suspended business on June 10, 1917, and plaintiff's check was never paid.

This action was commenced by the holder of the check, R. W. Shaw, the appellee, on or about the 27th day of July, 1917, against the drawers of the check, to recover the amount of the check, $218.39, with interest thereon at the legal rate, and costs.

The defendants first pleaded payment, satisfaction, and discharge of the debt; then, in other later pleadings, they set forth that:

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"Plaintiff was negligent in cashing and collecting the said check, and wholly lacking in ordinary diligence, and that if any loss or damage has resulted to plaintiff, it is wholly due to his own negligence and lack of diligence in presenting and cashing said check."

The cause was tried before the court without a jury, and the court rendered judgment for the plaintiff for the amount claimed. From an order refusing a new trial, and from the judgment, the defendants appeal.

The appellants assign as error the rendering of said judgment for the plaintiff for the reasons as follows:

"(1) Because appellee was bound to present the check given to him at the earliest opportunity; that he had presented it at the bank when the money was tendered him in full, and that he refused it because the bills were of smaller denomination than he wished to carry to Los Angeles.

"(2) The court erred in rendering said judgment, because there is no evidence of any valid promise on the part of appellants to make good said check to appellee.

"(3) The court erred in overruling appellants' motion for a new trial, for the reasons above stated."

One of the controversies at the trial was the inquiry into the circumstances under which plaintiff failed to get the money from the bank on the 1st day of June, 1917. All parties concede that plaintiff was in the bank with the check on that date, and that some officer or employé of the bank examined the check, and did not object to payment because the drawer, the appellants, were short of funds with which to pay. The appellants contended at the trial that the bank offered to pay the check, and produced currency in bills of small denomination, which the plaintiff did not wish to accept, and, being informed by the bank that it then had no larger bills, plaintiff asked to have the check returned to him, which was done, and he thereupon indicated that he would take the check with him to Los Angeles, and there collect it through a bank at that city; that plaintiff did not deposit the check in a Los Angeles bank for collection until after the 10th day of June, 1917, on which date the Commercial Bank of Parker became insolvent. The appellants produced substantial evidence tending to support their said contention.

On the other hand, the plaintiff contended that when he, in person, presented the check to the said payor bank on the 1st day of June, 1917, at Parker, the person representing the bank at the time of such presentation of the check stated to plaintiff that heavy demands had been made of the bank's supply of cash, and that they had paid out so much money during the day that they did not have on hand a sufficient amount of money with which to cash this particular check at that time, and suggested to plaintiff that the bank would receive, during the night following, plenty of money, and if he, the plaintiff, would return with the check on the next morning, June 2, 1917, that the bank would then pay the check. The appellee did not wait until the next day, but proceeded to Los Angeles, and then on the 9th, 10th, or 11th day of June, 1917, he deposited the check with a bank for collection. Plaintiff did not know that the Commercial Bank of Parker became insolvent until after he had deposited the check with the Los Angeles bank.

The plaintiff produced substantial testimony tending to establish all of such disputed facts.

[1] "A check must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay." Paragraph 4331, R. S. Ariz. 1913, Negotiable Instruments Law.

[2, 3] Under the conflicting evidence, the trial court has necessarily determined that the plaintiff presented the check to the bank within a reasonable time after its issue. The determination of that fact is wholly within the province of the court trying the facts; and the evidence, while conflicting on that question, amply sustains the conclusion reached, and, as a consequence, the conclusion reached on conflicting evidence will not be disturbed by this court because of such conflict.

[4] The holder of the check was not bound to present it for payment "at the earliest opportunity," as contended by appellants, but he was bound to present the check for payment "within a reasonable time after its issue" to prevent the discharge of the drawer to the extent of loss arising from unreasonable delay. Paragraph 4331, supra. Whether the plaintiff did present the check for payment within a reasonable time in the circumstances here shown was a question of fact, and that question has been determined adversely to the appellants.

[5] The appellants insist that the judgment is erroneous because the bank offered to pay the check and the holder of the check refused to accept the kind of money he was offered by the bank. This contention, like the former, was necessarily decided against the appellants. On this dispute, the evidence was also conflicting, as indicated above. The court necessarily found that the bank requested the holder of the check to return later for payment, as plaintiff's evidence tends to prove.

[6, 7] The second statement of error, to wit, "The court erred in rendering said judgment because there is no evidence of any valid promise on the part of appellants to make good said check to appellee," is set forth upon the theory that the appellee's debt, owing by appellants, was paid, satisfied, and

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discharged by them by the issuance of a check to their creditor. Such is not the law, unless, as a fact, the creditor accepts the check as final payment. The appellants do not claim that the appellee did accept the check as a final payment, but they insist that appellee sustained a loss because he failed to use ordinary diligence in presenting his check to the bank for payment. The appellants nowhere directly contend that they, the drawers of the check, lost anything because of the plaintiff's failure to present the check for payment within a reasonable time after they issued the check and delivered it to him. The bank suspended business a short time after the check was issued, and the appellants had a fund with the bank subject to the said check, and sufficient in amount to pay the check at the time the bank became insolvent, and from such facts the inference may be drawn that the appellants lost a portion of their said funds by such insolvency, but no inference can be drawn from such facts that the appellants suffered a loss because of the appellee's unreasonable delay in presenting the check for payment. The appellants nowhere directly claim a loss from such cause.

Upon the whole case, we find no reversible error on the record. As a consequence, the judgment must be affirmed.

ROSS, J., concurs.

NOTE.—Judge BAKER having been of counsel in the case, he, therefore, took no part in this decision.

(92 Or. 462)

OLCOTT, Governor, v. HOFF, State Treasurer.

(Supreme Court of Oregon. June 10, 1919.)

1. MANDAMUS ⟸176 — JURISDICTION — ORIGINAL PROCEEDINGS IN SUPREME COURT —SCOPE OF RELIEF.

On an original proceeding in mandamus in the Supreme Court, the court will decide all matters of general public interest and importance which the petition asks and which are argued in the briefs, not personal to the petitioner, and which, until decided, will seriously affect and unsettle the administration of the affairs of the state, though a decision as to such matter might be dicta as far as the parties involved are concerned.

2. STATES ⟸60 — DEATH OF GOVERNOR — SUCCESSION.

Where the Governor of Oregon is removed, dies, resigns, or is unable to discharge the duties of his office, the secretary of state becomes governor in fact and is entitled to receive compensation as such, under Const. art. 5, § 8, notwithstanding Const. art. 3, § 1, art. 2, § 10, providing, among other things, that no person shall hold more than one lucrative office at the same time.

3. COURTS ⟸90(3)—STARE DECISIS.

When one of the clauses of the Constitution has been construed by the Supreme Court, that construction should not be set aside except for the most cogent reasons.

In Banc.

Original proceeding in mandamus by Ben W. Olcott, Governor, against O. P. Hoff, State Treasurer. Writ ordered to issue.

This is an original proceeding on a petition for an alternative writ of mandamus, in which it is alleged that at the general election on November 5, 1918, James Withycombe was elected governor of the state of Oregon, and that he duly qualified for that office on January 14, 1919; that at the general election held on November 7, 1916, the petitioner, Ben W. Olcott, was elected secretary of state of the state of Oregon, and that he duly qualified for that office on December 26, 1916; that ever since he "has been and now is the duly qualified and acting secretary of state," and that on March 3, 1919, James Withycombe, the duly elected and qualified governor of the state, died. Further allegations of the petition follow:

"That under and by virtue of section 8, art. 5, of the constitution of Oregon, the office of governor and the duties thereof devolved upon the secretary of state, and that on the 7th day of March your petitioner, Ben W. Olcott, took the oath of office and assumed the office and duties of governor. That he has been since that time and now is the governor of the state of Oregon. That on April 1, 1919, a warrant was duly issued by the secretary of state in favor of Ben W. Olcott, governor, for the sum of $336, in payment of the salary due said Ben W. Olcott, as governor, from March 7 to March 31 (inclusive), 1919, in accordance with law. That your petitioner has presented said warrant to O. P. Hoff, state treasurer, and that said O. P. Hoff, state treasurer, has failed and refused and still fails and refuses to pay the same, alleging as his reason that the warrant should be drawn to Ben W. Olcott, secretary of state, acting governor. That there is money in the state treasurer's hands to the credit of the fund for the payment of the salary of governor, which money was appropriated by H. B. No. 470, passed at the thirtieth session of the legislature, sufficient to pay petitioner's claim."

Wherefore the petitioner prays:

"That an alternative writ of mandamus issue out of this court, returnable on the 8th day of April, 1919, commanding the said O. P. Hoff, state treasurer, to pay said warrant, or on the failure thereof to show this court on the return day why the same has not been done, and for such other relief as may be proper, and your petitioner particularly prays that this court will define his duties and powers in relation to the office of Governor."

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To this petition the defendant, O. P. Hoff, state treasurer, demurred upon the ground that "it appears from the face thereof that the writ does not state facts sufficient to constitute a cause of action against this defendant." The case was argued and submitted on April 10, 1919, at which time the court extended a general invitation to the bar of the state to file informal briefs on either side, as a result of which numerous and exhaustive briefs pro and con were submitted by able and distinguished attorneys, covering a wide range of research and investigation.

On behalf of the petitioner it is vigorously contended that in the interests of the general public, to settle and determine chaotic political and governmental conditions, this court should define his official title and tenure of office and prescribe his duties. The right or province of this court to decide such questions under the record is strenuously denied by opposing briefs. The vital question we are asked to decide is whether the petitioner, Mr. Olcott, holds the office of governor in fact, and, if so, for how long, or whether he has the right only to discharge the duties of that office during the remainder of his term as secretary of state. For the purposes of this opinion, all of the allegations of the petition must be deemed taken as true.

George M. Brown, Atty. Gen., and J. M. Devers, Asst. Atty. Gen., for petitioner.

Stephen A. Lowell, of Pendleton, and Carey & Kerr, Fred W. Mulkey, Wood, Montague & Hunt, M. L. Pipes, C. J. Schnabel, and J. G. Arnold, all of Portland, amici curiæ.

J. G. Richardson, of Salem, for defendant.

Frank S. Grant, Ralph E. Moody, and W. H. Holmes, all of Portland, amici curiæ.

JOHNS, J. Under our form of government all power, both state and federal, is vested in the legislative, executive, and judicial departments. Each is separate and distinct from the other. In the affairs of state the governor is the chief executive and all other officers in that branch are more or less subordinate to his position. The office of secretary of state is next in importance. Section 1 of article 3 of the constitution provides:

"The powers of the government shall be divided into three separate departments—the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this constitution expressly provided."

Sections 1 and 8 of article 5 follow:

"The chief executive power of the state shall be vested in a governor, who shall hold his office for the term of four years; and no person shall be eligible to such office more than eight in any period of twelve years."

"In case of the removal of the governor from office, or of his death, resignation, or inability to discharge the duties of the office, the same shall devolve on the secretary of state; and in case of the removal from office, death, resignation, or inability, both of the governor and secretary of state, the president of the senate shall act as governor, until the disability be removed, or a governor be elected."

The latter article also defines the qualifications of governor and the manner of his election, specifies who are ineligible for the office, and names his special powers and duties.

[1] In addition to such obligations and responsibilities, it is a matter of common knowledge that the governor is a member of numerous boards before which important business of all state institutions is daily transacted and by which large amounts of bonds are issued and certified for state purposes. This court knows as a matter of law that Mr. Olcott's term of office as secretary of state expires on January 3, 1921, and that if his right to the office of governor or to discharge the duties of that office ends with his term of secretary of state, another governor must be elected at the next general election. These are all matters of general public interest and importance, not personal to Mr. Olcott, and until such time as they are decided will seriously affect and unsettle the administration of the affairs of state. For such reasons, we think it is not only our province but our duty, in this kind of a case, in a measure to disregard and overlook any of the apparent forms or technicalities which have been suggested, and decide such public questions as are not inconsistent with our judicial duties.

[2] Whether Mr. Olcott is governor in fact and holds the office as such for the unexpired term of the late Governor Withycombe, or whether he shall discharge the duties of that office for the remainder of his term as secretary of state, depends upon the legal construction which should be placed upon section 8 of article 5 of the constitution, above quoted.

As stated by Mr. Justice McBride in State v. Finch, 54 Or. 482, 103 Pac. 505, our constitution is largely copied from that of Indiana, which was adopted by that state in 1851, and which provides:

"In case of the removal of the governor from office, or of his death, resignation or inability to discharge the duties of the office, the same shall devolve on the lieutenant governor."

By substituting the words "secretary of state" for "lieutenant governor" that section of the Indiana organic law is made identical with the corresponding section of our own constitution. Counsel have not

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cited, and we have not been able to find, any decision of the state of Indiana construing that section of its constitution.

The federal constitution, section 1 of article 2, provides:

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"In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice president."

It will be noted that by inserting the words "powers and" between the words "the" and "duties" and substituting the title "vice president" for "secretary of state" our own constitution is made identical with the federal. In so far as we are advised, this particular section of the federal constitution has never been construed by any court, yet upon the death of the president no one has ever claimed that the vice president became acting president only, or that he would not succeed to the office of president itself for the remainder of the unexpired term for which the president was elected.

We have examined the constitutions of every state in the Union, and none of them are identical with our own; the closest resemblance being found in the Indiana and federal constitutions, as above noted.

Under their respective constitutions, in the event of the death of the governor, the powers and duties of that office devolve upon the lieutenant governor in the following states: Alabama, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas, Vermont, Virginia, Washington, Wisconsin. And under like condition such duties devolve upon the president or speaker of the senate in the following named states: Arkansas, Florida, Georgia, Kansas, Maine, Maryland, New Hampshire, New Jersey, Tennessee, West Virginia. It is only in Oregon, Arizona, Utah, and Wyoming that in the event of the governor's death the secretary of state succeeds to his office or performs his duties. Excluding Oregon, the constitutions of Alabama, Delaware, New Mexico, Oklahoma, South Carolina, and Virginia, only, expressly provide that upon the death of the governor the office of governor itself shall devolve upon his designated successor; and we have not been cited to or able to find any decision by the courts of either of those states construing that particular section of their respective constitutions.

The only decision of this court on the subject was rendered in the case of Chadwick v. Earhart, 11 Or. 389, 4 Pac. 1180, which is vigorously assailed by counsel here, who claim that it was largely dictum, is not the law, and should be overruled. That case was decided at the October term, 1884, and it appears from the brief of the respondent R. P. Earhart, who was then the secretary of state, that—

"The statement of facts contained in the stipulation which is the basis of this action may be briefly stated by submitting the questions. In the event of the resignation of the governor of Oregon does the secretary of state become the governor by operation of law, and is he entitled to the salary provided by law for that office? * * * A nice question is raised by the stipulation, but it is of no importance in ascertaining whether appellant is entitled to the salary in question, that is, was the appellant the governor during the two days after the qualification of the respondent and before the qualification of Governor Thayer? And further, as the secretary of state is governor or acting governor, as the case may be, the office or duties thereof devolved on the respondent during that time. And we maintain that the title to each office terminated with the expiration of the four years after his qualification."

Among other things, it was stipulated that—

"Mr. Earhart objects to the salary being paid from the 9th day of September, 1878, to the 11th day of September, 1878—two days—on the ground that Mr. Chadwick was not secretary of state after Mr. Earhart was sworn in on the 9th day of September, 1878, though Mr. Chadwick acted as governor until and including the 11th day of September, 1878."

The attorney for Mr. Chadwick, the appellant, made the following contention in his brief:

"In the event of the happening of any one of the above contingencies the office of governor devolves upon the secretary of state. The language in reference to the duties of secretary of state in this event is the same as that defining the office of president when the vice president succeeds to the same, except the word 'powers' is omitted.

"The office of governor is distinctive. It cannot merge into another. It cannot be vacant any more than can be the president's office. The appointments under a constitution cannot be broken, whether they are made by an election or otherwise. The office is always filled. The incumbent is an incident to the office. Whether the incumbent is at the time secretary of state, he is the governor, and as much as if his appointment had been made by an election. The office devolves on him. The means used to fill the office of governor are absolute, and while they may be different according to contingencies, the one act of filling the office makes the incumbent governor. It is the office, not the man. Under a constitution there can be no such thing as an 'acting officer.' That is one that appears to be what he is not. No more than a clerk of a department could discharge the duties of president.

"There can be but one construction of the constitution in reference to this matter, and that is the office shall devolve on the sec-

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retary of state. Duties are subordinate to the office and a part of it, and when the office devolves on the secretary of state, duties follow—prescribed, or to be prescribed, by legislative enactment. 1 Kent Com. 279."

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It was on such stipulation of facts and the briefs of respective counsel that the decision was rendered wherein this court, through Mr. Chief Justice Waldo, said:

"Two questions are submitted in this case. The first and principal one is, whether, when, under section 8 of article 5 of the constitution of Oregon, the duties of the office of governor devolve upon the secretary of state, he has a right to the salary of the office. Second. If this question be answered in the affirmative, whether he shall continue to perform the duties of the office for the remainder of the term of the outgoing governor, or shall he perform those duties only so long as he shall continue to be secretary of state. * * *

"Counsel for the respondent claims that in the contingency provided for in said section 8 the duties of the office of governor become annexed to the office of secretary of state and are discharged as duties incident to the latter office. In other words, that the duties of the office, but not the office itself, devolve upon the secretary of state.

"This position seems to require: First, either that the office of governor should continue vacant during the time the secretary discharges its duties, and that such duties be in some way performed by the secretary of state, as such, consistently with a condition of vacancy; or, second, that the office be filled and yet he who fills it be in no wise governor, but continue to be merely secretary of state.

"In the first place, it is not shown how an office can be vacant and yet there be a person, not the deputy, or locum tenens, of another, empowered by law to discharge the duties of the office and who does in fact discharge them. It is not explained how, in such a case, the duties can be separated from the office, so that he who discharges them does not become an incumbent of the office. And, in the second place, how a person can fill the office of governor without being governor.

"It is the function of a public officer to discharge public duties. Such duties constitute his office. Hence, given a public office and one who, duly empowered, discharges its duties, and we have an incumbent in that office. Such is the case here. The secretary of state, by force of the function cast upon him, becomes governor, and consequently entitled to the salary appertaining to the office.

"Nor does the language of the section, grammatically considered, bear the interpretation counsel has put upon it. Leaving out the co-ordinate clauses following the first clause, and the sentence reads: 'In case of the removal of the governor from office, the same shall devolve on the secretary of state;' that is, the office shall devolve. So, taken with each of the succeeding clauses, the word 'same' stands for 'office.'"

As to the second question, the opinion holds that the individual—

"* * * answering the description at the time the contingency arises designates him as the person who is to enter and fill the office, and when, as thus designated, he enters into the office, he holds it in his natural, and not in his official, capacity. This seems to be the principle which applies when the office of governor devolves on the secretary of state on the happening of any of the events specified in the constitution. * * * Now, as two offices may remain distinct which are not incompatible, though the officer is the same person, it would seem that the same principle should govern the holding of the office of governor by the secretary of state.

"This question therefore must also be answered in favor of the appellant, and judgment be entered accordingly."

We do not agree with the statement of counsel that other courts have refused "to accept the Chadwick Case as sound law." Upon that particular point, no United States court has ever construed the federal constitution and no state court has ever rendered any decision construing the same, or a similar provision of a state constitution.

To support the argument that Mr. Olcott does not hold the office and is acting governor only, amicus curiæ, counsel for defendant, cites and relies upon the following authorities: State v. Grant, 12 Wyo. 1, 73 Pac. 470, 2 Ann. Cas. 382; State v. Sadler, 23 Nev. 357, 47 Pac. 450; Clifford v. Heller, 63 N. J. Law, 105, 42 Atl. 155, 57 L. R. A. 312; People v. Budd, 114 Cal. 168, 45 Pac. 1060, 34 L. R. A. 46; People v. Cornforth, 34 Colo. 107, 81 Pac. 871; Opinion of the Justices, 70 Me. 570; State v. Stearns, 72 Minn. 200, 75 N. W. 210; State v. McBride, 29 Wash. 335, 70 Pac. 26; Futrell v. Oldham, 107 Ark. 386, 155 S. W. 502, Ann. Cas. 1915A, 571. Those decisions were rendered under the respective constitutions of the different states, which provide as follows:

"If the governor be impeached, displaced, resign or die, or from mental or physical disease or otherwise become incapable of performing the duties of his office or be absent from the state, the secretary of state shall act as governor until the vacancy is filled or the disability removed." Wyoming, art. 4, § 6.

"In case of the impeachment of the governor, or his removal from office, death, inability to discharge the duties of the said office, resignation or absence from the state, the powers and duties of the office shall devolve upon the lieutenant governor for the residue of the term, or until the disability shall cease." Nevada, art. 5, § 18.

"In case of the death, resignation, or removal from office of the governor, the powers, duties, and emoluments of the office shall devolve upon the president of the senate." New Jersey, art. 5, § 12.

"In case of the impeachment of the governor, or his removal from office, death, inability to discharge the powers and duties of his office, resignation, or absence from the state, the powers and duties of the office shall devolve upon the lieutenant governor for the residue of the

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term, or until the disability shall cease." California, art. 5, § 16.

"In case of the death, impeachment, or conviction of felony or infamous misdemeanor, failure to qualify, resignation, absence from the state, or other disability of the governor, the powers, duties and emoluments of the office, for the residue of the term, or until the disability be removed, shall devolve upon the lieutenant governor." Colorado, art. 4, § 13.

"Whenever the office of the governor shall become vacant by death, resignation, removal from office or otherwise, the president of the senate shall exercise the office of governor until another governor shall be duly qualified." Maine, art. 5, § 14.

"The lieutenant governor shall be ex officio president of the senate; and in case a vacancy should occur, from any cause whatever, in the office of governor, he shall be governor during such vacancy." Minnesota, art. 5, § 6.

"In case of the removal, resignation, death or disability of the governor, the duties of the office shall devolve upon the lieutenant governor." Washington, art. 3, § 10.

"In case of the death, conviction on impeachment, failure to qualify, resignation, absence from the state or other disability of the governor, the powers, duties and emoluments of the office for the remainder of the term or until the disability be removed, or a governor elected and qualified, shall devolve upon and accrue to the president of the senate." Arkansas, art. 6, § 12.

It will be noted that in all of the sections quoted it is not the office, but the powers and duties of the office, which devolve upon his successor in the event of the death of the governor. The importance of that distinction is clearly pointed out by the recent decision of the supreme court of Arkansas in construing the constitution of that state in the case of Futrell v. Oldham, supra, where the opinion says:

"If the framers of the constitution had intended to provide for the devolution of the office of governor, in case of vacancy by resignation or otherwise, upon the president of the senate, that intention could easily have been directly expressed in appropriate words. But they chose other terms which clearly observe the distinction between the course of succession of the office itself and a mere devolution of the duties and the emoluments of the office for the time being, and deliberately adopted the latter as the best means of having the government administered until the people themselves can elect a governor."

That distinction was also made and emphasized by this court in the case of Chadwick v. Earhart, supra.

W. H. Holmes, who submitted an amicus curiæ brief in the instant case, was also one of counsel for the respondent Earhart in the Chadwick Case, and then contended that "the right of the appellant to the salary would depend on whether the title of the office of governor was vested in him or not;" that the title to that office was not vested in Chadwick and that his term as governor was special, "and the time cannot be extended by implication." In his brief in the pending case he frankly says:

"If the Chadwick case was correct law, it would seem the question has already been determined judicially and there would be nothing for the attorney general to do except to state that the question has been decided by the court of last resort in the state of Oregon and that the secretary of state would be justified in following the decision. Owing to the refusal of other courts in the land to accept the Chadwick case as sound law, and inasmuch as the secretary of state wants his rights and duties defined in regard to resigning his office as secretary of state, with the view of assuming the office of governor and appointing a person to the office which he proposes to resign, it is important that the question now before the court be correctly decided."

Then, as now, he vigorously asserted that it was not the law and should be overruled.

Much stress is laid upon the fact that R. P. Boise was a member of the constitutional convention, and that as circuit judge he sustained the demurrer to the complaint in the Chadwick Case. We have a very high regard and a profound respect for his judicial learning and ability, but his decision was rendered under the old practice and upon an agreed statement of facts, with a view of prosecuting an appeal and obtaining an early decision in the appellate court. Outside of the fact that Judge Boise sustained the demurrer, there is no written evidence in this or the circuit court as to what may have been his personal opinion or reason for sustaining the demurrer. The fact remains that the Chadwick Case was decided by this court in October, 1884; that the opinion of the then judges of this court, William P. Lord, E. B. Watson, and J. P. Waldo, Chief Justice, was unanimous, and that for more than 34 years it has never been questioned in this court.

Counsel now attack the grammatical construction given to that section of the constitution in the opinion, contending that the word "same" as used therein refers to the word "duties" and not to "office," and that it should be construed to mean that in case of the removal of the governor or of his death, resignation, or inability to discharge the duties of his office, the duties of the office, and not the office itself, should devolve upon the secretary of state. That question was squarely decided in the Chadwick Case and its decision was necessary to the opinion. It was there contended that Chadwick knew of the terms and provisions of that section of the constitution when he was elected and qualified as secretary of state; that because he was secretary of state he might be called upon to perform the duties of the office of governor, and for such reason he was not entitled to receive

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any compensation for his services in that capacity; and that even though he performed the duties of governor he should receive only his salary as secretary of state. In deciding that point the court held that the word "same" relates to and qualifies the word "office," and in legal effect that the section should read:

"In case of the removal of the governor from office or of his death, resignation, or inability to discharge the duties of the office, the office itself shall devolve upon the secretary of state."

Section 7 of article 2 of the organic law of Oregon adopted in 1845 provides that—

"The governor shall continue in office two years, and until his successor is duly elected and qualified; and in case of the office becoming vacant, by death, resignation or otherwise, the secretary shall exercise the duties of the office until the vacancy be filled by election."

Volume 9 of United States Statutes at large, p. 324, Act Aug. 14, 1848, c. 177, § 3, establishing the territory of Oregon, provides:

"And in case of the death, removal, resignation, or absence of the governor from the territory, the secretary shall be, and he is hereby, authorized * * * to perform all the powers and duties of the governor, during such vacancy or absence, or until another governor shall duly be appointed and qualified to fill such vacancy."

Our present constitution was adopted on November 9, 1857, and its framers must have known of such terms and provisions of the organic law and territorial statutes, both of which specify that in the event of the death of the governor the secretary of state shall exercise and perform the duties of that office; that under the organic law he should perform those duties "until the vacancy be filled by election," and that under the territorial statute he should perform those duties "during such vacancy or absence, or until another governor shall duly be appointed and qualified to fill such vacancy." Yet with such knowledge it is significant that the constitution which they adopted provides that—

"In case of the removal of the governor from office, or of his death, resignation, or inability to discharge the duties of the office, the same shall devolve on the secretary of state."

They did not select either, but drafted and adopted another section, using language of their own, with a different meaning. That section further says:

"In case of the removal from office, death, resignation, or inability, both of the governor and secretary of state, the president of the senate shall act as governor, until the disability be removed, or a governor be elected."

And it is contended that because in such a case "the president of the senate shall act as governor," it must follow that the section should be construed to mean that upon the death of the governor the secretary of state should "act as governor." We do not think that it will bear that construction. It specifically says that:

"In case of the removal of the governor from office, or of his death, resignation, or inability to discharge the duties of the office, the same shall devolve on the secretary of state"

—and that in the event of the death or disability of both the governor and the secretary of state the president of the senate shall act as governor. It does not say that the secretary of state shall act as governor, although it says that the president of the senate shall "act as governor." If it had been the intent of the framers of the constitution that the secretary of state should "act as governor," it would have been an easy matter to say so and to apply the same language to the secretary of state that it did to the president of the senate.

[3] Upon the question of stare decisis the supreme court of Washington in Re City of Seattle, 62 Wash. 218, 113 Pac. 762, says:

"The rule of stare decisis is peculiarly applicable to the construction of the constitution. The interpretation of that document should not be made dependent upon every change in the personnel of the court. When one of its clauses has been once construed, that construction should not be set aside except for the most cogent reasons. Certainty in the law is of the first importance."

In Cooley's Constitutional Limitations (7th Ed.) p. 83, it is said:

"Precedents, therefore, become important, and counsel are allowed and expected to call the attention of the court to them, not as concluding controversies, but as guides to the judicial mind. Chancellor Kent says: 'A solemn decision upon a point of law arising in any given case becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness and the community has a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it. It would therefore be extremely inconvenient to the public if precedents were not duly regarded and implicitly followed. It is by the notoriety and stability of such rules that professional men can give safe advice to those who consult them, and people in general can venture to buy and trust, and to deal with each other. If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property. When a rule has once been deliberately adopted and declared, it ought not to be disturbed unless by a court of appeal or review, and never by the same court, except for very urgent reasons, and upon a clear manifestation of error; and if the practice were

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otherwise, it would be leaving us in a perplexing uncertainty as to the law.'"

This rule of construction has been adopted and followed by a long line of decisions of this court, commencing with the case of State v. Clark, 9 Or. 470, and ending with the case of Multnomah County v. U. S. Fidelity & Guaranty Co., 180 Pac. 104, decided April 22, 1919. The rule is well stated by Mr. Justice Burnett in his dissenting opinion in Kalich v. Knapp, 73 Or. 587, 145 Pac. 27, Ann. Cas. 1916E, 1051, thus:

"Another doctrine equally well settled is that of stare decisis, to the effect that when a decision has once been rendered it amounts to an authoritative construction of the law, and should not be disregarded or overturned except for very cogent reasons showing beyond question that on principle it was wrongly decided. The principle is that laws are largely conventional rules of action, and it is more important that the rule be settled as a guiding precept to the public than that by the action of the courts the law should be made to fluctuate like the tides," citing authorities.

Section 10 of article 2 of the constitution provides that—

" * * * Nor shall any person hold more than one lucrative office at the same time, except as in this constitution expressly permitted."

It is contended that under section 1 of article 3, supra, and the section just quoted, no one individual can receive the emoluments and hold the offices of governor and secretary of state at the same time, but it will be noted that each of such sections contains the clause, "except as in this constitution expressly permitted," and that the offices of governor and secretary of state are both executive or administrative, and not legislative or judicial. All of the constitution was adopted at the same time, and its various provisions must be construed as a whole, and when section 10 of article 2 and section 1 of article 3 are considered with section 8 of article 5 they are not in conflict. The devolving of the office of governor, at the death of that official, upon the secretary of state is one of the exceptions contemplated by the framers of the constitution, provided for by section 10 of article 2 and section 1 of article 3. The word "devolve" has a legal meaning and is well defined by Bouvier thus: "To pass from a person dying to a person living."

Regardless of the question as to whether the Chadwick Case is sustained by the weight of authority, the fact remains that since its decision in October, 1884, many legislatures have come and gone; that the people have directly or indirectly had the power to amend the constitution; that for more than 34 years it has been the law of the state; and that it was decided by eminent justices of this court and is sustained by such reasoning and authority as clearly to bring it within the rule of stare decisis and make it binding on this court.

Mr. Olcott is governor in fact and has the right and title to the office itself, with the accompanying right and authority to perform the duties and receive the emoluments of the office. As to whether he could resign as secretary of state, and as governor appoint another to that position and still continue to hold the office of governor, we do not feel legally justified in going beyond anything said in this opinion. That is less a public and more a personal question for Mr. Olcott.

But we do hold that, upon the death of the late Governor Withycombe, by reason of the fact that Mr. Olcott was then secretary of state he automatically became governor, and when he took the oath as such the office of governor and the title to that office were thrust upon him by the terms and provisions of section 8 of article 5 of the constitution, and that under the authority of Chadwick v. Earhart, supra, he became and is now governor in fact and is entitled to hold that office, perform all of its duties, and receive its emoluments for the full period of the unexpired term to which the late Governor Withycombe was elected. This decision is based upon the express terms and provisions of our state constitution, which was adopted by a direct vote of the people, and which within itself, in case of the removal of the governor from office, or of his death, etc., provides how and by whom the office of governor shall be filled; and for such reason it is not in conflict with the recent opinion of the majority of this court in State ex rel. v. Kellaher, 177 Pac. 944. In that kind of a case there is a vacancy, and the law provides for an appointment to fill the same and states by whom the appointment shall be made. In the instant case, however, when the people elected Mr. Olcott secretary of state, by the very terms of the constitution they elected him to become governor upon the death of Governor Withycombe. There was no vacancy in that office, as the people, speaking through the constitution, have made their own selection.

The court sincerely thanks distinguished counsel for their able and instructive briefs as amici curiæ on the respective sides, and assures them that the same are duly appreciated.

Let the writ issue as prayed for in the petition.

BEAN, J., concurs.

McBRIDE, C. J. (specially concurring). I fully concur with the reasoning of Justice JOHNS, and in the conclusion arrived at by him, but think we should go further and decide every question that is presented in the briefs.

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In the specially concurring opinions of Justices BURNETT and BENNETT, it is urged that the question as to whether the petitioner will hold for the remainder of the unexpired term of the late Governor Withycombe, or only until his own term as secretary of state expires, and the further question as to whether Mr. Olcott can now resign the office of secretary of state and continue to hold the office of governor, are not necessarily involved here, and that any discussion of these questions is academic, and any opinion rendered in respect to them, would be merely dictum.

If these questions involved merely the private rights of individuals this contention would undoubtedly be correct; but where the general public has an interest in the controversy the courts have, with substantial unanimity, disregarded the technical limitations embraced in the term "dictum" and decided the whole controversy, where such a course appeared promotive of the public good, or calculated to settle disputed construction of provisions of the constitution and prevent future litigation concerning them. I do not now refer to or cite the decisions from those states where the law provides for the submission of such questions to the supreme court without suit, but to those having constitutions no broader in these respects than our own and to the supreme court of the United States. Giles v. Harris, 189 U. S. 475, 23 Sup. Ct. 639, 47 L. Ed. 909; Memphis St. Ry. Co. v. Rapid Transit Co., 133 Tenn. 99, 179 S. W. 635, L. R. A. 1916B, 1147, Ann. Cas. 1917C, 1045; Boise City Irr. & Land Co. v. Clark, 131 Fed. 415, 65 C. C. A. 399; Borguis v. Falk Co., 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489; State v. Stutsman, 24 N. D. 68, 139 N. W. 83, Ann. Cas. 1914D, 776; State v. Southern Tel. & Cons. Co., 65 Fla. 67, 61 South. 119; Commonwealth of Mass. v. Klaus, 145 App. Div. 798, 130 N. Y. Supp. 713; In re Fairchild, 151 N. Y. 361, 45 N. E. 943; People v. Gen. Com. of Republican Party, 25 App. Div. 339, 49 N. Y. Supp. 723; In re Morgan, 114 App. Div. 45, 99 N. Y. Supp. 775.

In Giles v. Harris, supra, the United States supreme court says:

"Perhaps it should be added to the foregoing statement that the bill was filed in September, 1902, and alleged the plaintiff's desire to vote at an election coming off in November. This election has gone by, so that it is impossible to give specific relief with regard to that. But we are not prepared to dismiss the bill or the appeal on that ground, because to be enabled to cast a vote in that election is not, as in Mills v. Green, 159 U. S. 651, 657 [16 Sup. Ct. 132, 40 L. Ed. 293], the whole object of the bill. It is not even the principal object of the relief sought by the plaintiff. The principal object of that is to obtain the permanent advantages of registration as of a date before 1903. * * *

"The traditional limits of proceedings in equity have not embraced a remedy for political wrongs. * * * But we cannot forget that we are dealing with a new and extraordinary situation, and we are unwilling to stop short of the final considerations which seem to us to dispose of the case." Giles v. Harris, 189 U. S. 475, 484, 486, 23 Sup. Ct. 639, 641, 642 (47 L. Ed. 909).

In Memphis St. Ry. Co. v. Rapid Transit Co., supra, the supreme court of Tennessee, says:

"We have formerly said that, when any question involving the constitutionality of an act of the legislature is bona fide made and relied upon in a case, this court should take appellate jurisdiction of such a case. * * * Although we appreciate the delicacy of passing on the validity of an act of the legislature, such a duty is often imposed upon us, and we must not dodge our jurisdiction. Where an act of the legislature undertakes to regulate a particular subject, and the application of such an act is invoked by one party in a suit involving that subject, and the validity of the act is questioned by the other party, we think it proper that the statute should be tested."

In State v. Southern Tel. & Const. Co., supra, the supreme court of Florida says:

"The railroad commissioners, acting for the state, are the relators and plaintiffs in error, and the fact that the person in whose favor the order is sought to be enforced has moved away does not show that under no circumstances can the writ be made effective for the purpose designed in this case. And even if under no circumstances the writ could be made effective because of Mr. Chaires' removal, the appellate court does not thereby lose jurisdiction of the cause, and it may be retained for the determination of questions properly presented involving the duties and authority of state officials that are of general interest to the public. * * *

"The respondent's motion to quash the alternative writ presents questions of law that affect the authority and duties of the railroad commissioners in regulating the service rendered by telephone companies, and the public as well as the relators is interested in having the legal questions raised determined for the future guidance of the state officials. * * *"

In Commonwealth of Mass. v. Klaus, supra, the court says:

"This is an appeal from an order of a justice * * * denying a motion to issue a subpœna requiring Rembrandt Peale, a person within the state, to appear and testify in a criminal action pending in the state of Massachusetts. * * * By the subpœna applied for, it was sought to procure the attendance of Peale in Massachusetts in September, 1910, and it may be that the criminal prosecution has already ended, so that his attendance would now be useless.

"On this point the papers on appeal do not advise us, but even if such were the case we should deem it our duty to examine the question of the validity of the act, because the special term decision already referred to will, unless overruled, probably serve to render the act nugatory. Appellate courts not infrequently pass upon questions affecting important public

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interests, even where in the particular case the question has become academic."

In Re Fairchild, supra, the court of appeals of New York says:

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"The respondent contends that, inasmuch as the election has been held, the decision of the questions presented on this appeal is of no importance, as it can, at most, only affect the questions of costs. We think the questions involved are of sufficient importance to require their determination by this court, as it may prevent future embarrassment in the congressional district to which the controversy relates, and also settle other questions upon which there is a conflict in the decisions of the supreme court. * * *"

In People v. Gen. Com., etc., supra, the same court says:

"This court held in Re Cuddeback, 3 App. Div. 103, 39 N. Y. Supp. 388, viz.: 'An appeal will not always be dismissed because the question is no longer a practical one. Notwithstanding the fact that an election has been held, and a decision of the question involved cannot affect the result of that election, yet, where the point at issue is one of public interest, affecting the rights of all the electors of the state, the courts will determine it.'

"Following the doctrine there laid down, it seems that we ought not, in this case, to dismiss the appeal, because the question here involved is as much a matter of public interest as the question involved in the case from which the quotation has been made. * * *"

And in Re Morgan, supra, the same court says:

"* * * The sole question involved in this appeal is the constitutionality of said amendment, and, although the said election has long since passed, and therefore our decision can have no effect upon the rights of the appellant at said election, both sides urge a consideration by this court of a public question vitally affecting the conduct of elections in the future. Although in one sense academic, such considerations have moved both this court * * * and the court of appeals * * * to consider and determine cases involving the election laws, although the immediate necessity therefor has passed away. * * *"

This phase of the matter here under discussion did not escape the astute mind of Bouvier, who observes:

"So also it has been held, with respect to a court of last resort, that all that is needed to render its decision authoritative is that there was an application of the judicial mind to the precise question adjudged; and that the point was investigated with care and considered in its fullest extent ([Alexander v. Worthington et al.], 5 Md. 488), and that when a question of general interest is involved, and is fully discussed and submitted by counsel, and the court decides the question with a view to settle the law, the decision cannot be considered a dictum (Id.)."

In the present case it cannot be successfully argued that the public has not a profound interest in the speedy solution of the questions submitted. There can be little question that Mr. Olcott is entitled to hold both the office of governor and secretary of state, and to draw the salaries of both. It is creditable to him that he does not wish to do the first and will not do the second. In the infancy of the state, when its business was insignificant and its revenues small, one person could well perform the duties of both governor and secretary of state, but with the enormous expansion of state business each of the three constitutional officers finds in his own department all the business which he can attend to, and more.

Questions involving the care and expenditure of vast sums of money and affecting large social and economic interests continually present themselves before the various boards, of which these officers are members. The object of having a board composed of these officers was to have the advantage of the opinions of three minds and the independent research of three persons before conclusions, vital in the administration of the state's fiscal affairs, were arrived it. Where the offices of governor and secretary of state are merged in one individual, the public loses the safeguard that was intended by the constitution when it provided that certain boards should consist of three officers, namely, the governor, secretary, and treasurer. If it is possible for Mr. Olcott to give up the office of secretary of state and retain the office of governor, he should be permitted to do so, in the public interest, and we ought not to quibble about "dicta" in so declaring.

The public also has an interest in having the duration of his term of office settled. If a new governor is to be chosen at the next general election, the voters of the state should be apprised of that fact, so they may look about and weigh the qualifications of the various candidates, or prospective candidates, with a view to enabling themselves to choose intelligently. With the question undecided, and perhaps a large majority of the voters under the impression that Mr. Olcott's term will not expire at the next general election, the primary election for that office will be clouded with uncertainties not conducive to intelligent selection.

It is true that each of these questions could be presented later by two or more additional lawsuits; that to use a homely simile, we could "cut the dog's tail off by inches" instead of by making one slash and finishing the business once for all. It is true the progress by inches would furnish business for attorneys and capital for petty politicians, but it would not promote the interest of the public, which, as before shown, is to have these questions settled now.

I consider every question discussed in the various briefs absolutely settled by the case of Chadwick v. Earhart, 11 Or. 389, 4 Pac. 1180, cited in the principal opinion. Chief Justice Waldo, who delivered the opinion in

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that case, was not only a lawyer of great learning but notably accurate in his choice of language, and the language used by him seems to me to bear no other construction than that when the secretary of state becomes governor he becomes such in his natural, not official, capacity; just as the vice president, on the death of the president, succeeds to the office for the remainder of the term. Such was the interpretation put upon that opinion by Justice Lord, who was one of his associates and who concurred in the opinion. After Justice Lord's retirement from the bench, he was selected as a commissioner to revise the Oregon laws, and produced the compilation which now bears his name.

His annotation to section 8 of article 5 of the constitution is as follows, citing Chadwick v. Earhart, supra:

"Under this provision when the governor resigns, the duties of the governor's office devolve upon the secretary of state, who continues to perform them for the remainder of the term."

If the language of the opinion were even obscure, which it is not, this interpretation by one of the learned justices who participated in its rendition ought to settle the question as to what the court meant to decide.

I do not consider the cases of State v. Johns, 3 Or. 533, State v. Ware, 13 Or. 380, 10 Pac. 885, and State v. Kellaher, in point in the present controversy. They were decided upon the theory that where a vacancy in an elective office is filled by appointment the people should have the right to elect a successor at the earliest opportunity. Such is not the case here. Mr. Olcott was not appointed to the office of governor. He succeeded to it by virtue of his election to the office of secretary of state, just as the vice president of the United States, upon the death of the president, succeeds to that office. The people, when they elected him secretary of state, had notice, by the very terms of the constitution, that in case the governor should die he would succeed to the office of governor; they chose him with that contingency in view. In effect, in choosing a secretary of state, they chose a vice governor, the rules of whose succession to the office are in no wise different from those investing the vice president, except that while the governor lives the secretary performs the duties relating to the secretaryship, while the vice president, during the life of the president, performs the duties of president of the senate. In both instances the original source of their authority is an election by the people and not, as in the case of State v. Johns, an appointment by the executive.

For the reasons given by Justice JOHNS, as well as those urged herein, I am of the opinion that this court should declare the petitioner is governor in fact and not acting governor; that he is entitled to the salary of governor; that he holds the office for the remainder of the term of the late Governor Withycombe, and that he may resign the office of secretary of state and still hold the office of governor.

HARRIS, J. (concurring in part). On April 1, 1919, a warrant was issued by the secretary of state in favor of "Ben W. Olcott, governor, for the sum of $336 in payment of the salary due said Ben W. Olcott, as governor, from March 7, to March 31, 1919." The state treasurer contends that the warrant "should be drawn to Ben W. Olcott, secretary of state, acting governor"; and since the warrant is not so drawn the state treasurer refuses to pay it. From this brief statement it can be seen at a glance that the sole question for decision is whether the state treasurer is obliged to pay the warrant; and yet, while it is true that the only question for decision is whether the state treasurer must pay the warrant, it is also true that it may be necessary to decide certain preliminary questions before the ultimate question can be reached or decided, and therefore any opinion expressed about the preliminary questions or the ultimate question is not obiter dictum. As the writer views it, one of the preliminary questions is whether Ben W. Olcott was, from March 7th to March 31st, merely ex officio governor or governor in his natural capacity. The petitioner is probably entitled to the salary attaching to the office of governor for the period mentioned in the warrant, whether he was merely acting as governor by virtue of his office as secretary of state or whether he was governor in truth and in his natural capacity. I prefer, however, to decide the ultimate question for decision by deciding whether Ben W. Olcott was only secretary of state and merely performing the duties of the office of governor as ex officio governor or whether he was in truth governor, and thus place my conclusions upon stated, certain, and defined ground. Furthermore, since the state treasurer will be obliged to pay warrants each month so long as the petitioner is entitled to occupy the office of governor, I think that we can with propriety discuss and determine the question as to how long Ben W. Olcott is entitled to hold the office of governor, and thus decide the rights of the petitioner upon the one hand and the duties of the defendant upon the other.

The conclusion reached by this court in 1884 in Chadwick v. Earhart, 11 Or. 389, 4 Pac. 1180, when applied to the same facts confronting us now and here, indubitably decides that Ben W. Olcott is in truth governor. If article 5, § 8, of the state constitution, were now for the first time presented for judicial construction I would, for reasons which to me are not only persuasive but convincing, take the view that upon the removal, death, resignation, or inability of the governor to discharge the duties of the office, the

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secretary of state becomes merely ex officio governor. In other words, it is my opinion that a correct construction of the constitution only empowered Chadwick to act as governor until he ceased to be secretary of state and then the duties of the office of governor devolved upon Earhart, the succeeding secretary of state, until Thayer qualified as governor; or, applying what I conceive to be the meaning of the constitution to the instant case, because and only because he is secretary of state, Ben W. Olcott would perform the duties of governor until his term as secretary of state expires on the first Monday in January, 1921, when his successor's term as secretary of state shall begin, and such successor would then discharge the duties of governor until the speaker of the house of representatives at the session to be held in 1921 publishes the vote for governor. Although I would entertain an opinion different from that expressed in Chadwick v. Earhart if the question of the construction of article 5, § 8, of the organic act were res integra, nevertheless whatever the views of any of us may be, candor compels each of us to admit that the question of the construction of this section of the constitution is not so plain and clear as to be entirely free from serious debate. The members of the legislative assembly of 1878 differed in their opinions as to whether Chadwick or Earhart was entitled to perform the duties of governor during the two days which intervened between the expiration of Chadwick's term as secretary of state and the commencement of Thayer's term as governor; and in the subsequent litigation growing out of that situation lawyers and judges differed in their views as to whether the secretary of state became governor in his natural capacity upon the death or resignation of the governor. Stephen F. Chadwick was a member of the constitutional convention, and he asserted that he was entitled to hold the office of governor until the inauguration of Thayer, who had been elected at the June, 1878, election; but so far as the writer has been able to discover, every other member of the constitutional convention who has left any record of his view was of the opinion that Chadwick was only governor ex officio and that when Earhart became secretary of state he, and not Chadwick, was entitled to act as governor until the inauguration of Thayer. The house and senate journals of the session of 1878 contain some interesting information. Before noticing the legislative journals, however, we should first acquaint ourselves with all the facts entering into the controversy in Chadwick v. Earhart, because by so doing we can better understand the story told by the house and senate journals and better comprehend the full meaning of the decision rendered in that lawsuit.

Stephen F. Chadwick was elected secretary of state and L. F. Grover was chosen governor at the June, 1874, election. Each was elected for a term of four years. At that time the biennial sessions of the legislative assembly commenced on the second Monday of September in the even-numbered years, and this accounts for the fact that there was a regular session in 1874 and also in 1878, but commencing with 1885 the biennial sessions have begun on the second Monday in January of the odd-numbered years. Article 4, § 10, State Constitution; section 2594, L. O. L. The constitution provides that the returns of every election for governor shall be sealed up and directed to the speaker of the house of representatives, who shall open and publish them in the presence of both houses of the legislative assembly. Article 5, § 4. In 1878, as now, the law provided that the term of office of the governor ceases when his successor, having been declared elected by the legislative assembly, as provided in the constitution, shall be inaugurated by taking the oath of office. Deady's Code, p. 711; section 3440, L. O. L. See, also, chapter 84, Laws 1913. In 1878, the statute provided that—

"The term of office of the secretary of state, state treasurer and state printer shall cease on the first day of the regular session of the legislative assembly next following the general election on which the terms of their successors shall begin." Deady's Code, p. 711; section 3441, L. O. L.

In 1908 the constitution was amended so as to read thus:

"All officers except the governor, elected at any regular general biennial election after the adoption of this amendment, shall assume the duties of their respective offices on the first Monday in January following such election." Article 2, section 14. See Laws 1909, p. 8.

The legislative session which was held in 1878 commenced on Monday, the 9th day of September; R. P. Earhart was elected secretary of state at the June, 1878, election; Chadwick qualified as secretary of state in September, 1874, and by force of the statute then in existence his term as secretary of state ceased on September 9, 1878, and Earhart's term as secretary of state began simultaneously with the termination of Chadwick's term as secretary of state. The legislative assembly of 1876 elected L. F. Grover United States senator; and on February 1, 1877, Grover resigned as governor so that he could assume the duties of United States senator. W. W. Thayer was elected governor at the June, 1878, election. The vote for governor was published by the speaker of the house on September 10th, and Thayer "took the oath of office" on September 11, 1878. Chadwick assumed and discharged the duties of governor from February 1, 1877, the date when Grover resigned, until September 11, 1878, the date when Thayer was installed in the office. Chadwick ceased to be secretary of state on September 9, 1878, the date when

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he was succeeded by Earhart as secretary of state, and notwithstanding the fact that Earhart and not Chadwick was from that time on secretary of state the latter and not the former acted as governor.

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The house and the senate each effected a permanent organization on September 9, 1878. On the following day D. P. Thompson of Multnomah county introduced House Joint Resolution No. 2, which reads as follows:

"Resolved, that a committee of three on the part of the house and two on the part of the senate be appointed to wait on his excellency, Governor R. P. Earhart, and inform him of the organization of the two houses, and that they are ready to receive any message he may be pleased to make."

H. Green of Benton county immediately moved to amend the resolution "by striking out the word 'Earhart' and substituting therefor the word 'Chadwick.'" The motion to amend prevailed, and then the resolution, as amended, was adopted by a vote of 34 for with 23 against it. Among those voting against the resolution as amended was W. A. Starkweather, who was a member of the constitutional convention. When H. J. R. No. 2 was received by the senate that body adopted it. There was but one absentee, and all the members present voted for the resolution. It may be of interest to note in passing that the membership of the senate included at least seven lawyers. According to the journal of the house on September 11th:

"The convention was called to order by the president of the senate, who stated the object of the convention to be to hear the biennial message of the outgoing executive, Governor Chadwick, and also, the inaugural address of his excellency, W. W. Thayer, governor elect."

Chadwick delivered a message to the joint convention and then Thayer "took the oath of office" and delivered his inaugural address.

We find from an examination of the records that Chadwick, who helped to frame the constitution asserted that he was governor; that Starkweather, by his vote as a member of the house of representatives, denied that Chadwick had authority to act as governor after his term of secretary of state had expired; and that R. P. Boise, who was also a member of the constitutional convention, as a circuit judge decided that Chadwick was not entitled to the salary of governor for any part of the period from February 1, 1877, to September 11, 1878. It is a very significant circumstance that Matthew P. Deady, who was the president of the constitutional convention and afterwards became a very eminent jurist, in his code of 1866 employs the following marginal heading for section 8 of article 5: "Acting governor in case of vacancy or disability." We find members of the house of representatives, among whom were lawyers of recognized ability, expressing different views; but we also find a majority of the members of the house affirmatively and squarely deciding that Chadwick was governor, and we likewise find all the members of the senate, except a single absentee, unequivocally treating Chadwick as governor, presumably with full knowledge of the controversy that had arisen in the house and of the decision reached by a majority of the members of the house concerning the official status of Chadwick. Although the decision of the legislature does not bind the court when called upon to construe the constitution, nevertheless the views of the members of the legislature, solemnly expressed at a time when the constitution was only 19 years old, are not entirely without significance and may afford some aid. We find, however, that when the controversy was finally submitted to an appellate court the question was judicially settled by the unanimous voice of that court.

A judicial decision which is clearly and manifestly erroneous, and because erroneous produces injustice and hardship, should, like the errors of any other tribunal, officer, or person, be corrected and righted at the earliest opportunity, for the doctrine of stare decisis was never intended to apply to such a situation; but when a court is confronted, as we are now, with a controversy involving the construction of a section of the constitution, and the official records of the state disclose the fact that different persons, bearing the responsibilities of public office, have in the discharge of their duties expressed variant opinions, and it appears that a legislative assembly, removed only 19 years from the date of the adoption of the constitution, has by unmistakable action decided that the resignation of the elected governor devolves the office of governor upon and transfers it to the secretary of state, and it is shown that an appellate court has by a unanimous voice adjudged that the death of the elected governor devolves the office of governor upon and transfers it to the person who is secretary of state, the rule of stare decisis becomes peculiarly and pre-eminently applicable, because it accomplishes what it was designed to accomplish, by giving to the law, as construed by the courts, the qualities of certainty, definiteness, and stability. The decision rendered by the court in Chadwick v. Earhart ought to be binding upon us to the extent that it was necessary for the court to construe article 5, § 8, in order to decide the issues presented in that litigation. Turning now to the pleadings in Chadwick v. Earhart we find that Chadwick demanded of Earhart as secretary of state a warrant for $2,420.75 to cover the salary of governor for the period, commencing February 1, 1877, and ending September 11, 1878. Earhart refused to issue the warrant. Chadwick brought a proceeding for the purpose of compelling the issuance of the warrant. The stipulation upon which the case was tried contained the following recital:

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"Mr. Earhart objects to the salary being paid from the 9th day of September, 1878, to the 11th day of September, 1878—two days—on the ground that Mr. Chadwick was not secretary of state after Mr. Earhart was sworn in on the 9th day of September, 1878, though Mr. Chadwick acted as governor or until and including the 11th of September, 1878."

Thus it will be seen that the question of salary covered two periods: (1) From February 1, 1877, to September 9, 1878, or the period during which Chadwick was secretary of state, and (2) from September 9, 1878, to September 11, 1878, or the period during which Chadwick was not secretary of state. The court decided that Chadwick was entitled to the salary of governor for both periods, and hence in order to reach that decision it became necessary to construe article 5, § 8, and to determine whether Chadwick was simply ex officio governor while secretary of state or whether the office devolved upon him in his natural capacity thus making him governor in truth; and since the court determined that the office of governor devolved upon Chadwick in his natural capacity, making him governor in truth, that decision ought to be accepted as final, and ought to govern now just as it governed then.

However, as I read it, the written opinion rendered in Chadwick v. Earhart does not decide that the people cannot elect a governor at the general election to be held in 1920, or that the person so elected cannot qualify and assume the office of governor when the speaker of the house publishes the vote in January, 1921, after the legislature convenes. Ben W. Olcott was elected secretary of state at the November, 1916, election and his term as such will expire on the first Monday in January, 1921. His successor will be elected at the November, 1920, election and such successor will assume the duties of secretary of state on the first Monday in January, 1921. James Withycombe was elected governor at the November, 1918, election and he qualified on January 14, 1919, after the speaker of the house of representatives published the vote cast for governor. James Withycombe was elected for a term of four years ending in January, 1923, but he died on March 3, 1919, and hence two regular elections will be held between the date of his death and the end of the four-year period for which he was elected. In this respect the facts in Olcott v. Hoff are essentially different from the facts in Chadwick v. Earhart; for in the latter case Grover resigned on February 1, 1877, and a governor was elected at the very first opportunity which was in June, 1878, and the elected governor assumed the duties of the office at the very first opportunity, which did not occur until the speaker of the house published the vote cast for governor. When in Chadwick v. Earhart the court speaks of "the remainder of the term of the outgoing governor," reference is made to the "remainder" left after February 1, 1877, for the court was dealing with that and no other "remainder." The court was not called upon to decide, nor did it attempt to decide, whether Chadwick could have occupied the office of governor from February 1, 1875, if Grover had resigned on that date, and held it through two elections, one in 1876 and the other in 1878. As I read the opinion in Chadwick v. Earhart, no expressions appearing there or rule applied there can be found sustaining the view that the people cannot elect a governor at the next election to be held in November, 1920. When James Withycombe died, the constitution appointed Ben W. Olcott, because he was secretary of state, governor "until * * * a governor be elected," so that the office will not be without an occupant "until * * * a governor be elected." If we apply to the facts presented to us the same rules that were applied in State ex rel. v. Johns, 3 Or. 533, the conclusion is unavoidable that the legal voters can, at the election to be held in November, 1920, elect a governor who can assume the office in 1921 when the speaker of the house publishes the vote cast for governor. Be it remembered, too, that it was R. P. Boise, a member of the constitutional convention, who as circuit judge decided State ex rel. v. Johns in the circuit court, and that his reasoning was repeated with approval and that his conclusion was affirmed when the supreme court decided the same case on appeal; and, moreover, one of the judges participating in the decision announced by the supreme court was P. P. Prim, also a member of the constitutional convention. The doctrines which were announced and applied in State ex rel. v. Johns were again recognized in State ex rel. v. Ware, 13 Or. 380, 10 Pac. 885, and at a more recent date followed by a majority of the court, as now constituted, in State v. Kellaher, 177 Pac. 944. The same rule was followed and put into practice when Ben W. Olcott was elected secretary of state at the 1912 election to succeed Frank W. Benson, who had died in April, 1911, after having been elected in 1910 for the full term of four years. Suppose that Frank W. Benson had not died in April, 1911, but that he had lived and filled out his term, and that Ben W. Olcott had been elected secretary of state in 1914 and re-elected in 1918 contemporaneously with the re-election of James Withycombe as governor, and suppose that Ben W. Olcott should to-day resign both the office of secretary of state and governor; would any one be so bold as to contend that the president of the senate would be entitled to act as secretary of state and also as governor, or that he could act as either until 1923? The framers of the constitution deliberately provided for the two offices of governor and secretary of state, and they intended that those offices should be occupied by different persons so long as possible; but, anticipating

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the possibility of death, resignation, or removal, they provided for those contingencies by declaring that the secretary of state shall be automatically appointed governor "until * * * a governor be elected." This automatic appointment is temporary and ends just as soon as the people can elect a governor at the next biennial election. When the writers of the constitution made the governor, secretary of state, and state treasurer a board of commissioners for the sale of school and university lands and for the investment of funds arising therefrom, they did so for the manifest purpose of bringing to the business the judgment, wisdom, and experience of three men; and every one of the various subsequent acts of the legislature making these officers the constituent members of boards was framed for the same purpose. The makers of the constitution did not intend that one person could occupy more than one of these offices any longer than was necessary.

In article 2, § 10, we read that no person shall "hold more than one lucrative office at the same time, except as in this constitution expressly permitted." There is no provision in the constitution expressly or by manifest implication declaring that the secretary of state shall hold the office of governor through two biennial elections; but, upon the contrary, the whole plan and purpose of the constitution negatives the idea that the secretary of state can hold any longer than is necessary. The constitution provides for the two offices of governor and secretary of state because the framers of the organic act deemed two offices necessary; one person is prohibited from holding two lucrative offices except as in the constitution expressly provided, because the framers of the organic act deemed it desirable that one person hold only one lucrative office. The rule established by the constitution is that one person can hold but one office; for one person to hold two offices is the exception. The framers of the constitution anticipated the contingencies of death, resignation, or removal by providing for the exception. The important business of the management of school and university lands and funds was placed in the hands of three and not two persons. A board of three persons is the rule; a board of two persons is the exception. The office of governor as well as that of secretary of state is elective. An election is the rule; an appointment is the exception. Finding as we do that two offices with two persons as the officers is the rule, while two offices with one person acting as the two officers is the exception, that an election is the rule and an appointment is the exception, that a board of three commissioners for the management of the school and university lands and funds is the rule, while a board with two commissioners is the exception, we would also expect to find provisions terminating the exceptions whenever they occur, and re-establishing the rule at the very earliest opportunity. The rule was provided for because it was deemed to be the best; the exception was provided for because it was deemed to be the next best; and naturally the theory of the constitution is that the best shall be had as long as possible, while the next best shall be had only so long as necessary. As shown by the stipulation filed in Chadwick v. Earhart the "remainder" discussed and referred to in that case only covered the short period which intervened between the end of Chadwick's term as secretary of state and the commencement of Thayer's term as governor. That case, as well as every case, must be read in the light of the facts presented to the court. The conclusion that the office of governor can be filled by the people at the next election harmonizes every part of the constitution with every other part, gives full meaning to every word and every section, and as said in State ex rel. v. Johns "is in perfect accord with the spirit of our constitution and laws."

There is no analogy whatever between the offices of president and vice president of the United States on the one hand and those of governor and secretary of state in the other. By the express language of the constitution of the United States the president "shall hold his office during the term of four years, and, together with the vice president, chosen for the same term, be elected as follows." Our constitution does not tie the office of governor to that of the secretary of state; nor does it tie the latter to the former. The governor is elected "at the times and places of choosing members of the legislative assembly." Article 5, § 4. Members of the legislature are elected at the general elections which are held biennially. In brief, I take the view that Ben W. Olcott is governor in truth as distinguished from governor ex officio; that he is entitled to hold the office of governor and is entitled to the salary of that office until his successor is elected and qualified; and that the legal voters are entitled to elect a governor at the next election to be held in November, 1920, and that the person so elected is entitled to assume the duties of the office when the vote is published by the speaker of the house of representatives in January, 1921. I think, too, that the logic of the holding in Chadwick v. Earhart inevitably leads to the conclusion that the petitioner can resign as secretary of state and continue to occupy the office of governor.

BENSON, J., concurs.

BENNETT, J. (specially concurring). In this case it appears from the pleading that the petitioner, who was secretary of state at the time of the death of Governor Withycombe, and who has assumed the office of

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governor, drew his warrant on the state treasurer for $336, being the salary as governor from the death of Governor Withycombe to the 1st of April. This warrant was drawn "in payment of the salary due said Ben W. Olcott, as governor." The defendant, the state treasurer, refused to honor this warrant upon the ground that it should have been drawn to "Ben W. Olcott, secretary of state, acting governor."

It seems the legal controversy between the parties is over a mere matter of words; the one claiming the warrant should be drawn for his salary "as governor," and the other that the warrant should have been drawn in his favor as "acting governor."

I do not think there is any question but what the warrant was sufficient, and therefore, in any view, should have been honored, and that the plaintiff is entitled to the relief prayed for. I therefore concur in the result of the opinion of Mr. Justice JOHNS.

The real purpose of the proceeding was, no doubt, to test questions which, as I view them, go far beyond the real question involved in the case. However important the public questions involved may be, I do not think we have any authority to go beyond the case presented to us. If we did and should decide questions not presented, our decision would be mere dictum, and not binding upon our successors, or even upon us individually, if we should change our individual opinion at some future date.

No doubt the power should be vested in the courts to pass upon moot questions of great public interest like this in an authoritative way, but so far the legislature does not seem to have conferred that power. I therefore reserve my opinion as to the question of whether or not the petitioner will continue to hold the office of governor personally after he ceases to be secretary of state, and as to the kindred questions urged.

In view of the opinions written by the Chief Justice and some of the other justices, I deem it necessary to add something to the above brief expression of my views.

I do not view the authorities cited by Mr. Chief Justice McBride, in relation to our authority or lack of authority to pass upon questions in no way involved in the case before us as at all in point, or as giving us the slightest authority to go beyond the issues presented in this case.

In all of these cases the questions decided by the court were squarely within the issues made by the pleadings, and the decision was entirely pertinent and responsive to the actual case in litigation. In some of them the decision of the court could still be made partly or wholly effective. In others, by reason of the lapse of time or the happening of some event between the decision of the lower court and that of the appellate tribunal, the decree in the particular case could no longer be enforced, but the issues between the parties, which were living issues at the time of the commencement of the action, still remained. In such a case it is well settled that the appellate court may retain and decide the case, or it may, at its option, refuse to proceed further and dismiss the appeal.

The leading case cited—Giles v. Harris, 189 U. S. 475, 23 Sup. Ct. 639, 47 L. Ed. 909—belongs to the former class of cases, and the questions decided were not only clearly within the issues made by the pleadings, but were still practical living issues in the case at the time of the ultimate decision.

That case was a suit brought by a colored man in the state of Alabama on behalf of himself and 5,000 other colored voters against the board of registrars of Montgomery county, to secure the right of permanent registration and also the registration for the coming election in November. Before the hearing was reached in the United States supreme court that election had passed, but there still remained in the case the question of permanent registration. It was in such a case that the language, quoted with so much apparent assurance that it is an authority in this case, was used. The court said:

"To be enabled to cast a vote in that election is not * * * the whole object of the bill. It is not even the principal object of the relief sought by the plaintiff. The principal object * * * is to obtain the permanent advantages of registration."

The court denied the relief upon two grounds. Having considered the case and found against the plaintiff upon one ground, it also proceeded to consider the second ground and decide against him as to that also, and it was in this connection that the court used the language, which is referred to in the second quotation:

"We are unwilling to stop short of the final considerations which seem to us to dispose of the case."

Here then, was simply the common occurrence of there being two grounds upon which a case could be decided; both of them squarely within the issues of the case and the court deciding them both. In such a case, I think it is well settled that the court may dispose of the case upon one ground alone, or may properly pass upon both questions involved.

I cannot see how such a case furnishes an iota of authority for us to go entirely outside of every issue in this case and decide questions that are not in the case at all.

It is a significant fact in the Giles Case supra, that one of the questions urged was that the new constitution of Alabama was in conflict with the federal constitution, and therefore void. No question, it would seem, could exceed such a question in public importance, yet the court refused to pass upon it, saying:

"We express no opinion as to the alleged fact of their unconstitutionality."

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Another significant thing is that the court cites with approval the previous case of Mills v. Green, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 293, in which the same court had used the following language:

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"The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it."

The case of Memphis v. Rapid Transit Co., cited from 133 Tenn. 99, 179 S. W. 635, L. R. A. 1916B, 1143, Ann. Cas. 1917C, 1045, was a suit by a street car company against a jitney company for operating jitneys in competition; the plaintiff relying upon an act of the legislature. The defendant demurred to the complaint, relying upon two grounds, one of which was that the act was unconstitutional. At the hearing it was claimed the case could be decided upon other grounds than the constitutional question, and that therefore (under the practice in that state) the cause should have been appealed to a different court. The court held the constitutional question squarely in the case, and therefore proceeded to decide the same. It was under these conditions and in regard to such a case, that the court used the language quoted.

The case of Boise City Land Co. v. Clark, cited from 131 Fed. 415, 65 C. C. A. 399, was a case brought by a water company in Idaho against the county commissioners to annul an order fixing the rate it could charge in the year 1901 for water from its canals. The case was tried in the United States circuit court and appealed to the court of appeals. Before it could be reached for hearing in the latter court, the period for which the rates were fixed for that season had expired. Nevertheless the court proceeded to decide the case, which involved no question of general public importance, but the questions decided were all squarely within the issues and necessary to a decision.

It is one thing to decide the issues actually presented in a case, even although something has happened pending the appeal, making the judgment ineffective, and an entirely different matter to go clear outside of the issues, as we are asked to do.

In many cases, as in the fixing of rates for a particular year, or the right to vote at a particular election, it is impossible to reach a decision in the appellate courts before the party's right in the particular instance has expired, and he could never have the question or his rights decided if his cause should be dismissed upon that ground. In such cases the courts have always, and I think properly, exercised their discretion to dismiss the cause, or to hear and decide it, as seemed just under the particular circumstances.

The other cases of State v. Stutsman, 24 N. D. 68, 139 N. W. 83, Ann. Cas. 1914D, 776; State v. Tel. Co., 65 Fla. 67, 61 South. 119; Comm. v. Klaus, 145 App. Div. 798, 130 N. Y. Supp. 713; In re Fairchild, 151 N. Y. 361, 45 N. E. 943; People v. General Committee, 25 App. Div. 339, 49 N. Y. Supp. 723, and In re Morgan, 114 App. Div. 45, 99 N. Y. Supp. 775, cited in Chief Justice McBride's opinion, are all exactly similar, in principle and in questions involved, to the case of Boise City v. Clark, supra, and are no more in point. It will be noticed that in every one of them there was a real lawsuit between real adversary parties. In no one of them did the court go outside of the issues made by the pleadings.

There is no case cited, and I do not think any one can be found, in which the court has deliberately and intentionally gone clear outside of the issues (as we are asked to do) and decided questions which were not and never had been in the case.

If we do this we are not following any beaten path; we have no precedents; we are cutting the fences that have marked the boundaries of proper judicial authority ever since we have had English-speaking courts. The common law never gave us any such authority. Neither did the state constitution, nor has the legislature. Our only pretence of authority will be the invitation of public officers, who have no more statutory right to invite us to make the decision than we have to accept the invitation.

I do not wish to quibble or to shirk my share of responsibility in deciding any question that is properly before the court. Neither am I willing to be stampeded into a decision I have no right to make, nor to rush headlong to the exercise of powers I do not possess, in order that I may have the satisfaction or the notoriety of helping to decide some important question.

This is not a case where the questions presented have become merely academic, after the case was commenced, by reason of the lapse of time. Here the question as to who will be governor if the secretary of state resigns, or if another governor should be elected at the election in 1920, never was in the case, and could not be, for no such state of facts yet exists. The question may never arise. Mr. Olcott may never resign as secretary of state. He may run for governor himself at the next election.

To accept and amplify Mr. Chief Justice McBRIDE'S homely illustration, this is not a case where any one has suggested to "cut the dog's tail off by inches." It is a case where, because one dog has a broken tail which needs amputation, we are asked to drag in the other dogs in the community and mutilate them, because their tails might possibly be broken at some time in the future.

If another secretary of state, elected at the next election, shall claim the office of

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governor, he will have a right to be heard. There will then be an actual controversy, and I think he ought not to be foreclosed, by any premature decision we may now make, in a "mock trial" on a "moot" question in an arranged and fictitious lawsuit.

As a citizen, I have a more or less well-defined opinion as to all the questions suggested here, formed partly from my own impressions and partly from the briefs of the attorney general, and those of public spirited citizens, who, at the invitation of the court, have taken enough time from their private business to file more or less careful briefs in the case. If I should don my official robe and attempt to give my half-baked street opinions judicial utterance, I would agree with Mr. Chief Justice McBRIDE as to the result, but not as to the reasoning or analogies by which he has reached that result. On the other hand, I should agree with Mr. Justice HARRIS as to his reasoning, up to a certain point, but not as to the result reached by him. But if I should attempt to do so, some other judge succeeding me might properly refuse to give my opinion any binding force. He might well conclude that it takes more than a judge and a gown to make a judicial decision.

I shall content myself, therefore, with the expression of an opinion on the questions really in issue, and upon which, as I understand, we are all agreed.

BURNETT, J. (concurring in part). In this case an alternative writ of mandamus was issued out of this court, directed to the defendant, from which, barring a clerical omission, we learn in substance that James Withycombe, the duly elected and inaugurated governor of the state, died March 3, 1919, at which time the petitioner, Ben W. Olcott was the duly elected, qualified, and acting secretary of state and has since then continued to hold the latter office. It is further recited that on April 1, 1919, the secretary of state issued a warrant in favor of Ben W. Olcott for $336, in payment of the salary due him for service as governor of the state from March 7 to March 31, inclusive, 1919, which warrant the petitioner herein has presented to the defendant as state treasurer and the latter fails and refuses to pay the same, although there is money in his hands applicable to the payment of the salary of the governor. By the writ, the defendant was required to show cause why he had not paid the warrant. On the return day the defendant demurred, not to the petition for the writ, but as the statute requires (L. O. L. § 618), to the writ itself, on the ground that it does not state facts sufficient to constitute a cause of action against the defendant.

The sole question presented is whether the defendant is right in refusing to pay the warrant in question. We have nothing to do with the petition. It has performed its office in securing the issuance of the writ, for, as shown in sections 618, 619, and 620, L. O. L., the pleadings in a proceeding by mandamus are the alternative writ, the demurrer or answer to the same, and the demurrer or reply to the answer, and none others are allowed. They are to "have the same effect and to be construed and may be amended in the same manner as pleadings in an action."

Admitted, as it is, that the regularly elected governor died during his incumbency in office and that the petitioner here was at the time the duly elected, qualified, and acting secretary of state, we are not at present concerned about whether he is performing the duties of the office of governor as de facto or de jure governor, or merely by virtue of the authority vested in him as secretary of state, or, in other words, as an alternate upon whom the constitution imposes the functions of governor in case of the death of the latter officer. So far as public interests are concerned or the rights of the people are involved, it matters not in which of the two suggested capacities the duties and the authorities of the executive office are exercised, so they are performed. It is said in the writ:

"That under and by virtue of section 8, art. 5, of the constitution of Oregon, the office of governor and the duties thereof devolved upon the secretary of state, and that on the 7th day of March, 1919, petitioner, Ben W. Olcott, took the oath of office, and that since that time he has been and now is the governor of the state of Oregon."

This states but a mere conclusion of law and presents no issuable fact. Neither is it directly averred that the petitioner has performed any of the duties or exercised any of the powers of governor. It is presumed, however, that official duty has been regularly performed, whether it be that of the secretary of state or that of a successor to a deceased governor. Indeed, it may well be doubted whether an auditing officer can assume to pass upon the amount or quality of service of any individual upon whom official duties have been cast by operation of law.

Coming to the precise question of whether the petitioner is entitled to the salary which otherwise would have been paid to the elected governor had he survived, the rule is well stated in Preston v. United States (D. C.) 87 Fed. 417, 418, thus:

"If there be no incompatibility between the respective duties of the two offices or employments, and the functions of each are separate and distinct, he is entitled to recover two compensations."

Section 8, art. 5, of the constitution, reads thus:

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"In case of the removal of the governor from office, or of his death, resignation, or inability to discharge the duties of the office, the same shall devolve on the secretary of state; and in case of the removal from office, death, resignation, or inability, both of the governor and secretary of state, the president of the senate shall act as governor, until the disability be removed, or a governor be elected."

Whatever view may be taken of this clause of the fundamental law, as to the capacity in which the petitioner shall administer the duties of the chief executive, it is plain that by force of the constitution itself the duties of the two offices are not incompatible with each other, however separate and distinct they may be. In other words, the constitution itself casts the performance of the duties of both offices upon the same individual under certain circumstances, with the result that they are constitutionally compatible with each other. Under such circumstances, the extra duty having been performed, as we must presume it has been, the petitioner is entitled to the compensation which the law provides for such service. As stated by Mr. Chief Justice Bigelow in State ex rel. v. La Grave, 23 Nev. 216, 45 Pac. 243, 35 L. R. A. 233:

"Another reason that may be offered for this conclusion is that it is a general principle of justice and right that, when one legally performs the duties of an office, he should be entitled to the emoluments thereof."

In United States v. Saunders, 120 U. S. 126, 7 Sup. Ct. 467, 30 L. Ed. 594, the claimant drew a salary as clerk of a committee of congress and likewise as clerk in the president's office. The duties of the two were held not to be incompatible, and hence his claim was allowed for both salaries. In State v. Roddle, 12 S. D. 433, 81 N. W. 980, the defendant was a secretary of state and likewise was made by a statute a member of the state committee on brands and marks, carrying with it an additional compensation, and it was held that he was entitled to both emoluments. Similarly, in State ex rel. v. Walker, 97 Mo. 962, the individual who held the office of secretary of state and was also a member of the board of equalization was allowed pay for both positions. In Scranton School District v. Simpson, 133 Pa. 202, 19 Atl. 359, and in McCauley v. School District, 133 Pa. 493, 19 Atl. 410, the occupant of the office of city treasurer, who was ex officio treasurer of the school district, was allowed the statutory compensation for both positions. The same doctrine is taught in United States v. Macdaniel, 7 Pet. 1, 8 L. Ed. 587; United States v. Ripley, 7 Pet. 18, 8 L. Ed. 593; United States v. Fillebrown, 7 Pet. 28, 8 L. Ed. 596; and in Milnor v. Metz, 16 Pet. 221, 10 L. Ed. 943. In Love v. Baehr, 47 Cal. 364, the attorney general, to whom was allowed by law a statutory salary, was also made a member of the board of examiners, carrying with it a special additional compensation, and he was sustained in his claim for both emoluments. In re Conrad (C. C.) 15 Fed. 641, is a case where the same individual was claiming fees as chief supervisor and as a United States commissioner, and his claim was sustained; and in Smith v. Waterbury, 54 Conn. 174, 7 Atl. 17, the city attorney had a salary allowed to him by law and a statute allowing him certain fees for special services was sustained. In other words, the common sense principle is that he who performs services enjoined upon him by law is entitled to the compensation provided by the same law of those particular services, in the absence of anything restricting the emolument to a single office.

It is true that section 10 of article 2 of the organic law declares that:

"No person holding a lucrative office or appointment under the United States or under this state shall be eligible to a seat in the legislative assembly; nor shall any person hold more than one lucrative office at the same time, except as in this constitution expressly permitted."

This must be read in connection with section 8 of article 5, already quoted. If the latter section be construed to invest the petitioner with the office of governor both de facto and de jure, it would constitute an exception within the meaning of section 10 of article 2. On the other hand, if it be held that he is merely exercising functions of the office of secretary of state visited upon him on account of the death of the elected governor, he would not be holding more than one lucrative office within the meaning of the latter section.

This disposes of the question presented by the pleadings for our consideration. All else respecting the length of time the petitioner shall perform the duties of governor, or whether he has authority to resign the office of governor or resign the office of secretary of state and continue to hold as governor, or whether he can obstruct the order of succession provided by section 8 of article 5 by appointing a secretary of state to succeed himself, is not presented by the instant record, and any attempt to dispose of these matters in this proceeding would be gratuitous dictum. The only excuse for discussing those questions is found not in any allegation even of the petition itself, and much less in the writ which is the primary pleading, but only in the last clause of the prayer of the petition, as follows:

"And this petitioner particularly prays that this court will define his duties and powers in relation to the office of governor."

Nowhere in the record does the petitioner intimate any desire for advice or decision

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about his right to resign any office, or concerning the length of time he will be required or permitted to exercise its functions. As already pointed out, the petition is no part of the pleadings. McLeod v. Scott, 21 Or. 111, 26 Pac. 1061, 29 Pac. 1; Elliott v. Oliver, 22 Or. 44, 29 Pac. 1; Shively v. Pennoyer, 27 Or. 33, 39 Pac. 396. The clause of its prayer, if indeed we may consider it at all, amounts simply to a request for the court to give counsel to the petitioner on a question not presented by the record. It does not call for any decision. It is said in section 957, L. O. L.:

"Any judicial officer may act as an attorney in any action, suit, or proceeding to which he is a party or in which he is directly interested. A judge of the county court or justice of the peace, otherwise authorized by law, may act as an attorney in any court other than the one of which he is judge, except in an action, suit, or proceeding removed therefrom to another court for review; but no judicial officer shall act as attorney in any court, or otherwise other than as in this section allowed. * * *"

In effect, at least, if we undertook to advise the petitioner concerning "his duties and powers in relation to the office of governor" we would violate this provision of the statute. Moreover, as declared in chapter 196, Laws 1915, it is the function of the attorney general, when requested to do so by any state official, to give his opinion in writing upon any question submitted to him in which the state of Oregon may have an interest, and he shall, when requested, give legal advice to any of said officials, boards, or commissions. For this court or its members to give such counsel as the petitioner in his prayer requests would be to usurp the functions of the attorney general in contravention of section 1 of article 3 of the constitution, dividing the powers of government into three separate departments, the legislative, the executive, including the administrative, and the judicial, and forbidding any person charged with official duties under one of these departments to exercise any of the functions of another. All we are called upon by the record before us to decide is the issue of law presented by the demurrer to the writ. All beyond that would be unwarranted and would not bind any one. We could not compel the petitioner to resign either the office of secretary of state or of governor, nor could we restrain him on the record from doing either of those acts, any more than we could direct him in the care of his children or the investment of his money. It would present a situation thus described in 3 Words & Phrases, 2052:

"The mere dictum of a judge is not the decision of a court. There is nothing authoritative in a case except what is required to be decided to reach the final judgment, and what, by the judgment, becomes res adjudicata between the parties as to the subject-matter of the suit. Love v. Miller, 53 Ind. 294, 21 Am. Rep. 192. 'An obiter dictum is a gratuitous opinion, an individual impertinence, which, whether it be wise or foolish, right or wrong, bindeth none, not even the lips that utter it. Old Judge'—taken from the title-page of a work on 'Obiter Dicta,' published by John D. Allen, New York, 1885. Hart v. Stribling, 6 South. 455, 456, 25 Fla. 433."

For these reasons I concur in the direction that a peremptory writ issue commanding the state treasurer to pay to the petitioner the amount of the warrant in question; but I object to the gratuitous statement in the opinion of Mr. Justice JOHNS about the length of time the petitioner may discharge the duties of the chief executive of the state, as not within the issue presented by the record and not even requested by either party.

(75 Okl. 15)

STATE ex rel. DALE et al., State Bar Com'rs, v. CURD. (No. 9978.)

(Supreme Court of Oklahoma. May 27, 1919.)

(Syllabus by the Court.)

1. REVOCATION OF ATTORNEY'S LICENSE — STATUTE.

Under the third subdivision of section 252, Rev. Laws 1910, the license of an attorney at law may be revoked for the willful violation of any of the duties of an attorney or counsellor.

2. ATTORNEY AND CLIENT ⟸53(2) — DISBARMENT—EVIDENCE.

The evidence in the record examined, and found to fully support the referee's findings of fact and conclusions of law that the respondent has willfully violated his duties as an attorney and counselor at law, and is guilty of unethical and unprofessional conduct in the practice of his profession, for which his license to practice law should be revoked, and the referee's report is therefore approved, and the license of the respondent to practice law is revoked.

Original proceedings by the State of Oklahoma, on relation of Frank Dale and others, as the State Bar Commissioners of the State of Oklahoma, for the disbarment of Edward Curd. Respondent disbarred.

E. L. Fulton, of Oklahoma City, for relators.

N. A. Gibson and W. J. Crump, both of Muskogee, for respondent.

RAINEY, J. This disbarment proceeding was commenced in this court by the State

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Bar Commission against Edward Curd, a legally licensed attorney under the laws of this state, and on the 25th day of June, 1918, the Honorable P. D. Brewer was appointed by this court as referee to hear the evidence and to report his findings of fact and conclusions of law based thereon. On March 5, 1919, the honorable referee filed his report, containing the following findings of fact, conclusions of law, and recommendation:

"Findings of Fact.

"1. Your referee finds that at all the times mentioned in the petition for disbarment and in this report Edward Curd, the respondent, was and now is a highly intelligent and educated man and a duly and legally licensed attorney at law, with authority to practice law in this and the other courts of the state of Oklahoma.

"2. Your referee finds that at all the times mentioned in said petition for disbarment and in this report the said respondent was employed and acting as the attorney for the guardian of Sarah Rector, a minor Creek freedwoman, and for her estate, which was a very large one, and as such attorney conducted and handled all of the legal business in which said estate, or the guardian as such, was interested.

"3. Your referee finds that, while said respondent was acting as such attorney for the guardian and the estate of the said Sarah Rector, the said estate, under orders of the county court of Muskogee county, Oklahoma, made numerous investments of the surplus funds belonging to said estate by purchasing farm lands and city property; that the proceedings to accomplish these investments and through which such purchases were made, under petitions to and orders of the said county court, were all prepared and conducted by the said respondent in the name of the guardian of said estate; said guardian acting in all of them under the advice and with the legal assistance of the said respondent.

"4. Your referee finds that the said respondent from time to time petitioned for and was allowed by the county court of Muskogee county, Oklahoma, out of the funds of said estate, attorney's fees and compensation for all the work done by him for such guardian and such estate, including the work performed in conducting the proceedings for the purchase of real estate, with the funds of such minor and hereinafter more specifically referred to.

"5. Your referee finds that during the year 1916 (the exact date being a little uncertain) E. A. Hill, who was a real estate broker and at the time was representing Sleeper & Scott, negotiated with this respondent, as the attorney for said guardian and said estate, regarding the sale to the estate of certain real property; that during such negotiations this respondent informed Hill that there would be a great deal of work necessary in getting the matter through, and that he would require a fee or compensation from Mr. Hill therefor; that the said Hill finally agreed with the respondent that, if the sale went through, he would pay said respondent two-thirds of the amount of commissions or brokerage that he (Hill) would obtain through the transaction; that the respondent prepared and filed for the guardian the petition for such purchase and investment, and conducted the proceedings looking thereto, and obtained all the necessary orders and the purchase was made. Thereafter Hill, in keeping with his agreement so to do, paid the respondent $1,462.67, which was two-thirds of the amount of the commissions growing out of the transaction coming to the said Hill. This sum was taken to respondent's office in cash, placed in an envelope, and left on respondent's desk, who at the time was not in his office. After the investigation which finally led to these charges was instituted, the respondent paid back to Hill this sum of money, suggesting at the time that he say nothing about it.

"6. Your referee finds that in 1917 (the exact date being uncertain) one W. G. McGoffin, a real estate broker, took up with the respondent, as the attorney for said guardian and said estate, negotiations for the sale to the said guardian for said estate of certain lands belonging to one Robert Fike, and that at the suggestions of the respondent the said broker agreed to pay respondent one-half of his brokerage to become due in the transaction if the sale went through. The respondent, acting as attorney for the guardian and for said estate, conducted the proceedings and obtained the order for the investment of the minor's funds by purchasing the said real estate for $57,000. Said McGoffin's brokerage out of the transaction was $7,000, out of which he paid this respondent $3,500, as he had agreed to do. This sum was paid respondent by the broker in cash, and according to his best memory in $100 bills.

"7. Your referee finds that the said W. G. McGoffin, referred to in the last paragraph above, also sold to the said estate, through negotiating the same with the respondent, certain other real estate belonging to a Mr. Culbertson, in which he, said McGoffin, agreed to pay respondent one-half of his brokerage if the sale went through. This transaction was conducted by the respondent for the guardian and said estate, and also went through. In this transaction the broker paid the respondent $800 for his fees and compensation. This likewise was paid in currency.

"8. Your referee finds that one W. M. Gulager, acting for himself and other parties jointly interested with him, during the year 1915 entered into negotiations with the respondent, as attorney for said guardian and said estate, for the purpose of selling to said estate, through said attorney and said guardian, certain farming lands located near Ft. Gibson, Oklahoma, the owners' price of the land for sale to said estate being at $125 per acre, and in the negotiations with the said respondent it was agreed that, if the sale went through at that price, respondent was to be paid $10 per acre as his fees or compensation. The respondent, acting for the guardian and for said estate, prepared the legal papers, did the legal work and obtained the necessary orders to invest the funds of said estate in these farming lands, but at a less price than the $125 per acre. That, after the sale went through and was cleaned up, said Gulager settled with the respondent by paying him $1,500 for his fees and compensation in the matter. There may be just a little uncertainty as to how this sum of money was

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paid, but it is reasonably certain it was also paid in cash.

"9. Your referee further finds that neither the guardian, nor Sarah Rector, nor the county judge, in whose court her affairs were being administered, were ever informed by the respondent, or knew that the respondent, while acting as the attorney for said guardian and said minor's estate, and conducting the proceedings in the county court for the investment of its funds in the real estate hereinbefore mentioned, was to have or receive, from the sellers of such property to said estate, secret fees or compensation whatever.

"10. Your referee finds: That on July 24, 1914, the respondent received from said estate, under orders of court, $600 as attorney's fees. That respondent petitioned for and was allowed and paid out of said estate December 18, 1916, $1,425 for services to said guardian and said estate, which payment included in compensation as petitioned for, for handling the purchase by the estate of the lands near Ft. Gibson, Oklahoma. That on August 26, 1915, the guardian petitioned for an order of court to be allowed to pay the respondent attorney's fees, reciting numerous services performed by respondent including the purchase by the estate of the 'Fike lands' and that on said date $1,500 was allowed and paid by order of court out of the funds of the said estate. That on August 5, 1916, the court allowed the guardian to pay respondent $1,500 for acting as attorney for the said guardian and said estate. That on May 21, 1917, the court allowed the guardian to pay said respondent $500 for conducting for the estate the 'Fish purchase' and $500 for the 'Dawes purchase,' and said sums were paid. That on August 11, 1917, the guardian petitioned the court for authority to pay respondent, as attorney for the said estate, $875 per month for the seven preceding months. On the same day the court made an order which apparently allows $875 for the seven months' services. Whether this sum was the total amount received under this order, or whether he received that much for seven months, I am unable to find.

"11. Your referee finds that, during the four years respondent was acting as attorney for the guardian of the estate of Sarah Rector, he received from the said estate, through orders of court for his services, the sum of $6,875; that during the same period, and in transactions in which he was attorney for the guardian and the said estate, he received from persons selling it lands the sum of $7,262.67; that during the same period, and while respondent was representing the guardian and the said estate, in loaning out its surplus funds, he received commissions and fees, from the persons borrowing them, the sum of approximately $1,200.

"12. Your referee finds that, up to the time of the commencement of the investigation which finally led to these disbarment charges, the respondent Edward Curd's reputation and standing as a citizen and a lawyer in Muskogee, Oklahoma, and vicinity, was good.

"13. In the answer and response filed in this case by the respondent, the claim is set forth that the respondent acted in good faith, under a custom that had grown up in Muskogee county, and possibly some adjoining counties in this state, whereby, in the handling of minors' estates, it was customary for the attorney for the guardians and the minors to receive compensation from outside parties having dealings with the estates, and some effort has been made to establish this custom as a fact, and while it may be true that in numerous instances oil companies, in securing oil and gas leases on minors' lands, have paid the fees to the guardians' attorney for conducting the proceedings, yet, so far as I have been able to learn, this was always done open and above board with the knowledge of the court and all parties concerned, and for the purpose of saving the proceeds of the lease intact to the estate; but I find there was no custom in Muskogee county, Oklahoma, whereby the attorney for a guardian could represent him in procuring the investment of the ward's funds in the purchase of real estate, and at the same time, without his knowledge or the knowledge of the court, receive large fees and compensation from the owner of the real estate, or his broker, who was attempting to get through the sale, and, if there was such a custom, its inherent vice and immorality would prevent its being operative or affording a shield for the attorney acting under it.

"Conclusions of Law.

"1. Your referee concludes as a matter of law that the conduct of the respondent in accepting the fees and compensations in the various transactions set out in the above findings, without the knowledge of his client, the guardian, or of the court through which the sales were being conducted, and while, at the same time, he was the attorney and adviser of the guardian and conducting the proceedings to accomplish the same and receiving or expecting to receive compensation from the estate, was a willful violation of his duties as an attorney and counselor.

"2. Your referee is of the opinion that such conduct is immoral and dishonest, and tends to degrade and bring under reproach the profession of attorney and counselor at law.

"3. Your referee is of the opinion that it is unsafe to risk any man serving two masters at the same time, whose interests are diametrically opposed one to the other. The relation of attorney and client is one of the highest trust and confidence. The guardian, in making the investments of his ward's funds in these various land transactions, had a right to rely upon the judgment and advice of his counsel, and that it would be given with an eye single to the interests of the estate, and without the slightest chance or hope of reward from any other source, which might rise up to blind the judgment or color the advice given.

"4. Your referee is of the opinion that the attempt to show that the estate did not suffer any in these transactions, and that the lands bought were appraised by appraisers appointed by the court, and were worth the price paid for them, is no answer or justification for the respondent's conduct; nor does it answer or justify to show that he, said respondent, had been allowed too little compensation for his services to the estate by the court.

"Recommendation.

"Your referee recommends to the court that the respondent, Edward Curd, for and on ac-

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count of his violation of his duties as an attorney and counselor at law and of his unethical and his unprofessional conduct in the practice of his profession, as above set out, should be disbarred and his license to practice law in the state of Oklahoma revoked.

"Respectfully submitted.

"P. D. Brewer, Referee."

[1, 2] In the brief filed by counsel on behalf of the respondent, it is stated that counsel do not desire to impress upon the court any particular objections to the findings of fact other than as to the mere matter of error in some of the detailed statements therein, and our examination of the record shows that the referee's findings are substantially correct. The defense made is as stated by the referee in paragraph 13 of the above findings, and since we are in thorough accord with the referee's views we deem it unnecessary to comment thereon. Under the third subdivision of section 252, Rev. Laws of 1910, the license of an attorney at law may be revoked for the willful violation of any of the duties of an attorney or counselor. We therefore adopt the findings of fact and conclusions of law of the honorable referee, and approve his recommendation, based thereon, that the respondent, Edward Curd, should be disbarred and his license to practice law in the state of Oklahoma revoked.

It is therefore ordered that the license heretofore issued by this court to the said Edward Curd be and the same is hereby revoked, and the said Edward Curd is disbarred from hereafter practicing law in the courts of this state.

KANE, HARRISON, PITCHFORD, JOHNSON, and McNEILL, JJ., concur.

OWEN, C. J., not participating.

(75 Okl. 42)

SOUTHWESTERN BELL TELEPHONE CO. v. STATE ex rel. FREELING, Atty. Gen.

(No. 10480.)

(Supreme Court of Oklahoma. March 25, 1919. Rehearing Denied June 3, 1919.)

(Syllabus by the Court.)

1. TELEGRAPHS AND TELEPHONES ⟸26¾, New, vol. 7A Key-No. Series—RATES—INJUNCTION—AGENTS OF POSTMASTER GENERAL.

An injunction against the collection of telephone rates prescribed by the Postmaster General and payable to him for services rendered by a telephone system, in his possession and under his control, and used for the public benefit and welfare as an instrumentality of war under congressional resolution (July 16, 1918, c. 154, 40 Stat. 904 [U. S. Comp. St. 1918, § 3115¾x, appendix), and proclamation of the President of the United States (July 22, 1918), cannot be granted in an action against the agents of the Postmaster General, carrying out his orders in the operation of such system, as they have no individual interest in the controversy, but the relief is in fact asked against the Postmaster General.

2. TELEGRAPHS AND TELEPHONES ⟸26¾, New, vol. 7A Key-No. Series—TELEPHONE RATES—INJUNCTION—POSTMASTER GENERAL AS NECESSARY PARTY.

In an action for injunction, where the effect of the decree would be to control the action of the Postmaster General in the operation of a telephone system, in his possession and operated as a governmental agency for the public benefit and welfare in time of war, the Postmaster General is an indispensable party, his agents through whom he directs the operation having no individual interest and being without authority to grant the relief asked for.

Hardy, C. J., and Harrison, J., dissenting.

(Additional Syllabus by Editorial Staff.)

3. PARTIES ⟸32—EQUITABLE PROCEEDINGS—COMPLETE RELIEF—NECESSARY PARTIES.

In actions of equitable cognizance, the general rule is that all parties materially interested, either legally or beneficially, in subject-matter of suit must be made parties either as plaintiffs or defendants, so that a complete decree may be made binding upon all parties, as unless necessary and indispensable parties are before the court that cannot be done.

Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

Action for injunction by State of Oklahoma, on relation of S. P. Freeling, Attorney General, against the Southwestern Bell Telephone Company, a corporation. Judgment for plaintiff, and defendant brings error. Reversed, with directions to dissolve the injunction.

S. H. Harris, J. R. Spielman, and J. I. Howard, all of Oklahoma City, for plaintiff in error.

John A. Fain, U. S. Atty., of Lawton, for the United States.

S. P. Freeling, Atty. Gen., W. R. Bleakmore, Asst. Atty. Gen., and Paul A. Walker of Oklahoma City, for defendant in error.

OWEN, J. This action was brought by the Attorney General in the district court of Oklahoma county, for an injunction to restrain the Southwestern Bell Telephone Company, a corporation, and its managing officers, Pottingill, Nims, Reed, Noble, and Westervelt, from charging or collecting from the people of Oklahoma, for service in the use of the telephone lines of the corporation within the state, any sum or amount in excess of that prescribed and established by the Corporation Commission of the state as set

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forth in the schedule of rates and charges in its order of February 1, 1918. A temporary injunction was issued, and the Telephone Company appeals to this court.

The Attorney General alleged that the telephone company and the other defendants, officers, and employés of the corporation conformed in all respects to the regulations of the Corporation Commission as to rates established prior to the 21st day of January, 1919; that since that date the employés and officers of the telephone company, in subservience to an order made by the Postmaster General of the United States, have been charging rates for all telephone service other and in excess of the rates fixed by the Corporation Commission. It is alleged that the President of the United States, on July 22, 1918, assumed possession and control of the telephone system of the defendant company, through Postmaster General Burleson, by virtue of a joint resolution of Congress (July 16, 1918, c. 154, 40 Stat. 904 [U. S. Comp. St. 1918, § 3115¾ x, appendix]), and ever since said time the defendants claim to have been operating the business and telephone system of the defendant company under the supervision and control of the Postmaster General. It is alleged that the Postmaster General is purporting to act in pursuance to the proclamation of the President made in virtue of the joint resolution of Congress, and, acting as such, has made and promulgated a certain order or bulletin, fixing rates and charges for toll service in the transmission of messages over the telephone system of defendant company between persons and places within the state different from the rates prescribed and established by the Corporation Commission. It is alleged that the defendants, assuming to act as the agents of the Postmaster General and under his direction, will continue to exact these rates for whatever service they render to the citizens of the state unless enjoined from so doing. It is also alleged that all revenues of the telephone company are in the possession and are daily being taken into the possession of the Postmaster General, and such revenues collected from the people of the state are not liable to seizure upon execution, and to seize or restrain any of the property of the defendant company would operate to interfere with the transmission of communications of the national government, and would therefore constitute the use of force beyond the power of the state, and would be an interference with a governmental agency.

The prayer is that the defendants be enjoined from charging or collecting any sum greater or in excess of the amount prescribed by the order and regulation of the Corporation Commission.

The defendants by way of special plea to the jurisdiction of the court pleaded the joint resolution of Congress by the terms of which the President was authorized to take possession and assume control of the telephone system, and to operate the same in such manner as may to him appear to be needful or desirable for the duration of the war; the proclamation of the President taking possession, assuming control and supervision, and directing that such supervision, possession, control, and operation should be exercised by and through the Postmaster General, and that such duties imposed upon the Postmaster General should be exercised through the owners, managers, board of directors, officers, and employés of the telephone system until otherwise ordered, not beyond the date of the proclamation of the President of the exchange of ratifications of the treaty of peace; that pursuant to the authority vested in the President and Postmaster General, the Postmaster General selected and created an operating board charged with the detail work of carrying out orders of the Postmaster General, and since the taking over of the telephone system, the Postmaster General, or his agents or board of control, has in every respect assumed and exercised full control and supervision over the defendant company and its property, employés, rates, and operating methods, and the defendant corporation, its employés and codefendants, is in no manner conducting said telephone business or controlling the persons engaged in connection therewith, and has no power or supervision over said business, for the reason that said business is in every sense and respect in the possession and under the control of and being operated by the Postmaster General; that the defendant company and its codefendants have no power or authority to obey in connection with the management orders or directions of the Corporation Commission, or any power or authority other than that of the government of the United States through the Postmaster General; that the government of the United States, or the Postmaster General, is the proper party against whom any suit or proceeding may be maintained affecting, controlling, or limiting the power and authority of the Postmaster General in the management, operation, and control of the defendant telephone company.

[3] The general rule in actions of equitable cognizance is that all persons materially interested, either legally or beneficially, in the subject-matter of the suit must be made parties, either as plaintiffs or defendants, so that a complete decree may be made, binding upon all parties. The court cannot properly adjudicate matters involved in a suit where it appears that necessary and indispensable parties to the proceedings are not before the court. 16 Cyc. p. 181; Fla. L. R. & P. Co. v. Anderson, 50 Fla. 501, 39 South. 392; Stories' Eq. Pl. § 271.

[1, 2] The Attorney General argues the joint resolution of Congress does not give the President the right to fix rates, and there-

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fore it is not necessary to make the Postmaster General a party, because he is exceeding his authority, and that the defendants should not be treated as agents and employés of the United States government, but as individuals who are threatening to perpetuate an unlawful act outside of their official functions.

It appears the money collected from the people is under the control of and daily paid to the Postmaster General, the telephone company to receive a specified sum from the government for the use of its property. The effect of the injunction asked for, if binding upon the Postmaster General, would be to interfere with a governmental agency during the prosecution of war. So far as this case is concerned, under the terms of the joint resolution pleaded by the Attorney General, the duration of the war will be until the proclamation by the President of the exchange of ratifications of the treaty of peace. If the injunction would have no effect upon the Postmaster General, then it would be a useless act to enjoin the persons named as defendants, for the reason that the Postmaster General might install other employés in their places and continue in force the rates sought to be enjoined.

This identical question was presented to the Supreme Court of Louisiana recently in the case of Railroad Commission and Attorney General of La. v. Cumberland T. & T. Co. and Albert L. Burleson, Postmaster General, and it was there held that the authority of the President to take possession and assume control of the telephone companies for national security or defense, and to operate same in such manner as may be needful or desirable for the duration of the war, clearly includes the power to fix and collect rates. But in view of the conclusion we have reached we deem it unnecessary to determine the question whether the President, acting through the Postmaster General, exceeded his authority in promulgating the rates complained of. Under the congressional resolution he was given the right to take possession when he deemed it necessary and expedient to do so, and to control the telephone system, including all of its property and appurtenances, in such manner as he might deem needful and desirable for the public defense and welfare for the duration of the war. It is alleged the President took possession of the entire property, and that the revenues of the telephone company are in the possession and under the control of the Postmaster General, and unless the defendants are restrained they will continue, under the directions of the Postmaster General, and assuming to act as his agents, to pay the revenues to the Postmaster General. Thus it clearly appears the defendants have no personal interest in the rates collected, and are without power or authority to grant the relief prayed for.

The collection of the money, the entire subject-matter of the action, is directed and controlled by the President under the terms of a war measure, for the public defense, and when received is the property of the United States. The defendants cannot be considered as acting merely as the agents of the telephone company, or in their capacity as individuals, but solely as the agents of the President of the United States, under the Postmaster General, in his possession and control of the entire system, which includes all the property and revenues of the telephone company. Whatever is done by these agents in connection with their management and operation of the telephone lines is done by the President, through them in their capacity as agents. Therefore the injunction seeking to restrain the management and operation of the telephone system is in effect a suit against, and the purpose of which is to control the Postmaster General, and he is a necessary and indispensable party.

In the case of Belknap v. Schild, 161 U. S. 10, 16 Sup. Ct. 443, 40 L. Ed. 599, it was held that an injunction against the infringement of a patent by the use of a gate which is a part of a dry dock in the navy yards, put in place by, and the property of, the United States, and used for public benefit, would not lie to restrain the officers and agents of the government of the United States, as they had no individual interest in the controversy, and that the United States was a necessary party to the action. It was there held that an injunction cannot be issued against officers to restrain or control their use of property already in the possession of the government, and although the suit was not brought against the United States by name, but against their officers and agents only, nevertheless, so far as the bill prayed for an injunction and for the destruction of the gate in question, the defendants had no individual interest in the controversy; the entire interest adverse to the plaintiff was the interest of the United States in the property of which the United States had both the title and possession. Therefore the United States were the real party, against whom in effect relief was asked, and against whom the decree would effectively operate. It was said the plaintiffs sought to control the defendants in their official capacity, and in the exercise of their official functions, as representatives and agents of the United States, and thereby defeat the use by the United States of the property owned and used by it, for the common defense and general welfare, and the United States were an indispensable party to enable the court to grant the relief sought.

In the case of Cunningham v. Macon & B. R. Co., 109 U. S. 446, 3 Sup. Ct. 292, 609, 27 L. Ed. 992, the action was brought by bill in equity to foreclose a second mortgage on the railroad and to set aside a sale and convey-

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ance of the road to the state of Georgia under foreclosure of the first mortgage. It was held the state of Georgia was an indispensable party, for the reason that it was the only party having a personal interest in the matter of any authority to grant the relief asked.

The Attorney General relies upon the case of American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90, and similar cases in which the Supreme Court of the United States held that in cases where the government is neither formally, nor in effect, a party, its officers, although acting by its orders and for its benefit, may be restrained by injunction from doing positive acts for which they are personally and individually liable, taking or injuring the plaintiff's property, contrary to plain official duty and requiring no exercise of discretion. These cases, in our opinion, have no application to the facts pleaded in the instant case. Taking possession of the telephone system, its manner of operation and control, under the terms of the congressional resolution, is left to the discretion of the President, and in an unbroken line of decisions the Supreme Court of the United States has held that no injunction can be issued against the officers of the government to restrain or control the use of property already in the possession of the government and being used for the common defense and general welfare, as was said in the case of Belknap v. Schild, supra, or where the effect of the injunction is to control the discretion of the officers. Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 23 Sup. Ct. 698, 47 L. Ed. 1074. In that case it was held that whether the official decided right or wrong is not the question presented to the court; but, having jurisdiction to decide at all, it was his duty to decide as he thought the law was, and the court had no power whatever, under those circumstances, to review or control his determination by injunction. The opinion, delivered by Mr. Justice Peckham, reviews the McAnnulty Case, relied upon by the Attorney General, and construes it to be authority only to the extent of holding that the Postmaster General might be compelled by mandamus to deliver mail matter containing money and checks to the person to whom it was addressed, property of which the government had the possession for the sole purpose of delivering it to the owner, and in which the government claimed no title, clearly a ministerial duty, under the general laws and in time of peace, not property of which the government had possession, and using for the public defense and welfare, as an instrumentality of war, under a war measure and in time of war, and in the use of which the government officials must exercise discretion.

The congressional resolution under consideration in this case was enacted as a war measure, giving to the President the power to take possession of the entire telephone system, including all property and appurtenances, whenever he deemed such action necessary and expedient, and to operate such system in such manner as he deemed necessary and desirable, for national security and defense. The petition alleges that he did take possession, and is now, through the Postmaster General, operating the entire telephone system. A decree restraining his agents from carrying out orders in the manner of operation would be, in effect, to interfere with his operation and control, and for that reason the Postmaster General, through whom the President is in actual possession, is a necessary and indispensable party to the action.

Therefore the judgment of the lower court is reversed, with directions to dissolve the injunction.

All the Justices concur, except HARDY, C. J., and HARRISON, J., dissenting.

(75 Okl. 17)

TANCRED et al. v. BREWER. (No. 8538.)

(Supreme Court of Oklahoma. May 27, 1919.)

(Syllabus by the Court.)

1. PLEADING ⟸254 — JUDGMENT ON DEMURRER.

Where the amended petition of the plaintiffs states a cause of action against the defendant in a representative capacity, and the defendant interposes a demurrer "that the facts set forth in said petition do not constitute a cause of action against this defendant," which was sustained by the court, and the plaintiffs elect to stand upon their amended petition and decline to further plead, and the court rendered judgment that the plaintiffs take nothing and awards that the defendant recover his costs, *held*, the judgment must be reversed and the cause remanded for a new trial.

(Additional Syllabus by Editorial Staff.)

2. PLEADING ⟸214(1) — DEMURRER — ANSWERS.

For the purpose of a demurrer to an amended petition, all allegations of such petition must be treated as true.

Error from District Court, Pittsburg County; R. W. Higgins, Judge.

Action by M. T. Tancred and W. L. Cox, copartners doing business under the firm name and style of Tancred & Cox, against R. P. Brewer, as administrator of the estate of J. C. Wilson, deceased. Demurrer to amended petition sustained, and judgment

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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against plaintiffs for costs, and they bring error. Reversed and remanded.

Frank G. Anderson, of McAlester, for plaintiffs in error.

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Williams H. Scott, of McAlester, for defendant in error.

JOHNSON, J. This is an appeal from the district court of Pittsburg county from a judgment of the court sustaining a demurrer of the defendant to the amended petition of the plaintiffs. The plaintiffs having elected to stand upon their demurrer, the court thereupon rendered judgment that the plaintiff take nothing by reason of this action, and that the defendant have judgment against the said plaintiffs for costs, to which judgment the plaintiffs excepted, which exceptions were allowed by the court.

On August 12, 1916, the plaintiffs, who were plaintiffs below, filed their petition in error in this court against the defendant in error, who was defendant below, with a transcript of the record of the court below attached. This action was commenced by the plaintiffs on February 19, 1914. The amended petition of the plaintiffs was filed in the court below on the 22d day of April, 1916, which, omitting the caption, is as follows:

"Come now the plaintiffs, M. T. Tancred and W. L. Cox, and for their cause of action against R. P. Brewer, as administrator of the estate of J. C. Wilson, deceased, allege and state:

"That the said M. T. Tancred and W. L. Cox, plaintiffs, are now and at all times hereinafter mentioned were, copartners and doing business under the firm name and style of Tancred & Cox. That upon the 22d day of July, 1913, the defendant, R. P. Brewer, was by the county court in and for Pittsburg county, state of Oklahoma, duly appointed administrator of the estate of one J. C. Wilson, deceased, and that ever since said date the said R. P. Brewer has been and is now the duly appointed, qualified, and acting administrator of the estate of the said J. C. Wilson, deceased. That on or about the 6th day of July, 1913, the said J. C. Wilson died, in Pittsburg county, state of Oklahoma. That during the lifetime of the said J. C. Wilson, to wit, on or about the 14th day of February, 1913, the said firm of Tancred & Cox, made and entered into a verbal contract with the said J. C. Wilson, under and by virtue of the terms of which the said J. C. Wilson sold to said firm of Tancred & Cox four hundred and forty (440) head of cattle and three (3) cow ponies, all of said cattle being branded "bar W bar" (—W—), with the exception of about twenty or twenty-five head, which were unbranded, and that the said Tancred & Cox agreed to pay the said J. C. Wilson therefor the sum of $30.00 per head for two hundred and sixty (260) head of said cattle and the sum of $20.00 per head for one hundred and eighty head of said cattle, and the sum of $50.00 each for said three ponies, and that said Tancred & Cox then and there paid to the said J. C. Wilson, the sum of $500.00 upon the purchase price of said cattle and cow ponies, and the said J. C. Wilson then and there agreed to deliver the cattle and cow ponies to the said Tancred & Cox, during the spring and summer of 1913, at Canadian, Oklahoma, and the said Tancred & Cox agreed to pay to the said J. C. Wilson the balance of said purchase price as the said J. C. Wilson should deliver said cattle and ponies.

"That said J. C. Wilson, during his lifetime, in pursuance of the terms and conditions of said contract, did on or about the 21st day of February, 1913, deliver to said Tancred & Cox, at Canadian, Oklahoma, three hundred and twenty-four (324) head of said cattle, which delivery included the two hundred and sixty (260) head of said cattle, for which the said Tancred & Cox were to pay the sum of $30.00 per head, and sixty-four (64) head, for which the said Tancred & Cox were to pay the sum of $20.00 per head, and that upon the delivery of said cattle the said Tancred & Cox paid to the said J. C. Wilson the purchase price due for said cattle delivered, after deducting the sum of $500.00 paid to the said J. C. Wilson on the purchase price of said cattle at the time of the making of said contract, and that said J. C. Wilson thereafter during his lifetime, to wit, on or about the 13th day of March, 1913, delivered to said Tancred & Cox, at Canadian, Oklahoma, thirty-eight (38) head of the remainder of said cattle, for which the said Tancred & Cox were to pay the sum of $20.00 per head, and also delivered the said three cow ponies, and that upon said delivery the said Tancred & Cox paid to the said J. C. Wilson the purchase price of said cow ponies, to wit, the sum of $20.00 per head for said cattle and $50.00 per head for said cow ponies. That at the time of the death of the said J. C. Wilson, to wit, on or about the 6th day of July, 1913, there remained seventy-eight (78) head of said cattle to be delivered by the said J. C. Wilson, in pursuance of the terms and conditions of said contract, which the said J. C. Wilson had not delivered to the said Tancred & Cox, for which the said Tancred & Cox were to pay the sum of $20.00 per head, and that said seventy-eight (78) head of cattle have never been delivered to said Tancred & Cox, although during the summer of 1913 said Tancred & Cox repeatedly demanded of the said defendant, R. P. Brewer, as the administrator of the estate of the said J. C. Wilson, that said R. P. Brewer, as such administrator, deliver to said Tancred & Cox said seventy-eight (78) head of cattle according to the terms and conditions of said contract, but that the said R. P. Brewer, as such administrator, disregarding said contract, has at all times refused to deliver said cattle to said Tancred & Cox, and disregarding said demands made by the said Tancred & Cox, for the delivery of said cattle, said R. P. Brewer, as the administrator of the estate of said J. C. Wilson, sold said cattle to parties other than said Tancred & Cox.

"Plaintiffs further state and allege that said seventy-eight (78) head of cattle purchased by the plaintiffs from said J. C. Wilson, which have not been delivered as hereinbefore stated, were of the reasonable value of $34.50 per head, making a total value of $2,691.00, and that the price agreed to be paid therefor by the said Tancred & Cox, was the sum of $20.00 per head, making a total of $1,560.00; therefore,

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by reason of said defendant's failure and refusal to carry out the terms and conditions of said contract and deliver said cattle in accordance therewith, said plaintiffs have been damaged in the sum of $1,131.00.

"Plaintiffs further state and allege that on the 14th day of August, 1913, said defendant as the administrator of the estate of the said J. C. Wilson, gave due notice by advertisement, as required by law, to the creditors of the said J. C. Wilson, deceased, to present to said administrator their claims against said estate within four months from the date thereof, or the same would be forever barred. That said plaintiffs duly presented to said administrator their said claim in writing, properly verified, for the said sum of $1,131.00 against said estate of said J. C. Wilson, on the 24th day of November, 1913, which claim was by the said administrator on said 24th day of November, 1913, disallowed. A copy of said claim as presented to said administrator is hereto attached, marked 'Exhibit A' and made a part thereof.

"Wherefore plaintiffs pray judgment against R. P. Brewer, as the administrator of the estate of said J. C. Wilson, deceased, for the sum of $1,131.00, together with interest thereon at the rate of 6 per cent. per annum from the 24th day of November, 1913, and a judgment allowing and establishing said claim as a valid claim against said estate, and that said administrator be ordered to pay said claim in the due course of the administration of said estate, and that plaintiffs recover the costs of this action, and that they have all other general and proper relief."

On the 9th day of May, 1916, the defendant filed a demurrer to the plaintiffs' amended petition, which demurrer, omitting the formal parts, is as follows:

"Comes now the defendant and demurs to the first amended petition filed herein, and for reason shows: That the facts set forth in said petition did not constitute a cause of action against this defendant."

And on the 24th day of June, 1916, the court sustained the demurrer of the defendant, and the plaintiffs elected to stand upon their amended petition, and, declining to further plead, the court rendered the following judgment:

"It is therefore by the court considered, ordered, adjudged, and decreed that said demurrer of the defendant to the first amended petition of plaintiff be and the same is hereby sustained. To which action by the court, sustaining said demurrer, plaintiffs at the time excepted, which exception was by the court allowed."

On August 12, 1916, the plaintiffs filed their petition in error in this court with a transcript of the proceedings attached, marked "Exhibit A," which petition in error contained the following assignments of error:

(1) That said court erred in sustaining defendant's demurrer to plaintiffs' amended petition, to which the plaintiffs at the time excepted.

(2) That said court erred in rendering judgment against said plaintiffs and in favor of said defendant upon said demurrer, to which plaintiffs excepted.

[1, 2] In disposing of this appeal, it will be only necessary to consider the plaintiffs' first assignment of error, as a determination of the question therein raised will necessarily determine the question raised by the second assignment of error.

The defendant's demurrer challenged the sufficiency of the plaintiffs' amended petition. For the purpose of the demurrer of the defendant the allegations of the amended petition must be treated as true, then it necessarily follows that, if the amended petition of the plaintiffs stated a cause of action against the defendant, the trial court committed error in sustaining the demurrer, and such judgment must be reversed.

The plaintiffs allege in their amended petition: That the defendant was the duly appointed, qualified, and acting administrator of the estate of J. G. Wilson. That on February 14, 1913, the plaintiffs entered into a verbal agreement with the said intestate of the defendant, by which they purchased from the defendant's intestate 440 head of cattle and 3 horses, and at the time paid to said intestate upon the purchase price of said property the sum of $500, such property to be delivered to the plaintiffs by the said intestate of the defendant during the spring and summer of 1913. That the said intestate of the defendant, in pursuance of said agreement, delivered to plaintiffs said 3 head of horses and all of the cattle except 78 head, and that the plaintiffs paid for the live stock delivered upon the delivery of the same. That the defendant's intestate died on the 6th day of July, 1913, and that on said date 78 head of the cattle, for which plaintiffs had agreed to pay at the rate of $20 per head, had not been delivered. That said cattle were of the reasonable value of $2,691, and that the sum agreed to be paid therefor was $1,560, and the failure to deliver the same caused a damage to the plaintiffs in the sum of $1,131. That on the 22d day of July, 1913, the defendant was duly appointed by the county court of Pittsburg county, Okl., administrator of the estate of J. C. Wilson, deceased, and has ever since said date been so acting. That thereafter the plaintiffs had requested said defendant, as administrator, to deliver to the plaintiffs the 78 head of cattle during the summer of 1913, according to the terms and conditions of said contract, but that the defendant refused to do so, and in disregard of the terms and conditions of said contract, and the plaintiffs' demand, sold said cattle to purchasers other than the plaintiffs, and that the plaintiffs have at all times since the making of said contract been ready, able, and willing to pay for said cattle according to the terms and conditions of such contract, and in all respects complied with the terms thereof on their part, and that

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said 78 head of cattle were reasonably worth $34.50 per head at the time the delivery thereof was refused by the defendant, and that on the 14th day of August, 1913, the defendant, as administrator of the estate of his said intestate, gave notice to creditors to present their claims, and that on the 24th day of November, 1913, and within the time allowed for presentation of claims against said estate, the plaintiffs presented their claim to the defendant as such administrator, and the same was by him disallowed, and that this suit was commenced on the 19th day of February, 1914, within time allowed by law for the bringing of actions upon claims disallowed by the administrator of said estate, in the district court of Pittsburg county, Okl.

As before stated, the question here presented is: Did the facts alleged in such amended petition constitute a cause of action, sufficient when challenged by the demurrer of the defendant? Rev. Laws 1910, § 6302, provides:

"Actions for the recovery of any property, real or personal, or for the possession thereof, and all actions founded upon contracts, may be maintained by and against executors and administrators in all cases and in the same courts in which the same might have been maintained by or against their respective testators and intestates."

This court, in the case of Kaufman v. Boismeir, Adm'r, 25 Okl. 252, 105 Pac. 326, construing section 1692, Wilson's Rev. & Ann. St. 1903, which is the statute under consideration, said:

"The administrator, however, is the real party to the action, * * * and verifies the pleadings as such party, and not as agent of the intestate"—citing Wilson v. Me-ne-chas, 40 Kan. 648, 20 Pac. 468.

Rev. Laws 1910, § 6336, provides:

"Every executor or administrator must, immediately after his appointment, give notice to the creditors of the decedent, requiring all persons having claims against said decedent to present the same. * * * Such notice shall be substantially in the following form:

"All persons having claims against A. B., deceased, are required to present the same with the necessary vouchers, to the undersigned administrator, at ——, within four months of the date hereof, or the same will be forever barred. A. B., Administrator.

"Dated ——, 19—."

Rev. Laws 1910, § 6338, provides:

"All claims arising upon contracts hereafter made, whether the same be due, not due or contingent, must be presented within the time limited in the notice; and any claim not so presented is barred forever."

Exhibit A, to the plaintiffs' amended petition, with indorsements thereon, is as follows:

"Rec. 11—24—13

"Dis. All. do.

"State of Oklahoma, Pittsburg County—ss.:

"In the County Court.

"In the Matter of the Estate of J. C. Wilson, Deceased, R. P. Brewer, Administrator, in Account with Tancred & Cox.

"M. T. Tancred and W. L. Cox, partners doing business as Tancred & Cox, hereby submit the following claim against the estate of J. C. Wilson to R. P. Brewer, administrator of said estate, and found said claim on the following facts and figures, to wit:

"That on or about the 14th day of February, 1913, the deceased, J. C. Wilson, then living, entered into a contract with Tancred & Cox, whereby the said J. C. Wilson sold to Tancred & Cox all of his cattle of the —W— brand, on left side, the number of cattle to be sold being founded on the book account of the said J. C. Wilson, which account at that time was 440 head of cattle. That all of said cattle were to be delivered to the said Tancred & Cox at Canadian, Oklahoma. That Tancred & Cox were to pay for the cattle as follows: $30.00 per head for 260 of said cattle when delivered as above, and $20.00 for the balance when delivered as stated above.

"That the said J. C. Wilson delivered the 260 and received therefor the agreed amount, viz. $30.00 per head. That he delivered 102 of the said cattle at the price of $20.00 per head. That at the time of the death of the said J. C. Wilson there remained to be delivered under the said contract 78 of the said cattle at the price of $20.00 per head. That since the death of the said J. C. Wilson Tancred & Cox have demanded that the administrator deliver them the cattle according to the contract mentioned above, but that the said administrator refused so to do, but sold the said cattle to another person than the said Tancred & Cox. That by reason of the said action for the administrator there is due to Tancred & Cox, out of the estate of J. C. Wilson, the sum of $1,131.00 as follows:

Value of 78 cattle at $34.50 per head.....	$2,691 00
Value of 78 cattle at $20.00 per head.....	1,560 00
Due Tancred & Cox.....	$1,131 00

"That said cattle were reasonably worth the price of $34.50 per head on or about the 1st day of March, 1913, at the date of the sale of said cattle. Tancred & Cox, by Mc.

"State of Oklahoma, Pittsburg County—ss.:

"M. T. Tancred, being duly sworn, on oath says that the within claim against the estate of J. C. Wilson, deceased, amounting to the sum of $1,131.00, is just, after allowing all just credits and offsets, and is now due and unpaid.

"Subscribed and sworn to before me this 22d day of November, 1913. Clark Nichols.

"My commission expires Feb. 7th, 1917."

It will be observed that the plaintiffs allege in their amended petition that the defendant's notice to creditors was dated August 14, 1913, and that the plaintiffs duly presented their claim to the defendant, as administrator of the estate of his intestate.

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on November 24, 1913, which was within four months from the date of said notice. Rev. Laws 1910, § 5279, provides:

"In addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to the person, or to real or personal estate, or for any deceit or fraud, shall also survive; and the action may be brought, notwithstanding the death of the person entitled or liable to the same."

This section was borrowed from Kansas (Gen. St. Kan. § 4615), and was construed by this court in Kas. City, M. & O. Ry. Co. v. Shutt, 24 Okl. 96, 104 Pac. 51, 138 Am. St. Rep. 870, 20 Ann. Cas. 255. Syl. 1 of the opinion is as follows:

"A cause of action in favor of the owner of personalty, against a party wrongfully taking and converting the same to his use, is assignable."

And by the Supreme Court of Kansas in Watson, Stewart et al. v. Balderson et al., 10 Kan. 131, Syl. 1:

"A claim for money tortiously obtained from the claimant may be assigned to a third person, so as to give the assignee a right to recover the same in his own name."

Section 6302, supra, was borrowed from California, and is Code Civ. Proc. Cal. § 1581, and was construed by the Supreme Court of California, in the case of Janin v. Browne, 59 Cal. 44, wherein it was said:

" 'Where the contract of the deceased is of an executory nature, and the personal representative can fairly and sufficiently execute all the deceased could have done, he may do so and enforce the contract.' Pars. Cont. 131. E converso, the personal representative is bound to complete such a contract, and, if he does not, may be made to pay damages out of the assets. Siboni v. Kirkman, 1 Mees. & W. 418."

And the court also quotes with approval from 1 Chitty on Contracts (11th Am. Ed.) at page 138, as follows:

"It is a presumption of law that the parties to a contract bind, not only themselves, but their personal representatives, and executors, therefore are held to be liable on all contracts of the testator which are broken in his lifetime, and, with the exception of contracts in which personal skill or taste is required, on all such contracts broken after his death; and such parties may likewise sue on a contract, although they are not named therein."

" ' "Where the contract of the deceased is of an executory nature, and the personal representative can fairly and sufficiently execute all the deceased could have done, he may do so and enforce the contract." Parsons on Cont. 131. E converso, the personal representative is bound to complete such a contract, and, if he does not, may be made to pay damages out of the assets. Siboni v. Kirkman, 1 Mees. & W. 418.' But where an executory contract is of a strictly personal nature, the death of a party by whom the work is to be done before its completion determines the contract—unless what remains to be executed can certainly be done to the same purpose by another. Parsons on Cont. 131. Even if it be admitted that the contract we are considering was personal—and involved the placing by the plaintiff of peculiar confidence in the skill and judgment of Browne, in so far as it authorized him to superintend the building of the house—the house was completed before the death of Browne. What remained to be executed—the sale of the property—could be done as well by the administrator as by Browne, had he lived."

In view of the record and the authorities cited, we hold that the trial court erred in sustaining the demurrer of the defendant to the amended petition of the plaintiffs, and therefore this case is reversed and remanded, that the court proceed with the same in accordance with the views herein expressed.

(72 Okl. 317)

WESTERN CASUALTY & GUARANTY INS. CO. v. McLEAN. (No. 10100.)

(Supreme Court of Oklahoma. May 13, 1919.)

(Syllabus by the Court.)

CORPORATIONS ⟹80(12) — SALE OF STOCK—FRAUD—PROOF—QUESTION FOR JURY.

In an action to rescind a written contract on the grounds of fraud in procuring of said written instrument, and to recover back the money paid on said contract, the proof of the plaintiff must sustain the allegations of fraud by a preponderance of the evidence, so great as to overcome all opposing evidence and repel all opposing presumptions of good faith, and if the evidence of the plaintiff is contradicted by the writing itself, or any other fact or circumstances, the same becomes a question of fact for the jury, and it is error for the court to instruct a verdict for the plaintiff even though defendant has offered no evidence.

Appeal from Superior Court, Oklahoma County; John W. Hayson, Judge.

Suit by George D. McLean against the Western Casualty & Guaranty Insurance Company. Judgment for plaintiff on a directed verdict, motion for new trial overruled, and defendant appeals. Reversed and remanded.

Ledbetter, Stuart & Bell, of Oklahoma City, for plaintiff in error.

Stuart, Cruce & Cruce, of Oklahoma City, for defendant in error.

McNEILL, J. This is an appeal from the district court of Oklahoma county in an action wherein George D. McLean brought suit against the Western Casualty & Guaranty Insurance Company and the Southwestern

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Casualty Insurance Company, a corporation, to rescind a contract on the ground of fraud and recover $1,375 paid on said contract. The petition alleges that on the 7th day of March, 1910, the Southwestern Casualty Insurance Company was duly incorporated, and was perfecting its organization by selling stock in said company; that on the 7th day of March, by and through its agent, they sold and agreed to deliver to plaintiff $5,000 worth of stock of the Southwestern Casualty Insurance Company, and received therefor as advanced payments the sum of $1,375; that at the time of the sale it was agreed between the plaintiff and the agents of the defendant that as an additional consideration for the purchase of said stock, that plaintiff should be employed by the Southwestern Casualty Insurance Company as a medical director, and to receive therefor the sum of $1,500 per year; this was the sole consideration prompting the plaintiff to purchase said stock; that thereafter the Southwestern Casualty Insurance Company reorganized without the knowledge and consent of this plaintiff under the name of the Western Casualty & Guaranty Insurance Company of Oklahoma City, Okl., and are now doing business under said name, and because of the reorganization of the company and that they have contracted with other parties to represent them as medical director, it is impossible for defendants to comply with the contract of plaintiff; that the representations in regard to employing plaintiff were false and untrue, and made for the purpose of persuading plaintiff to invest his money, upon said false and fraudulent representations, and plaintiff asks for the return of the money.

The defendant filed an answer, which was a general denial, and further alleged that, if any such contract was made, said persons acted without the scope of authority, had no right to make such contract to bind said company, and that as additional answer the defendant further alleged that at the time of the alleged agreement of plaintiff, if any such agreement was made, the defendant was not engaged in writing or transacting any insurance business in the state; that while the charter was granted the defendant was engaged in selling stock, and, if said agreement was made, it was made without the knowledge or consent of the stockholders, and plaintiff was attempting to obtain an undue and illegal advantage over other subscribers to the capital stock of this defendant. If the terms of the agreement had been carried out by the defendant the plaintiff would have had a contract for the purchase of stock, that was less onerous than the contract of other subscribers to said capital stock, and the position of plaintiff would have been more profitable than other subscribers to said capital stock, and by reason of said fact the defendant pleads that, if said contract was made, it was illegal, null, and void and contrary to public policy.

At the close of the evidence the court directed a verdict for the plaintiff for the full amount. The defendant filed a motion for a new trial, which was overruled, and brings the case here for reversal. As grounds for reversing said judgment, plaintiff in error alleges that the court committed error in directing a verdict in favor of the plaintiff and against the defendant. For the sake of convenience hereafter, we will refer to the corporation as the defendant and Dr. McLean the plaintiff, as they were designated in the court below.

The evidence on behalf of the plaintiff was, in substance, that two agents of the company in the fall of 1909 solicited him to subscribe for some stock in the Southwestern Casualty Insurance Company. They informed him that, if he would take $5,000 worth of stock, he would be recommended as having a preference right as a medical director of the corporation. Thereafter, in November, 1909, the agents returned and stated, if he would take $5,000 worth of stock, that he would retain the preference right to the medical examiner's place. Plaintiff testified he subscribed for the stock at that time, and in payment therefor he gave a note for $250 which was payable in 30 days and a note for $250 payable July 1, 1910. The application for subscription at that time was for only 10 shares of stock of the value of $500. He further testified that the agent talked to him many times thereafter, and wanted him to complete the subscription of the stock to make it $5,000; so in March or April the agent and Dr. Edwards met with plaintiff, and the agent agreed that, if each of them subscribed for $5,000 worth of stock, he would make each of them a medical director at a salary of $1,500 each. At that time the doctor subscribed for 90 shares of stock or $4,500 worth, making his total subscription total 100 shares or $5,000 worth. He testified that he gave a note for $1,125 payable in 30 days, and executed another note for $3,375. On cross-examination the doctor admitted that he did not give a note for $1,125, but the note was probably for $675, and the agent gave him credit for some money the agent had borrowed from him. The $675 note was paid by the doctor. And his other note was for $3,375. At the time of executing the application when he subscribed for stock in November, 1909, the application contained the following provision:

"It is understood and agreed that no conditions or agreements other than those printed herein shall be binding on the company, and that the first payment hereon shall be the liquidated damages of the company should I fail or refuse to complete this subscription as agreed."

And on the same day he was given a receipt for $250 which contained the following provision:

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"This receipt will not be binding on the company if any conditions on the face hereof or in the face of the subscription are changed, or if new conditions are added."

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At the time of making his application in March, his application contained the same provision, and the receipt contained the same provision. The doctor further testified that he talked to the agent, and the agent later on told him if he would settle the installments that were due that he thought everything would come out all right. The doctor said he got uneasy, and in June the note of $250 executed November 28, 1909, came from Dallas, and he refused to pay the same.

It was admitted in evidence that the company was not authorized to do business prior to July 1, 1910. The records further disclose the corporation was reorganized July 18, 1910. The record does not disclose when the medical director was appointed. The record does not disclose why Dr. McLean did not receive his appointment. There is no evidence that he was to receive the same before the company started business. His own testimony showed that in June, 1910, and prior to starting business he repudiated the note he gave in November, 1909. It appears from the doctor's testimony that he made two separate applications for this stock; that the application made the 28th of November was only for $500 worth of stock. He testified that the agent agreed to give him the preference right for being a medical director if he subscribed for $5,000 worth of stock. This evidence could not be the foundation for fraud, for he only subscribed for $500 worth of stock at that time. There was no evidence that any representations were made about receiving any position upon subscribing for $500 worth of stock. On this subscription he paid $250; still the court instructed the jury upon that evidence to return the verdict for the plaintiff for this amount, which was included in the verdict, As to this, it was certainly error.

It is true the doctor testified that at the application made in March he had paid $1,125, but upon cross-examination admitted that he had only paid $675. He testified that the agent owed him for borrowed money, and, when he made his application, the agent gave him credit for this amount, in his receipt. The company would not be liable for what money he had loaned the agent, even though the receipt called for the same, unless the agent paid the same to the company. The most the doctor admitted that he ever paid was $925. The evidence is not clear as to who, if the doctor's contract for employment was true (the foundation for the subscription), breached the contract first. The evidence does not disclose when employment was to begin, but it is not presumed that it would begin before the company organized and started business. It is admitted that they did not start business until the 1st of July, 1910. The doctor testified that he refused to pay the $250 note in June, 1910. There is no evidence that any one at that time had been appointed a medical director, or that the board of directors had met to transact business, but the evidence on behalf of the defendant is that the first meeting was had in July, when the corporation was reorganized and the name changed.

The foundation of plaintiff's claim is based upon fraud in procuring his written application for said stock and the money that he had paid thereon. The rule governing the weight of evidence and testimony required to be introduced in such instances is expressed in the case of Owen v. United States Surety Co., 38 Okl. 123, 131 Pac. 1091:

"In this jurisdiction, where fraud is alleged in the procuring of a written instrument, the proof must sustain the allegations by a preponderance of the evidence so great as to overcome all opposing evidence and repel all opposing presumptions of good faith."

The same rule is set forth in the case of Moore v. Adams, 26 Okl. 48, 108 Pac. 392:

"In cases where fraud is alleged in the procuring of the execution of written instruments or deeds, the proof must sustain the allegations by a preponderance of the evidence so great as to overcome all opposing evidence and repel the opposing presumptions."

The rule governing the instruction of a verdict is expressed in Continental Casualty Co. v. Owen, 38 Okl. 107, 131 Pac. 1084:

"In trials by jury in this jurisdiction, it is only where the facts, although undisputed, are such that all reasonable men must draw the same conclusion from them, that the court is authorized to direct a verdict."

In the case of State Bank of Westfield v. Kiser, 46 Okl. 180, 148 Pac. 685, the court stated as follows:

"If there is any evidence offered which raises an issue of fact for the consideration of the jury, the court should, under proper instructions, submit such issue to them for their determination. It is not the policy of the law, in jury trials that the court shall invade the provinces of the jury and weigh the evidence and determine the facts, but that all issues of fact, whether they be clear or obscure, shall be submitted to the jury and determined by them."

In the case of Continental Insurance Co. v. Chance, 48 Okl. 324, 150 Pac. 114, this court says:

"Even though the defendant offers no evidence in rebuttal, where defendant had denied plaintiff's case, and the evidence introduced on the part of the plaintiff to prove his case was of such a nature that men of ordinary intelligence might draw different conclusions therefrom, it would be error for the court to instruct a verdict."

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As to what is necessary to direct a verdict, it is always essential to look at the kind and character of cases that were on trial. The defendant in error relies upon the following cases: Fitzpatrick v. Nations, 30 Okl. 462, 120 Pac. 1020; Moore v. Leigh-Head Co., 48 Okl. 228, 149 Pac. 1129; Dickerson v. Incorporated Town of Eldorado, 166 Pac. 708. In these cases the foundation of the plaintiff's claim was based upon a written instrument, and it was where the affirmative defense was upon the defendant, but in the case at bar the written instrument was made by the plaintiff in the case, and in order to prove his case it was necessary for him to overcome the presumptions contained in the instrument by showing the same was procured by fraud. The presumption in the case, to start with, was against the plaintiff; he was asking to have a written instrument set aside in order to recover. As stated in the case of Moore v. Adams, he must not only make out a prima facie case, but he must sustain the allegations of fraud by a preponderance of the evidence so great as to overcome all the opposite evidence, and presumption of good faith. The evidence of Dr. McLean as to the purpose that caused him to subscribe for said stock is contradicted by the written application he made. The amount that he had paid is not definite. The question of what fraud existed in November, 1908, at the time of subscribing for $500 worth of stock is not definite and certain. The question of who first breached the contract is not definite and certain, and there are many issues in this case that should be passed upon by a jury, and the court committed reversible error in instructing the jury to return a verdict in favor of the plaintiff and against the defendant, and the cause is therefore reversed and remanded.

RAINEY, HARRISON, PITCHFORD, and JOHNSON, JJ., concur.
SHARP, J., not participating.

(72 Okl. 293)

CHAPLIN v. FIRST BANK OF HITCHCOCK et al. (No. 8817.)

(Supreme Court of Oklahoma. May 20, 1919.)

(Syllabus by the Court.)

1. PROCESS ⟸96(8)—SERVICE BY PUBLICATION—STATUTE.

Under section 4722, R. L. 1910, providing for service by publication, it is not necessary to allege in terms that the action is one of those enumerated in the section where the affidavit to obtain service by publication mentions sufficient grounds.

2. SHARES OF STOCK OF INCORPORATED BANK —TRANSFER—VALIDITY.

The shares of stock of an incorporated bank are deemed personal property to be transferred on the books of the bank in such manner as the by-laws therefor may direct, and no transfer of stock shall be valid against the bank so long as the registered holder thereof shall be liable to the bank for any indebtedness, and the stock represented by the certificates is deemed to be held by the bank within the state whose creature it is, whenever it is sought by suit to determine the rights of parties therein.

3. PROCESS ⟸165—PUBLICATION—DEFECT—AFFIDAVIT—AMENDMENT.

Where the jurisdictional facts necessary to warrant service by publication were in existence at the commencement of the action, and the affidavit for publication is defective only that it states inferentially, or in any other way, any matter required by statute to be alleged therein, it is amendable.

4. JUDGMENT ⟸144 — ATTACK AFTER ADJOURNMENT—DEFECT IN AFFIDAVIT FOR PUBLICATION.

A judgment regular upon its face rendered by default, and upon publication service in the action, where such service is authorized by statute and approved by the court, is not subject after the adjournment of the term to attack by motion supported by affidavit upon the ground of the falsity of the affidavit for publication.

(Additional Syllabus by Editorial Staff.)

5. JUDGMENT ⟸490(3)—SERVICE BY PUBLICATION—AFFIDAVIT—COLLATERAL ATTACK.

If an affidavit seeking service on a nonresident defendant by publication fails in any jurisdictional particular, and judgment is entered in the case, it will be void and subject to collateral attack.

Error from District Court, Blaine County; Thos. A. Edwards, Judge.

Action by the First Bank of Hitchcock against M. S. Chaplin and Frank Cronkhite. Judgment for plaintiff against defendant Cronkhite by default, and against defendant Chaplin, motion by defendant Chaplin to set aside judgment overruled, and he brings error. Affirmed.

William O. Woolman, of Watonga, for plaintiff in error.
Seymour Foose and R. C. Brown, both of Watonga, for defendants in error.

PITCHFORD, J. On the 22d day of April, 1915, the First Bank of Hitchcock commenced in the district court of Blaine county an action against Frank Cronkhite and M. S. Chaplin. The relief sought will more fully appear from the affidavit herein. Personal service was had upon Frank Cronkhite, and plaintiff sought to have service on M. S. Chaplin by publication. The material portion of the affidavit for service by publication, after nam-

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ing the court, county, state and parties, is as follows:

"That the said plaintiff, the First Bank of Hitchcock, has filed its petition and commenced its action in said court against the defendants, Frank Cronkhite and M. S. Chaplin, and in said action and petition sues the defendants, Frank Cronkhite and M. S. Chaplin, to recover judgment on a promissory note given by the defendant Frank Cronkhite to the plaintiff on November 21, 1914, for the sum of $1,935.90 with interest at 10 per cent. per annum after maturity, and maturing January 20, 1915, and the additional sum of $250 as attorney's fees and for the costs of the action, and, to secure said indebtedness, claims a lien on 23⅓ shares of the capital stock of said plaintiff bank issued to and owned by the defendant Frank Cronkhite, together with the dividends, interest, and profits which may accrue thereon, and alleges that the defendant M. S. Chaplin claims some lien upon or interest in said shares of stock adverse to the plaintiff, but that whatever lien upon or interest in said shares of stock the said M. S. Chaplin may claim or have, if any, the same is inferior, junior, and subject to the lien and interest of the plaintiff as claimed and pleaded in its petition, and praying for judgment on said note against the defendant Frank Cronkhite, and for the foreclosure of its lien on said shares of stock, and that the same be sold according to the law and the proceeds of the sale applied to the discharge of said indebtedness and judgment, and that the defendant M. S. Chaplin be required to go into court and plead any claim of lien upon or interest in said shares of stock that he may have, and that judgment be rendered against him barring, divesting, and excluding him of all right, title, or interest in or lien upon said shares of stock, and for judgment against both of the defendants for all the costs of the action, and for all relief, orders and judgments to which the plaintiff may be entitled under the pleadings and the evidence."

On the 1st day of June, 1915, the defendant M. S. Chaplin, by way of special appearance and limiting his appearance to that purpose only, objected to the jurisdiction of the court for the following reasons, to wit:

First. That the action is not one in which service by publication can be had as against this defendant under any provisions of the laws of the state of Oklahoma.

Second. That the affidavit filed herein for service by publication is defective and insufficient, in this, that the same does not show that the personal property claimed to be involved in this action was in the state of Oklahoma at the time of the commencement of this action.

Third. That said personal property is not sought to be taken or affected by any of the provisional remedies.

After filing the foregoing objections and before the judgment of the court thereon, the plaintiff was granted leave over the objection of the defendant to amend the affidavit by inserting the following matter immediately after the end of the first paragraph, "located in the said Blaine county, state of Oklahoma, and organized under the laws of the state of Oklahoma," and the following words and matter immediately after the words "Frank Cronkhite" in the fourth from the last line on first page of said affidavit, to wit, "in said Blaine county." The court then overruled the special appearance, and the defendant M. S. Chaplin excepted. On the same day the defendant M. S. Chaplin filed his second special appearance, and moved to quash on the grounds that the court was without jurisdiction to grant the right to amend, which was by the court overruled and exceptions saved. Defendant Chaplin refused to plead further.

On the 26th day of January, 1916, the plaintiff obtained judgment by default against Frank Cronkhite in the sum of $2,132.75 and $25 attorney's fee, also a decree that the bank have a first lien upon said stock, and that the said M. S. Chaplin had no right or interest or lien in or against or upon said shares of stock, and also barring the defendant M. S. Chaplin from any right, title, and interest in said stock, and ordering the sale of said shares of stock to satisfy said judgment. We quote from the journal entry of the judgment the following:

"And now the court finds that the defendant Frank Cronkhite has been duly and personally served with summons in said action in Blaine county, and due return of such summons duly made and filed, and the time allowed said defendant by law and by the terms of said summons in which to answer has long since expired, and the defendant Frank Cronkhite has not answered or otherwise pleaded herein, and is hereby adjudged to be in default for want of answer or other pleading, and for want of appearance. The court further finds that a summons has been duly served on the defendant M. S. Chaplin, by publication, and that publication thereof has been duly made in accordance with the requirements of law and on a good and sufficient affidavit therefor, and proof of such publication of summons has been duly made by affidavit and filed herein, and is hereby approved, and that the time allowed the defendant M. S. Chaplin by law and by the terms of said summons to answer in said cause has long since expired, and the said defendant M. S. Chaplin has not answered or otherwise pleaded, and is in default for want of answer or other plea, and for want of appearance, and is so adjudged to be in default, and that each of said defendants by such default on his part is hereby held to have confessed the allegations of plaintiff's complaint."

On May 27, 1916, the defendant M. S. Chaplin filed a motion to set aside the judgment and the sale thereunder for the following reasons: That the court in rendering the judgment was without jurisdiction of the person of the defendant Chaplin and without jurisdiction over the property involved; that the affidavit filed in said cause for the purpose of obtaining service by publication is and was defective and insufficient, in this, that the same did not show that at the time of the filing of said affidavit originally on

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April 22, 1915, the shares of stock involved in said action were within the jurisdiction of the district court of Blaine county, or within the state of Oklahoma; that the original affidavit for service by publication was never amended in any particular except as is shown on the face thereof by interlineations with pen and ink, which affidavit was never reverified as amended, and was not authenticated by any officer authorized to administer oaths as being amended or reverified as of the date of September 25, 1915; nor does said amended affidavit purport to show on its face that on the 22d day of April, 1915, the said bank stock certificates were within the state of Oklahoma and within the jurisdiction of this court, and further, that there is no authority in law for the amendment of an affidavit for service by publication in this cause unless such amendment relates to a fact existing as a fact at the time of the filing of the original affidavit, which fact must appear affirmatively by the amendment as made; and, further, that said certificates of bank stock were at that time, to wit, on the 22d day of April, 1915, and still are, within the state of Iowa, and were not within the state of Oklahoma at that time.

On the 19th day of September, 1916, the foregoing motion was overruled, whereupon the said M. S. Chaplin appeals. The said Frank Cronkhite, refusing to join in the appeal, is made one of the defendants in error. Plaintiff in error relies upon two specifications of error:

First. The court erred in permitting the plaintiff to amend its affidavit for service by publication.

Second. The purported amendment was void and conferred no jurisdiction to obtain service by publication.

[1, 5] It is a well-settled rule in this state that, if an affidavit seeking service on a nonresident defendant by publication fails in any jurisdictional particular, and judgment is entered in the case, the same would be void and subject to collateral attack. The fact that the defendant M. S. Chaplin entered a special appearance in court and sought to have the service quashed did not result in a general appearance. Unless the court had jurisdiction of the subject-matter—that is, the shares of stock—it could acquire none of the defendant by the publication notice. Before the service by publication could be of any effect, the court had to have jurisdiction of the subject-matter, and the reason for calling the court's attention to the subject-matter was for the purpose of showing that the court was without jurisdiction, unless the property sought to be reached by the proceedings was within the state, and this fact must appear from the affidavit either positively or inferentially.

Under section 4722, R. L. 1910, service may be made by publication in actions which relate to, or the subject of which is, real or personal property in this state, which any defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or particularly in excluding him from any interest therein, and such defendant is a nonresident of the state.

The extent of the amendment permitted by the court was that the First Bank of Hitchcock was located in Blaine county, Okl., and organized under the laws of said state, and that the shares of the capital stock involved were in Blaine county. The intention evidently of the affiant was to show that the condition existing at the time of the amendment existed at the time of the original affidavit; that is, the First Bank of Hitchcock was located in Blaine county, Okl., and organized under the laws of the state of Oklahoma; that on that date Frank Cronkhite resided in Blaine county; that the shares of the capital stock were in Blaine county. This amendment was made before the court passed upon the motion filed by the defendant M. S. Chaplin to quash the service. After allowing the amendment, the court overruled the motion to quash. The defendant then filed a second motion, appearing especially for that purpose, and objected to the jurisdiction of the court over his person for the reason that the action was not one in which service by publication could lawfully be had, and that the original affidavit for service of publication was fatally defective and inefficient; that the same failed to show that the personal property claimed to be involved was in the state of Oklahoma; and that the attempted amendment of the affidavit for service was and is null and void and conferred no jurisdiction over this defendant.

Section 4725, R. L. 1910, provides that the publication for service shall state the court in which the petition is filed, the names of the parties, and must notify the defendant thus to be served that he has been sued, and must answer the petition filed by the plaintiff on or before the time stated, which shall not be less than 41 days from the date of the first publication, or the petition will be taken as true and judgment, the nature of which shall be stated, will be rendered accordingly.

[2] The objection in the motion to quash on the part of the defendant is that the affidavit failed to state that the shares were in the state of Oklahoma. We are of the opinion that the judgment rendered upon this affidavit and publication would have been good as against a collateral attack. In 10 Cyc. 588, it is said:

"A share certificate is merely the paper representative of an incorporeal right, and stands on a footing similar to that of other muniments of title. It is not in itself property, but is merely a symbol or paper evidence of property; hence the proprietary right may exist without a certificate. Certificates of shares of corporate stock are not letters of credit, or in the nature of letters of credit. Certificates of shares

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of capital stock are not negotiable instruments either in form or character, although they are often said to be quasi negotiable. The general consequence of this doctrine is that whoever takes them takes them subject to the equities and burdens which attend them, as in the case of the purchase of any other nonnegotiable paper, and that although ignorant of such equities and burdens, his ignorance does not relieve the paper thereof, or enable him to hold it discharged therefrom. They are nonnegotiable in the sense that a complete transfer of title good not only between the parties, but also against the corporation itself, can only be made with the concurrence of the act of the corporation in pursuance of its charter governing statutes or operative by-laws."

The same rules as announced by Cyc. are announced by Clark on Corporations, p. 258, second edition of said work. The certificates of shares being the symbol of property and evidence of an interest in the property, it follows that the property is located wherever the residence of the corporation may be, and litigation affecting the title of the stock should be in the jurisdiction where the corporation is created or resides, although the owner thereof might be a nonresident of the state, and that for the purposes of litigation affecting the title of the stock constructive service was sufficient.

In 7 Cyc. 496, we find the following:

"It is frequently provided that no transfer or assignment of stock shall be valid with respect to the bank unless or until there is a formal transfer of the stock on the books of the corporation; and where this is the case, it is the right of the bank to treat a stockholder as the true owner of stock and to deal with him accordingly until it receives notice that he has assigned such stock to another." People's Bank v. Macon Exchange Bank, 116 Ga. 820, 43 S. E. 269, 94 Am. St. Rep. 144.

In People v. La Salle St. Trust, etc., Bank, 269 Ill. 518, 110 N. E. 38, it was held that, where a stockholder had sold his stock and indorsed and delivered the certificate therefor to the purchaser, the transfer not being made on the books of the bank, and the vendor still appearing on the books and records of the bank as the owner of 40 shares of the stock, the purchaser of the stock who concealed his identity by his failure to have the stock transferred on the books of the corporation was held to know that his vendor would be recognized and could be dealt with as the real stockholder, and that, so far as the corporation was concerned, the original owner was the real stockholder, and until his stock was transferred according to law, or at least until the bank was notified of the transfer, the registered stockholder may be treated as the real owner of the stock.

Section 290, R. L. 1910, provides:

"The president and cashier of every incorporated bank shall cause to be kept at all times a correct list of the names and residences of all the shareholders in the bank and the number of shares held by each, in the office where its business is transacted. Such list shall be subject to the inspection of all the shareholders and creditors of the bank, and the officers authorized to assess taxes under the state authority. * * *"

Section 294, R. L. 1910, provides:

"The shares of stock of an incorporated bank shall be deemed personal property, and shall be transferred on the books of the bank in such manner as the by-laws therefor may direct, but no transfer of stock shall be valid against a bank or any creditor thereof so long as the registered holder thereof shall be liable as a principal debtor, surety or otherwise to the bank for any debt, nor in such cases shall any dividend, interest or profits be paid on such stock so long as such liabilities continue, but all such dividends, interest or profits shall be retained by the bank and applied to the discharge of such liabilities, and no stock shall be transferred on the books of any bank where the registered holder thereof is in debt to the bank for any matured and unpaid obligations."

Section 6738, R. L. 1910, is as follows:

"If there is no law to the contrary in the place where personal property is situated, it is deemed to follow the person of its owner, and is governed by the law of his domicile."

In Jellenik v. Huron Copper Mining Co., 177 U. S. 1, 20 Sup. Ct. 559, 44 L. Ed. 647, the court said:

"The certificates are only evidence of the ownership of the shares, and the interest represented by the shares is held by the company for the benefit of the true owner as the habitation or domicile of the company is and must be in the state that created it. The property represented by its certificates of stock may be deemed to be held by the company within the state whose creature it is, whenever it is sought by suit to determine who is its real owner."

[3] In passing upon the errors relied on, we are confronted with this proposition: If the affidavit for the warning order failed in any jurisdictional particular, was the court authorized in allowing the same to be amended? In the case of City National Bank v. Sparks, 50 Okl. 648, 151 Pac. 225, the court said:

"Where the jurisdictional facts necessary to warrant service by publication were in existence at the commencement of the action, and the affidavit for publication is defective only in that it states inferentially, or in any other way any matter required by statute to be alleged therein, it is amendable, even after judgment; but where there is a total want of averment in the affidavit of some material fact required by statute, * * * the service is void, and the defect cannot be cured by amendment."

The first special appearance of the defendant, seeking to have the service quashed, did not result in a general appearance. Before the defendant could be served by publication, it was necessary that the property to be affected be in the state; at least, it was neces-

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sary that the affidavit allege that fact either positively or inferentially. As we have seen, where there is a total want of averment in the affidavit of some material fact required by statute, the service is void, and the defect cannot be cured by amendment. Was there sufficient in the affidavit as originally filed to inform the nonresident defendant of the purport and scope of the judgment sought by the plaintiff? The affidavit and the warning order disclosed that the action had been brought in the district court of Blaine County, state of Oklahoma, gave the names of the plaintiff and defendants, and, further, that the judgment sought was to bar, divest, and exclude the defendant from any right, title, or interest in or lien upon 23⅓ shares of the capital stock of the said First Bank of Hitchcock issued to and owned by the defendant Frank Cronkhite, and, further, that the bank claimed a first lien on said shares of capital stock to secure the indebtedness of the defendant Frank Cronkhite to the said plaintiff. Any one seeing this affidavit and warning order would naturally infer that the plaintiff bank was located in Hitchcock, that Hitchcock was in Blaine county, and that Blaine county was in Oklahoma, and that the purpose of the action was to declare and foreclose a lien upon the 23⅓ shares of stock owned by the defendant Frank Cronkhite.

In the case of Osie Raymond v. Nix, Halsell & Co., 5 Okl. 656, 49 Pac. 1110, it was held that an affidavit for publication which stated defectively, but inferentially, the things required by the statute, was voidable, but not void, and the defects could be cured by amendment, and that, when the defendant enters a general appearance in the case without first attacking the service by publication on the ground of the defect in the affidavit for publication, he waives such defect. In the case at bar the amendment was made before the court passed upon the motion filed by the defendant. After allowing the amendment, the court overruled the motion to quash. The defendant then filed a second motion, appearing especially for that purpose and that alone, as stated in the motion, and objected to the jurisdiction of the court over his person for the reason that the action was not one in which service by publication could lawfully be had, and that, the original affidavit for service by publication being fatally defective and inefficient, the attempted amendment was and is null and void and conferred no jurisdiction over this defendant. The affidavit as amended fulfilled every requirement of the statute. It was thereafter made to appear that the bank was in Blaine county, that the shares of stock sought to be affected were in the state, and that the defendant Frank Cronkhite resided in the county. When the defendant filed his second motion to quash, he attacked the authority of the court to allow the amendment. Did he thereby enter a general appearance?

The case of Rogers v. McCord-Collins Merc. Co., 19 Okl. 115, 91 Pac. 864, was very much like the case at bar. There the defendant appeared especially and moved to quash and set aside the summons and the service thereof for the reason that the defendant was not at the time of service a resident of the county or territory. Evidence was introduced upon this motion and overruled by the court, and judgment was thereupon rendered as upon default. Thereafter the defendant filed a motion praying that the judgment rendered be set aside on the ground that the defendant was a nonresident when service was made and that the court had no jurisdiction of the person of the defendant. Evidence was introduced upon this motion, and heard by the court, and after consideration the court overruled the same. There the court held:

"This same question, having been presented to the court upon the motion to quash service, became res adjudicata, and the court would have been justified in overruling the motion upon that ground, if none other. An order overruling a motion to quash summons and service is as conclusive on appeal from a subsequent order involving the same question, and becomes res adjudicata to the same extent, as if the order had been made upon the final judgment. Generally, when an order is made denying a motion to quash service of summons, and a final judgment is rendered, an appeal will lie from such judgment, and the ruling arising upon the motion to quash service may be assigned as ground for reversal, and, if no appeal is taken, the matter arising on the motion to quash service becomes res adjudicata and a bar to the right of the defendant to raise the same question upon a subsequent motion involving the same subject-matter. While there are exceptions to the letter of this rule, yet, whenever the exceptions have been recognized, they have been based upon what seems necessary for the full protection of the rights of the parties. 'Orders made on motions affecting the substantial rights of parties from which an appeal lies, if the matter in question has been fully tried, are as conclusive upon the issue necessarily decided, as are final judgments.' Halverson v. Orinoco [89 Minn. 470] 95 N. W. 320."

In City National Bank v. Sparks, supra, the court said:

"Did the defendant, by a general appearance or otherwise, waive the defects in the service and submit himself to the jurisdiction of the court before or after judgment? Generally speaking, any plea or proceeding raising questions nonjurisdictional, and involving the merits, constitutes a general appearance, and waives all questions as to the regularity of the service, whether made before or after judgment. Any plea or proceeding which raises jurisdictional questions only is a special appearance, and the mere fact of filing the same does not give the court jurisdiction over the person of the defendant. Were this not true, the defendant's mouth would be forever closed to question the jurisdiction of the court over his person,

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but a party who denies the jurisdiction of the court over his person must first present that single question. He may not mingle with his plea other pleas which concede jurisdiction, and thereafter insist that there was error in overruling his plea to the jurisdiction. Where the pleader urges jurisdictional and nonjurisdictional grounds as a basis of relief, he enters a general appearance; and this is true when done at any stage of the proceedings."

In Ziska v. Avey et al., 36 Okl. 405, 122 Pac. 722, Sharp, C., in delivering the opinion of the court, said:

"We are aware that a number of courts of high respectability do not follow the rule laid down by this court and adopted and consistently followed by the Supreme Court of Kansas in the cases cited, and we believe that the rule should be confined rather than extended. However, the difficulty is one that may easily be avoided by the exercise of care in avoiding setting up other than jurisdictional grounds when relief is invoked. But what has plaintiff in error done in this case? Both in the first and second motions he attacks the sufficiency of the petition for various reasons. Under the authority cited, it will therefore be unnecessary for us to consider either the sufficiency of the affidavit for publication or the notice of publication, as the plaintiff in error by his motions to vacate entered a general appearance in said action, and thereby waived irregularities that may have prior thereto existed, even though such proceedings were up to the time of said entry or appearance void. In other words, by his motions plaintiff invoked nonjurisdictional as well as jurisdictional relief. Had the plaintiff in error confined himself alone to attacking the jurisdiction of the court by reason of the alleged void service of publication, then it would be necessary to consider and determine the sufficiency thereof, but, having invoked the jurisdiction of the court to pass upon and determine the sufficiency of the petition to state a cause of action, he will be considered to have waived any rights which he may otherwise have had by reason of the service by publication."

In the case of Barnett et al. v. Holyoke Mutual Fire Insurance Co., 78 Kan. 630, 97 Pac. 962, a motion was filed to vacate and set aside the judgment, for the following reasons:

First. Failure to serve summons on the defendants.

Second. That the court had no jurisdiction to render and enter judgment, because the plaintiff's petition failed to state a cause of action.

The motion was overruled and an appeal prosecuted. The court, in passing upon the question, said:

"In the view we have taken, however, the law insisted upon is unavailing in this case. Whatever rights the defendants may have had to vacate and set aside the judgment and decree under the first ground of the motion have been waived by the second ground thereof, as it amounts to no more than a general demurrer, which does not raise a jurisdictional question. It has long been held by this court that an attack upon a judgment by motion containing both jurisdictional and nonjurisdictional grounds constitutes a general appearance, the same as if an appearance had been made at the trial. * * * This rule of law may appear to be harsh in some instances, but in a case like this it seems to be both just and salutary."

In Thompson v. Pfeiffer, as Ex'r, etc., 66 Kan. 368, 71 Pac. 828, the defendant made what he called a special appearance and asked for a dismissal of the action for the following reasons:

First. Because the court had no jurisdiction to hear and determine the same.

Second. Because the same was an action in personam, being an action to enforce a stockholder's double liability, and the same could not be determined in an action in rem.

Third. Because the judgment on which said action was based had become dormant.

There the court held:

"The motion to dismiss, although designated as a special appearance, was, in fact, a challenge to the sufficiency of the averments of the petition. The first ground of the motion, it is true, was jurisdictional, but the second and third grounds invoked the judgment of the court on the merits of the cause of action set up by the plaintiff. Where a defendant, purporting to limit his appearance, actually invites an inquiry as to the sufficiency of a pleading, or upon a matter involving the merits of the controversy, he submits himself to the jurisdiction of the court and waives defects in the process or in the means of bringing him into court. The defendant's motion converted the so-called special appearance into a general one, and the court was therefore warranted in proceeding as though the original service had been complete and regular. Burdette v. Corgan, 26 Kan. 102; Life Ass'n v. Lemke, 40 Kan. 142, 19 Pac. 337; Frazier v. Douglass, 57 Kan. 809, 48 Pac. 36; Gorham v. Tanquerry, 58 Kan. 233, 48 Pac. 916. Later the plaintiff contested the sufficiency of the affidavit for attachment, and in that way raised a question which was not jurisdictional."

In Lausten v. Union National Bank of Bartlesville (Okl.) decided May 21, 1918, 173 Pac. 823, the court said:

"Where it is stated in an affidavit to obtain service by publication that a defendant is a nonresident of the state, and that the plaintiff cannot with due diligence make service upon him within the state, it is not void or voidable because it is not alleged in terms that the action is one of those enumerated in section 4722, Rev. Laws 1910, in which service by publication is authorized, provided the description of the cause of action in the affidavit is sufficient to show that it is a case where such service is authorized."

And further:

"A judgment regular upon its face rendered by default and upon publication service in an action where such service is authorized by statute after the adjournment of the term is not subject to attack by motion, supported by affi-

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davit, upon the ground of the falsity of the affidavit for publication."

It was further held that the question of whether the facts stated in the affidavit are true or not is immaterial until challenged in some recognized legal proceeding for the vacation of valid judgments.

It is insisted in the motion to set aside the judgment that the amendment to the affidavit in that the property was in Blaine county was not true, and the plaintiff by this motion is seeking to controvert this fact. As we have before stated, the judgment was regular upon its face. The court, before entering judgment, found that the defendant Frank Cronkhite had been duly and personally served with a summons in Blaine county, and, further, that summons had been duly served on the defendant M. S. Chaplin by publication; that publication thereof had been duly made in accordance with the requirements of law, and on a good and sufficient affidavit therefor, and proof of such publication of summons was duly made by affidavit and was duly approved by the court.

[4] Primarily the jurisdiction of the court did not depend upon the situs of the bank's certificates of stock, but upon the evidence thereof furnished by the affidavit, and as to whether the facts stated in the affidavit were true or not was immaterial until challenged in some recognized legal proceeding for the vacation of valid judgments. The affidavit, independent of the amendment, as we have seen, contained all the averments necessary to give the court jurisdiction. The judgment appears to be regular upon its face. if, as a matter of fact, the certificates of stock were not in the state, and the amendment to the affidavit to the effect that they were in the state was untrue, this did not appear upon the face of the affidavit, the warning order, or judgment, and could only be made to appear by extrinsic evidence. The judgment, being regular on its face, could not be attacked collaterally, but could only be set aside and vacated by the methods provided by law. Holding that the judgment was not void, but, at most, voidable, then in order to have the same vacated and set aside, it would be necessary to proceed under section 4728, R. L. 1910, which is as follows:

"A party against whom a judgment or order has been rendered, without other service than by publication in a newspaper, may, at any time within three years after the date of the judgment or order, have the same opened, and be let in to defend. Before the judgment or order shall be opened the applicant shall give notice to the adverse party of his intention to make such an application, and shall file a full answer to the petition, pay all costs, if the court require them to be paid, and make it appear to the satisfaction of the court, by affidavit or other evidence, that during the pendency of the action he had no actual notice thereof in time to appear in court and make his defense. * * *"

As a matter of fact, this affidavit could not be made in the instant case, for, when the defendant filed his second motion to quash, he invoked the jurisdiction of the court to pass upon the right to allow the amendment to the affidavit, and as this amendment could not be made unless it referred to facts in existence at the time of making the original affidavit, the court was necessarily called upon to pass upon that identical question, or at least, we are to presume, until the contrary is shown, that in allowing the amendment the court would not have permitted the same unless it had first ascertained that the facts alleged in the amendment were in existence at the time the affidavit was originally made.

We therefore conclude that the judgment of the lower court should be affirmed; and it is so ordered.

OWEN, C. J., and O'NEILL, SHARP, and HIGGINS, JJ., concur.

(72 Okl. 137)

TESCIER v. GOYER. (No. 8086.)

(Supreme Court of Oklahoma. March 11, 1919.)

(Syllabus by the Court.)

APPEAL AND ERROR ⟸1009(3)—JUDGMENT OF TRIAL COURT IN EQUITY ACTION—CONFLICTING EVIDENCE—AFFIRMANCE.

A judgment of the trial court in an equity action where the evidence is conflicting should be given weight, and, unless the court is satisfied that the conclusion reached by the trial court is wrong, should be affirmed.

Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

Suit by Rosalie Goyer against Anthony Tescier. Judgment for plaintiff, and defendant brings error. Affirmed.

Philip E. Winter, of Oklahoma City, for plaintiff in error.

W. P. Harper, of Oklahoma City, for defendant in error.

McNEILL, J. Rosalia Goyer brought this suit in the district court of Oklahoma county against the defendant, Anthony Tescier, for specific performance of a contract which had been fully executed on behalf of the plaintiff and to require the defendant to execute a deed to lots 2, 3, and 6 of section 7, township 12 north, range 1 east, I. M., in Oklahoma county, state of Oklahoma. The case was submitted to the court and the court found

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the issues in favor of the plaintiff and against the defendant, and ordered the defendant to execute a deed to the above-described property.

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From this judgment defendant appeals, and as error alleges that the judgment of the court below is not sufficiently supported by the evidence and is contrary to law.

The plaintiff below pleaded and introduced evidence to prove an oral contract and agreement whereby she agreed to procure for the defendant a deed to certain other lands, and to pay the defendant the sum of $140, and to deed to the defendant a certain portion of her land. She alleged she had complied with all her contract, had obtained the deed from the other parties to said defendant, had delivered a deed to her own land, and had tendered the sum of $140 to defendant, and also tendered the $140 into court for the use of defendant.

There were but three witnesses that testified as to this contract, plaintiff and her husband, upon the one side, and the defendant, upon the other side. The evidence was very conflicting as to the terms and conditions of the contract. The defendant claimed that the plaintiff was to pay the sum of $550, and the case was submitted upon that issue. There was some contention that the deed from plaintiff to defendant was to be approved by the Secretary of the Interior, but the evidence does not disclose that the Secretary of the Interior had refused to approve said deed, but the inference was that the defendant had failed to submit the same to the Department for approval. From the examination of the case it appears the only question is: Was the evidence sufficient to support the finding of the court? This court has laid down the following rule:

"While in cases of purely equitable cognizance the Supreme Court will review the evidence, the judgment of the trial court ought not ordinarily be set aside unless clearly wrong." Heckman v. McQueen, 57 Okl. 303, 157 Pac. 139.

This court again, in the case of Dandridge v. Dandridge, 158 Pac. 445, states as follows:

"The judgment of the trial court in an equitable action, where the evidence is conflicting should be given weight, and, unless the appellate court is satisfied that the conclusions reached by him are wrong, should be affirmed."

The evidence is conflicting as to one issue, and that is the amount the plaintiff was to pay. Two witnesses swear it was to be $140, and one swore it was to be $550. The trial judge heard the evidence, saw the witnesses on the stand, and was better able to judge the weight and credibility to be given their testimony than the appellate court, and, having found for the plaintiff, whose testimony was corroborated by her husband, we cannot say the judgment of the court is contrary to the weight of the evidence.

The judgment of the trial court is therefore affirmed.

All of the Justices concurring.

(75 Okl. 25)

DICKINSON v. PERRY. (No. 9118.)

(Supreme Court of Oklahoma. May 27, 1919.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⟸1004(3) — MASTER AND SERVANT ⟸33 — SERVICE LETTER — TRUTH—QUESTION FOR JURY — AFFIRMANCE OF VERDICT.

Where a railway company dismissed from its service an employé who had served the company for nine years in the capacity of switchman in its yards, and, while in the discharge of his duties, was thrown from a box car by reason of a defective brake, and received injuries for which the company voluntarily compensated him, and on being discharged from the hospital where he had been sent for treatment by the agents of the company, the physician in charge gave him a letter addressed to the yardmaster of the company where the employé had formerly worked for the company, which letter stated: "In the case of D. J. Perry injured at Shawnee, Oklahoma, on June 30, 1913, the injured party was able to resume work on the day of his return. He leaves Chicago Dec. 5, 1913"—and in a few days after his return he presented himself to such yardmaster and offered to resume his former duties and exhibited to him such letter, at the time the yardmaster saying, "Dan, you are out of service, you are ineligible, and you will have to see the superintendent," and that he thereafter saw the superintendent and asked for re-employment, and was by said superintendent informed that, according to the doctor's report, he could not do anything for him, and that thereafter he asked the superintendent for a service letter, who, in a few days thereafter, sent him a letter as follows: "That Daniel Jackson Perry has been employed on the Indian Territory Division of the Chicago, Rock Island & Pacific Railway Company as switchman from November 1, 1904, to July 1, 1913. Dismissed: Account responsibility in case of personal injury to himself June 30, 1913. Services otherwise satisfactory. H. F. Rettig, Supt."—and thereafter he again applied to the superintendent of said company for re-employment, and was again informed by the said superintendent that he was incapacitated according to the doctor's report; that he thereafter applied for work as switchman to the officers who were empowered to hire switchmen of four other railway companies, each time exhibiting his service letter, and each time failing to receive employment; and he thereafter filed suit against the receiver of such company so issuing said service letter for damages, making the same a part of his petition, and by proper averments charged that the language used in the said service letter stating why he was dismissed from the service

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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of the railway company was untrue, and that, as a result of the untruthfulness thereof, he had been blacklisted, and on account thereof refused employment by other railway companies, and that he could never secure employment from any railway company on account thereof, and as a direct and proximate result of said blacklisting he had been damaged in the sum of $20,000—*held*:

(a) That the truthfulness or untruthfulness of the statement contained in such service letter was an issue properly joined by the pleadings, and was a proper question for decision by the jury; and

(b) That, where special damages were alleged by the plaintiff and competent testimony offered in support thereof, the questions of the truthfulness or untruthfulness of the statement contained in the service letter as to why the plaintiff was dismissed from the service of the railway company and the measure of his damages were correctly submitted to the jury by the court, and the jury thereafter returned a verdict in favor of the plaintiff, and assessed his damage in the sum of $3,000, and the trial court approved the same, the judgment should be affirmed.

2. CONSTITUTIONAL LAW ⟸238(2), 275(2) — EMPLOYERS' SERVICE LETTERS—DUE PROCESS OF LAW — EQUAL PROTECTION OF THE LAWS.

Section 3769, Rev. Laws Okl. 1910, requiring that public service corporations give to employés discharged or leaving the service, a letter stating the nature of the service rendered and the cause for which the employé was discharged or quit the service does not deny to such public service corporations due process of law, and is not violative of section 7, art. 2, of the Constitution of Oklahoma, nor of the Constitution of the United States, or the Fourteenth Amendment.

3. MASTER AND SERVANT ⟸11—SERVICE LETTER—POLICE POWER.

Requiring public service corporations to give a letter as designated in the foregoing paragraph of the syllabus, commonly known as a "service letter," is a requirement which affects the public welfare, and is a valid exercise of the police power of the state.

4. CONSTITUTIONAL LAW ⟸90 — FREE SPEECH—EMPLOYERS' SERVICE LETTERS.

The requirement that a public service corporation shall give a service letter as described in the second paragraph of the syllabus herein is not a violation of section 22, art. 2, of the Constitution of Oklahoma, guaranteeing the right of free speech.

5. APPEAL AND ERROR ⟸1001(1)—VERDICT—REVIEW.

Where there is competent evidence reasonably tending to support the verdict of the jury and the instructions of the court to the jury fairly state the law arising upon the issue raised by the pleadings and the evidence, the judgment rendered upon the verdict will not be disturbed by the Supreme Court.

(Additional Syllabus by Editorial Staff.)

6. CONSTITUTIONAL LAW ⟸48 — CONSTITUTIONALITY OF STATUTE—PRESUMPTION.

The presumption is in favor of the constitutionality of statutes, and the Supreme Court, whenever possible to do so, will uphold the constitutionality of a legislative enactment.

7. CONSTITUTIONAL LAW ⟸70(3)—DUE PROCESS OF LAW — ARBITRARY OR UNREASONABLE LEGISLATION.

The Legislature is itself the judge of the conditions which warrant legislative enactments, and they are only to be set aside when they involve such palpable abuse of power and lack of reasonableness to accomplish a lawful end that they may be said to be merely arbitrary, capricious, and unreasonable, and hence irreconcilable with the conception of due process of law.

8. WORDS AND PHRASES—"CERTIFICATE."

A "certificate" is the usual and customary method to indicate that which has or has not been done.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Certificate.]

Error from District Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Action by Daniel J. Perry against J. M. Dickinson, receiver for the Chicago, Rock Island & Pacific Railway Company. Demurrer to plaintiff's evidence overruled, judgment for plaintiff, motion for new trial denied, and defendant brings error. Affirmed.

C. O. Blake, of El Reno, K. W. Shartel, of Oklahoma City, R. J. Roberts, of El Reno, and W. H. Moore, of McAlester, for plaintiff in error.

Vaught & Brewer, of Oklahoma City, for defendant in error.

JOHNSON, J. This is an appeal from the district court of Oklahoma county. Daniel J. Perry, defendant in error, plaintiff below, on the 11th day of March, 1916, commenced this action against J. M. Dickinson, receiver for the Chicago, Rock Island & Pacific Railway Company, a corporation, plaintiff in error, defendant below, by filing his petition, which was afterwards amended, to recover the sum of $20,000 damages. For convenience the parties will hereinafter be referred to as plaintiff and defendant, as they respectively appear in the court below.

The amended petition of the plaintiff is quite lengthy; therefore only the substance of the same will be stated.

He alleged that the defendant was receiver of the railway company named; that on the 30th day of June, 1913, the plaintiff was in the employ of said railway company in the city of Shawnee, Okl., as switchman; that on said date he was in discharge of his

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regular duties, and in setting the brake on a box car received injuries on account of a defect in the brake and its appliances, which defect was known to the agents and employés of the railway company, or could have been known with the exercise of proper diligence; that he was severely injured, describing his injuries, and that on account of same he was taken to the railway company's hospital in the city of Shawnee, where he was kept for two months, and for another month he spent his time at the hospital and at his home, going back and forth, and that thereafter he was advised by the physicians and representatives of the railway company that he would be ready for work within a very short time; that he entered into a settlement with the railway company for the damages he had sustained because of said injuries, and executed a release to the company for the same; that, after he had done so, he was taken worse, and said railway company, at its own expense, carried him to the hospital of said company, in the city of Chicago, where he was treated for approximately one month by a physician of said company; that thereafter he returned to Shawnee on or about the 17th day of December, 1913; that he was weak and run down, and remained at his home for approximately 60 days; that when he left the hospital in Chicago he was given a certificate directed to the general yardmaster of said railway company at Shawnee, Okl., advising said yardmaster that he was able to resume his work on his return to Shawnee, which certificate he attached to his amended petition, causing the same to be marked Exhibit A; that on his return to Shawnee he reported to the yardmaster of the company and was advised that he was out of service because he was ineligible for duty; that the report of the doctor showed he was incapacitated, and to see the superintendent; that he saw the superintendent, who informed him he was incapacitated according to the doctor's report, whereupon he exhibited the certificate marked Exhibit A, the superintendent remarking, "I have got nothing like that in my office."

Following this the plaintiff makes specific allegations in his amended petition which are as follows:

"Plaintiff alleges that said railway company refused to re-employ this plaintiff, although this plaintiff continued to apply for work from December, 1913, until August, 1915. On August 18, 1915, the said railway company, through its superintendent, H. F. Rettig, at Haleyville, Okl., issued to this plaintiff a service letter, a copy of which service letter is hereto attached marked Exhibit B and made a part of this petition; that after the issuance of said service letter, which service letter stated, after reciting the length of time which this plaintiff has been employed by said railway company: 'Dismissed: Account responsibility in case of personal injury to himself, June 30, 1913. Services otherwise satisfactory'—this plaintiff tried again to secure employment from said railway company, and he was advised by those having the authority to employ him and by various employés of said railway company that he could never secure employment from any railroad company under that service letter, as it meant that he was blacklisted, and meant also that he was personally responsible for his own accident, and that he could never secure employment from another railroad company."

That in the year 1915 he applied for employment at Ft. Worth, Tex., to the general yardmaster of the International & Great Northern Railway Company, and that he exhibited his service letter, marked Exhibit B, whereupon the yardmaster replied, "We can't use you on account of this letter." That thereafter he applied to the general yardmaster of the Texas & Pacific Railway Company at Ft. Worth, Tex., to whom he exhibited his service letter, whereupon the yardmaster replied, "Can't use you on that letter."

Plaintiff alleges that he was 51 years of age, and had been in the railroad business for more than 25 years; that he was in good health except for an occasional hurting in his back, but that he worked regularly at some kind of employment; that at the time of his injury he was receiving from the railway company $105.50 per month for 31 days; that he is now compelled to take such work as he can get at $1.50 per day or less; that he spent the best years of his life in preparing and equipping himself as a railroad man; that he is an experienced and trained brakeman and switchman, but, because of the issuance of said service letter by the railway company, cannot procure employment either from defendant company or from any other railroad company; that by said service letter he has been blacklisted and been denied employment by other railroad companies because of the wording of said letter; that by and under the American Mortality Table his expectancy is approximately 20 years, and that the compensation for switchmen or brakemen is not less than $100 per month; that said service letter did not truly state the facts or give the true reason for his discharge; that his failure to obtain employment from other railroad companies was due directly and proximately to the issuance and contents of said service letter; that said letter upon its face charged the plaintiff with being responsible directly for the injuries which he sustained on June 30, 1913, and that said statement is untrue, and was known to be untrue by the railway company; and that the railway company admitted its liability for said accident by making settlement with the plaintiff for such injuries by caring for him in its hospital both in Shawnee and Chicago, and rendering professional services free to him.

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The following is a true copy of Exhibits A and B with all indorsements thereon:

Exhibit A.

Rock Island Lines, Surgical Department.

Chicago, Ill., Dec. 5, 1913.

Mr. C. C. Rettig, Gen'l Yardmaster, Shawnee, Oklahoma—Dear Sir: In the case of D. J. Perry injured at Shawnee, Oklahoma, on June 30, 1913, the injured party was able to resume work on the day of his return. He leaves Chicago Dec. 5, 1913.

Yours truly,

Ferd. Engelbreetson, M. D.,
Local Surgeon, Chicago, Ill.

Exhibit B.

Haileyville, Okl., August 18, 1913.

This is to certify that Daniel Jackson Perry has been employed on the Indian Territory Division of the Chicago, Rock Island & Pacific Railway Company as switchman from November 1, 1904 until July 1, 1913.

Dismissed: Account responsibility in case of personal injury to himself June 30, 1913. Services otherwise satisfactory.

H. F. Rettig, Superintendent.

Rock Island Lines, Office of Superintendent. Haileyville, Oklahoma. Indian Territory Division. Aug. 19, 1915.

The defendant answered, admitting his receivership, then filed a general denial, then answered specifically as follows:

"This defendant avers that said statute of the state of Oklahoma upon which plaintiff bases his action and for which plaintiff seeks damages by reason of the breach of the same by this defendant was, at date of its passage and approval and at the date of the issuance of the service letter set out by the plaintiff therein as Exhibit E, unconstitutional and void, and deprived this defendant of due process of law and the equal protection of the law as guaranteed to him under the Fourteenth Amendment of the Constitution of the United States and section 7 of article 2 of the Constitution of the state of Oklahoma, in denying to this defendant freedom of speech and the press, including the right to remain silent."

The case was tried to a jury, who returned a verdict in favor of the plaintiff for $3,000, upon which verdict the court rendered judgment.

A timely motion for new trial was made by the defendant, which being overruled by the court, the defendant excepted, appealed to this court, and assigns error.

The plaintiff testified that he was 51 years old; resided in Shawnee, Okl.; his occupation was that of railroading and had been since 1889; that he had been in the employment of the Rock Island Railroad Company for 9 years; that previously he had worked for the Kansas City, Ft. Scott & Memphis, Illinois Central, and Mobile & Ohio Railroad Companies; that he began work for the Rock Island Railway Company in 1904 at Shawnee, Okl., and continued until 1913, in the capacity of switchman; that he never had suit against the company to recover for personal injuries; and that he was injured about June 30, 1913, while in the discharge of his duties as employé of the company in the Shawnee yards in substantially the following manner:

"We were switching up there by the house track and was kicking a car, the fireman and the man who was following the engine, kicking a car in, and, as I was working the field, it was my duty to catch this car. I got on this car and set the brakes, and when I had set the brake, I started to get off, and never took one of my hands off the brake wheel, and the dog slipped out of the ratchet and let the wheel reverse, and the way I was sitting I fell from there to the ground on the end of some ties."

It seems that there was a hole that had worn too much, and it gave the dog too much play; he never used that particular car before; that he fell off the car to the ground; that after the injury he went home and stayed there four days and nights, and then he was carried to the hospital in Shawnee by the railroad company's doctor. He stayed there and at home four or five months back and forth. He lived about a mile from the hospital, and the railway company would send him back and forth in a cab or hack; the orders being given by the company's physician, Dr. Blankendiffer.

The court sustained the motion by defendant's counsel to strike out the testimony as to the condition of the brake and instructed the jury to disregard it, to which plaintiff, through his counsel, excepted: That the company settled with him for his injuries through its claim agent, Mr. Charles Hardcastle, after he was released from the hospital in Shawnee; that he took a backset, and the company, through Mr. Hardcastle, gave him transporation to the hospital in Chicago, where he remained about a month, the company paying his expenses; he was not out a cent; that he left the Chicago hospital in December, at which time he was given by the surgeon in charge a paper which he identified as Plaintiff's Exhibit A, which was offered in evidence over the objection of the defendant; that he returned to Shawnee some time in September and showed Exhibit A to the defendant's yardmaster, Mr. Rettig; that Mr. Rettig handed it back to him, said he could not employ him because "I was incapacitated. I said, 'There is the report of the doctor that says I am able for duty, and this is the last doctor that had his hands on me;' that when I got back from Chicago, and as soon as I picked up a little and felt like I was strong enough, I went to the yardmaster and told him that I was ready for duty, and showed him that letter, and he said, 'Dan, you are out of service.' I said, 'What's the cause, Pete?' and he says, 'Ineligible; you will have to see the

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superintendent.'" He made application for employment, when he was informed by the yardmaster, "Pete," that he was out of service. "I says, 'What is the matter, Pete?' and he says, 'You are ineligible.' I says, 'What will we do about it?' and he said, 'You will have to see Mr. Rettig, the superintendent.'" That he saw Mr. Rettig, who said, "Dan, I have been busy to-day and I will see you the next time I come in." "When he came in again I saw him and talked a while, and he said, 'Dan, I can't do anything for you; the reason I put you off was to look up the doctor's reports, and according to the doctor's reports I can't do anything for you.' I then asked for a service letter two or three times, and he said he would give me one." He identified Exhibit B and said it was the letter given him; testified that he had known Mr. Rettig about 12 years, was acquainted with his signature that long, and had seen him write his name frequently, and that the service letter contained Mr. Rettig's signature. Exhibit B was then read to the jury without objection. He testified that he afterwards applied to the defendant company's yardmaster at Shawnee, a Mr. Ray, for employment, the man who employs switchmen. He applied for the position of switchman, and he was not employed. Mr. Ray refused to employ him. That he exhibited to him his service letter and was refused employment. That he made settlement for his injuries with Mr. Charles Hardcastle, claim agent for the defendant company, who told him that he had made investigation as to the condition of the brake on the car, and, as there was a deficiency in the brake, they were ready to settle for it. That he had been to doctors in Shawnee, Dr. Rowland, the trainmen's doctor, and Hughes and Herrington, the switchmen's doctor, and that Dr. Blankendiffer waited on him all the time. That Dr. Blankendiffer was the company's doctor, and that he told him that he would be able to go to work in a couple of months. "At the time I applied for work to the yardmaster at Shawnee, he said, 'The doctors have got you, Dan; we can do nothing for you'—this was before I got the service letter—and for me to see the superintendent."

The plaintiff testified that after he was refused employment by the Rock Island Railway Company he applied to a Mr. J. F. Ingram, yardmaster of the Texas & Pacific Railway Company at Ft. Worth, Tex., and gave him his service letter, Exhibit B, and that he failed to get employment, and also to the International & Great N. Railway Company at Ft. Worth, Tex., he showed his service letter and failed to get employment; also to the Ringling Road at Ardmore, Okl., and showed his service letter to the superintendent, who read it, and he failed to get employment; also to the Katy Railway Company at Oklahoma City, to Mr. Gardner, the trainmaster, and showed him the service letter; that he read it, and that he failed to get employment, and that during all this time he was able to do the class of work that he had done for the Rock Island Railway Company, and that he was familiar with the way that employés severed their connection with the railway companies and secured employment with them, and that when one left the railway company of his own volition and desired to secure employment from another railway company it was necessary to get a service letter showing the date he commenced and the date he quit, and that, when he secured employment with another company, it was necessary to show his service letter, and when he went to work for the Rock Island Company he had a service letter and showed it before he was employed. He also testified that in setting the brake upon the box car at the time he was injured he did it in the same way that he had always handled brakes on similar occasions.

It was admitted in the record that the American Mortality Table showed that the expectancy of a person 51 years of age is slightly in excess of 20 years.

That was, in substance, all the testimony of the plaintiff upon the trial, at the conclusion of which the defendant demurred to the evidence of the plaintiff, which was by the court overruled, and excepted to by the defendant; whereupon the defendant called as witnesses:

H. F. Rettig, who testified that he was the superintendent of the Rock Island Railway Company, had been in the railroad business 21 years, and superintendent of the Rock Island for 5 years, and that before he became superintendent for the Rock Island Company he was trainmaster for said company; that he was familiar with the plan of hiring employés for the Rock Island Company, and that he had never issued an order requiring service letters from the men who sought employment, and that it was not the policy of the Rock Island Company; that it was the policy of his company not to hire men for the first time to do switching and braking who were over the age of 45 years; that he did not dismiss men from their service who had attained the age of 45 years while employed.

Mr. C. B. Wildman, testified that he lived in Van Buren, Ark., and that he was working for the Iron Mountain Railway Company in the position of superintendent; that the company had a policy restricting the age at which switchmen would be employed for the first time, and that he did not employ men over the age of 45 years; that was the general policy of his road; and that he did not demand service letters of applicants for employment.

The next witness called by the defendant was J. M. Chandler, who testified that he lived at Springfield, Mo., and that he was inspector of transportation for the Frisco

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Railway Company, and that he had held the positions of trainmaster and superintendent and various other minor positions; been in the railroad business 19 years; that the Frisco had a policy with reference to the employment of switchmen and did not employ them for service beyond the age of 45 years; and that it did not require service letters of persons making application for employment.

Mr. G. S. Baxter was next called by the defendant, who testified that he lived at Shawnee, Okl., and that he was a physician and a graduate from the Memphis Hospital Medical College, and was acquainted with Dan Perry; had known him for six or seven years; that six or seven years ago he treated him for lobular pneumonia, and that he treated him from about August to September, 1913, and made an examination and found him suffering with the disease arterio sclerosis, which is a hardening of the blood vessels, and that a patient suffering from that disease grew progressively worse; that it was a disease of old men, but young men may have that condition; that he has not examined Mr. Perry since.

The defendant next called Dr. T. D. Rowland, whose testimony in substance was the same (he had known Mr. Perry probably 20 years), and Dr. E. E. Rice, who lived at Shawnee, whose testimony was in substance the same. The witness H. F. Rettig was not interrogated concerning the issuance of the purported service letter by him to the plaintiff.

The defendant in his petition in error makes the assignment:

"That the trial court erred in overruling the motion of said plaintiff in error for new trial."

[1] His first specification of error in the foregoing assignment is:

"That the court erred in failing to direct a verdict for the defendant as requested, because the proof failed to show that the service letter given the plaintiff did not truly state the cause of his discharge."

We hold that there is no merit in this contention, as we find that the testimony of the plaintiff tends strongly to show affirmatively that the service letter did not truly state the cause of the discharge, and the testimony offered by the defendant negatively tended to prove the same thing, in that it practically all tended to show that the real cause of the plaintiff's dismissal from the service of the railway company was because he was physically incapacitated for the duties of switchman, and that the trial court's refusal to give the peremptory instructions was not error. M., O. & G. Ry. Co. v. Davis, 54 Okl. 672, 154 Pac. 503; Menten v. Richards, 54 Okl. 418, 153 Pac. 1177; Mountcastle v. Miller, 166 Pac. 1057.

[2, 3, 6, 7] The defendant's second specification of error is:

"The court erred in failing to direct a verdict for the plaintiff as requested because the service letter statute in which recovery was sought violated the provisions of the Constitution of Oklahoma as set forth in sections 7 and 22, art. 2, because it denied to the defendant federal rights guaranteed under the Constitution of the United States and the Fourteenth Amendment thereof."

We are therefore called upon to determine the constitutionality of the Service Letter Law, to wit, section 3769, Rev. Laws 1910, which reads:

"Whenever any employé of any public service corporation, or of a contractor, who works for such corporation, doing business in this state, shall be discharged or voluntarily quits the service of such employer, it shall be the duty of the superintendent or manager, or contractor, upon the request of such employé, to issue to such employé a letter setting forth the nature of the service rendered by such employé to such corporation or contractor and the duration thereof, and truly stating the cause for which such employé was discharged from or quit such service; and if any such superintendent, manager or contractor shall fail or refuse to issue such letter to such employé, when so requested, or shall willfully or negligently refuse or fail to state the facts correctly, such superintendent, manager or contractor shall be deemed guilty of a misdemeanor and upon the conviction thereof shall be punished by a fine of not less than one hundred dollars and not more than five hundred dollars, and by imprisonment in the county jail for a period of not less than one month and not exceeding one year: Provided, that such letter shall be written, in its entirety, upon a plain sheet of white paper to be selected by such employé. No printed blank shall be used, and if such letter be written upon a typewriter, it shall be signed with pen and black ink and immediately beneath such signature shall be affixed the official stamp, or seal of said superintendent, manager or other officer of such corporation or contractor, in an upright position. There shall be no figures, words or letters used, upon such piece of paper, except as are plainly essential, either in the date line, address, the body of the letter or the signature and seal or stamp thereafter, and no such letter shall have any picture, imprint, character, design, device, impression or mark, either in the body thereof or upon the face or back thereof, and any person of whom such letter is required who fails to comply with the foregoing requirements shall be liable to the penalties above prescribed."

The presumption is in favor of the constitutionality of the statutes, and this court, wherever possible to do so, will uphold the constitutionality of an enactment of the Legislature. In M., K. & T. Ry. Co. v. Walker, County Treas., et al., 54 Okl. 359, 362, 154 Pac. 343, 344, it is said:

"The act being susceptible of a construction which will uphold it, the courts will so construe it. C., R. I. & P. Ry. Co. v. Beatty, 34 Okl. 321, 118 Pac. 367, 126 Pac. 736, 42 L. R. A.

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(N. S.) 984; St. L. & S. F. Ry. Co. v. Zalondek et al., 28 Okl. 746, 115 Pac. 867."

Lewis' Sutherland on Statutory Construction, § 82, states the rule followed by the courts in construing statutes as follows:

"Their presumption is in favor of the validity of the act of the Legislature, and all doubts are resolved in support of it. 'In determining the constitutionality of an act of the Legislature, courts always presume in the first place that the act is constitutional. They also presume that the Legislature acted with integrity and with an honest purpose to keep within the restrictions and limitations laid down by the Constitution. The Legislature is a co-ordinate department of the government, invested with high and responsible duties, and it must be presumed that it has considered and discussed the constitutionality of all measures passed by it.' The unconstitutionality must be clear or the act will be sustained."

It is not therefore necessary for this court to inquire into the necessity of the legislation or the motives which prompted the enactment of the law contested in this court. The Legislature is itself the judge of the conditions which warrant legislative enactments, and these laws are only to be set aside when they involve such palpable abuse of power and lack of reasonableness to accomplish a lawful end that they may be said to be merely arbitrary and capricious, and hence out of place in a government of laws, and not of men, and irreconcilable with the conception of due process of law. McGehee on Due Process of Law, p. 306. A legislative enactment will not be declared invalid by the courts unless such enactment is arbitrary and unreasonable.

Whether or not the custom still prevails, it appears that at one time it was the rule among railway companies and other corporations to keep a list of employés who were discharged or left the service and to furnish such list to other railway companies and employers. Any reason which might be agreed upon among employers was sufficient for "blacklisting" employés, thereby possibly preventing their again securing employment in their accustomed occupation or trade. It was this abuse, among other things, which caused the Legislatures of various states to enact laws declaring blacklisting unlawful, and requiring corporations to give a letter to employés discharged or leaving the service, setting forth the reasons for the discharge of the employé or of his leaving the service and the nature of the service rendered by the employé.

Labatt, in his work Master and Servant, vol. 5, § 2031, in discussing legislation of this character, says:

"It is apprehended that any harm which may result from a moderate limitation of the rights of employers in this respect will be slight in comparison with the evil consequences which are certain to follow if a practice so essentially repugnant to the free institutions of Anglo-Saxon civilization as that of systematic 'blacklisting' is allowed to remain unregulated. The inevitable effect of such a practice must be the subjection of a constantly increasing number of employés to disabilities and restrictions scarcely less oppressive than those to which servants were formerly subjected in England by statutory provisions long since obsolete."

As illustrative: "In 5 Eliz. c. 4, § 10, it was enacted that a servant in any of the various occupations specified should be liable to imprisonment if he departed from the city or parish in which he had been employed, without obtaining an official testimonial stating that he was licensed to depart from his master, and at liberty to serve elsewhere."

It is suggested by the author that:

"It is manifest that, if the practice of 'blacklisting' is left unchecked, the employers of our own times will be able, by private compacts, to place large bodies of employés in a position analogous to that which would result from the operation of such a statute."

The idea of requiring employers to give employés leaving their service a letter showing the character of work performed while in their service is not a new one. The common law recognized a moral obligation resting upon the employers to give a "character" to servants leaving the employment of their masters, but no legal obligation of this nature existed until laws touching these matters were enacted.

Labatt, in his Master and Servant, vol. 5, §§ 2013, 2014, says:

"The doctrine of the English and American courts is that a master is morally, but not legally, bound to give a character to the servant when he is discharged from or leaves the employment. * * * The extreme severity with which the rule may sometimes operate has recently been shown in a very striking manner by its application in that class of cases in which several employers in a certain line of business entered into a mutual agreement that no person who has previously been in the services of one of them shall be hired by any other, unless he can produce what is known as a 'character card' from his last employer. * * * In some jurisdictions the common-law rule has been modified by statutes applicable either to employers generally, or to employers of a particular class, and there seems to be good reason to anticipate that enactments of this type will be greatly multiplied in coming years. The desirability of thus supplying the deficiencies of the common law cannot be consistently disputed by any one who is of the opinion that it is proper to protect employés by legislation against 'blacklisting.' Manifestly the refusal to give a character may often be virtually the equivalent of 'blacklisting' so far as regards the injury inflicted on the servant."

The legislation is attacked herein upon the grounds that it is in violation of section 7 of article 2 of the Constitution of Oklahoma, which provides that no person shall be deprived of life, liberty, or property without

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due process of law, that it is in violation of section 22, art. 2, of the Constitution of Oklahoma, in that it denies the right of free speech, and that it is in violation of the Constitution of the United States and the Fourteenth Amendment thereof, in that it denies to the defendant due process of law and equal protection of the law.

The right of contract may not be arbitrarily interfered with and comes within the protection of the provisions of the Constitution of the state of Oklahoma and the United States protecting the life, liberty, and property of the citizens of the state. But the right of contract is not an absolute and unyielding right. It is subject to limitations in the interest of the public welfare. Thus legislation has been enacted to prevent the purchase or sale of lottery tickets. Minors are denied the right to make contracts except for the necessities of life. Corporations are denied the power to make contracts releasing themselves from negligence. The Constitution of the state prohibits the granting of perpetual or exclusive franchises within municipalities of the state. Section 5, art. 18, Constitution of the State of Oklahoma. Legislation has been enacted limiting the number of hours per day that corporations may contract with workers for employment. The list of laws which have been passed limiting the power of contract in the interest of public health, safety, and welfare might be continued, but it is not necessary to illustrate the point.

It is assumed by those who challenge the constitutionality of the law requiring employers to give service letters to their employés that the utmost freedom of contract now prevails, and that the employer deals with men who are at liberty to accept employment or not, as they like. During times of prosperity and when there is a scarcity of labor, this, in many instances, may be true, but ordinarily the individual employé is not on an equality with his employer so far as accepting or rejecting terms of employment is concerned. The average employé is a man of limited means, depending upon his day's wages for sustenance for himself and family. He is compelled to accept conditions as he finds them and to make such wage bargains as are offered him. It is only through the efforts of employés as organizations, through the policy of far-seeing employers, or through legislative enactments that a general amelioration of conditions is brought about. Employers and employés do not, therefore, deal on terms of absolute equality, and liberty of contract exists often only in theory. Hence reasonable limitations in the interests of public health, safety, and welfare may be thrown about the contracts which employers make with their employés.

There is nothing in the law contested which attempts to prevent a corporation from hiring whomsoever it pleases, or from discharging its employés when it sees fit. Neither is there anything in the law which requires a corporation to give a letter of recommendation to employés discharged or leaving its service. All that is required is a statement of the employer showing the character of services rendered by the employé and the reason for his leaving the service of his employer. It is a certificate which, when the facts are favorable to the employé, may assist him in securing other work along the line of his trade, and is a certificate to which he feels that in justice he is entitled.

[8] The custom of giving a certificate is so general that in our opinion objection would not be raised by railway companies to giving employés a certificate of this character were it not for the misconception which existed in the earlier days of the common law in reference to the treatment of servants by masters, and the earlier decisions of the courts based on the laws which reflected conditions then, but which no longer exist. There is nothing unusual or revolutionary in requiring the employer to give a certificate to the employé leaving his service showing the time he has been employed and the character of service rendered. A certificate is the usual and customary method to indicate what has or has not been done. 11 C. J. 76. Thus we have certificates of courts, public officials, and persons transacting business. Schools and colleges give a certificate or a diploma to those who have completed a required course of study. Persons who have passed examinations are entitled to a certificate showing their competency to enter a profession. Even those who fail in examinations are furnished with a statement of grades made. Soldiers leaving the army, after completing the period of their enlistment, are given a certificate of discharge. The employé who perhaps has devoted years of his life to a particular trade, when relinquishing employment, is without evidence to present in another locality or to another employer unless he has some certificate showing the term and character of his previous employment.

It has been said that, if a service letter speaks the truth, employers will be subject to libel and damage suits, but this assumes that justice cannot be secured in the courts, a presumption in which we cannot indulge, and one which is an unwarranted reflection upon our judicial system.

This legislation, we think, is a warranted and lawful exercise of the police power of the state. The police power of the state was not surrendered with the adoption of the federal Constitution nor taken from the states by the ratification of the Fourteenth Amendment. This power, though not precisely defined, includes the right to legislate on any matters pertaining to the health, safety, and welfare of the public.

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It is argued that the law in question involves a private, and not a public, matter, in that only the individual employé and the individual employer are concerned. This is pure assumption and fails to recognize conditions as they exist. The welfare of society very largely depends upon the condition of employés and the relationship of labor and capital, and any lack of morale of employés is quickly reflected in the industrial world. The welfare of employés affects the welfare of entire communities and of the whole public. Failure of employés to work on account of strikes and other causes may paralyze the commerce of the entire country. Legislation has been enacted to shorten the hours of labor and to provide time for recreation and to require the protection of the health and safety of employés. Such legislation, while affecting one particular class, indirectly affects the welfare of the entire public. Employés of railway companies are engaged in handling the commodities of the whole country, and any legislation which has to do with their protection, their comfort, and their welfare is legislation which may be said to be enacted under the broad powers giving the right to legislate in the interests of public welfare, and such legislation may therefore be said to be legislation within the police power of the state.

The Service Letter Law is in line with the spirit of a progressive age. It aims to protect the wage-earner in his right to work and labor for himself and for those who are dependent upon him. It aims to protect him from a condition that might pauperize him and his family and indirectly reflect itself in the conditions of society. Cheek v. Prudential Insurance Co. of America (Mo.) 192 S. W. 387, at page 392 (L. R. A. 1918A, 166). In this case the Supreme Court of Missouri, in construing a statute similar to the statute of Oklahoma, said:

"The statute in question is a wise exercise of the police power of the state; it affects a class composed of many thousands of people as to whom, if not protected from the evil mentioned, great hardships, injustice, and oppression could be perpetrated upon them. The same principle of police regulation lies at the base of this class of contracts that underlies the regulation of almost every other species of contracts negotiated in this state, the validity of which is no longer challenged."

We think that the legislation attacked does not deny to the defendant due process of law, that it does not constitute an illegal infringment upon the right to contract, and that it is within the police power of the state.

[4] It is argued that this legislation is a denial and abridgment of the right of free speech. Labatt, Master and Servant, vol. 8, § 2867, suggests:

"The theory that a constitutional provision which merely purports to secure freedom of speech includes by implication a guaranty of the 'liberty of silence' seems to involve some very questionable logic."

With this statement we fully agree.

The right of free speech is not an absolute one; neither is the right to remain silent. One does not have the absolute right to speak that which may injure the public or an individual, or to remain silent when silence would work a similar result. In Schenck v. United States, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. ——, it is said:

"The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. Gompers v. Buck's Stove & Range Co., 221 U. S. 418, 439, 55 L. Ed. 797, 805, 34 L. R. A. (N. S.) 874, 31 Sup. Ct. 492. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

Numerous instances may be cited wherein persons are not privileged to remain silent without suffering the penalty therefor. Refusal of a witness to testify may constitute contempt of court (13 C. J. p. 25, § 36, and cases cited, including Ex parte Gudenoge, 2 Okl. Cr. 110, 100 Pac. 39), and the same may be indictable (29 Cyc. 333). Failure of one accused of crime to speak may be relevant as tending to show guilt (21 Cyc. 421); and an unanswered relevant statement, taken in connection with a failure to reply, may be admissible evidence tending to show a concession of the truth of the facts stated (16 Cyc. 956). Silence may work an estoppel. 16 Cyc. 681, 759. Failure to disaffirm a contract made by an infant, after reaching his majority, constitutes ratification of same. 22 Cyc. 607. In contracts acceptance of an offer may be inferred from silence (9 Cyc. 258), and failure to repudiate acts of agents may bind the principal (31 Cyc. 1275). Corporations doing business within the state are required by law to file reports showing lists of officers, directors, stockholders, etc. Transportation and transmission companies doing business in this state are required, when directed to do so by the Corporation Commission, to make special reports and statements under oath concerning their business. Other similar state and federal laws requiring the giving of information which more seriously affects the corporation than would the giving of service letters to employés might be cited; and the validity of these laws has been upheld by the courts. A., T. & S. F. Ry. Co. v. State (No. 8162) 180 Pac. 849, not yet officially reported; I. C. C. v. Goodrich Transit Co., 224 U. S. 194, 56 L. Ed. 729, 32 Sup. Ct. 436.

We are unable to agree with the Supreme Court of Georgia in the case of Wallace v.

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Ga., C. & N. Ry. Co., 94 Ga. 732, 22 S. E. 579, the Supreme Court of Kansas in the Case of A., T. & S. F. Ry. Co. v. Brown, 80 Kan. 312, 102 Pac. 459, 23 L. R. A. (N. S.) 247, 133 Am. St. Rep. 213, 18 Ann. Cas. 346, and the Supreme Court of Texas in the case of St. L. S. W. Ry. Co. v. Griffin, 106 Tex. 477, 171 S. W. 703, 705, L. R. A. 1917B, 1108.

The right of free speech guaranteed by the Constitution of the United States and the Constitutions of the various states does not include the absolute right to remain silent under all conditions and when doing so may injure the rights of others or the public. A corporation exists and does business within the state under and by virtue of the laws of the state. It is subject to such reasonable restrictions as the state may see fit to impose, and these restrictions may include the requirement to give information necessary to the public welfare. We hold that the giving of a service letter to employés discharged or leaving the service is the giving of information which concerns and affects the public welfare, and is a reasonable requirement which may be imposed by statute, as was done by the Legislature of Oklahoma.

We have not heretofore been called upon to construe the Service Letter Law, but in two instances we expressed our belief in its constitutionality. C., R. I. & P. Ry. Co. v. Hall, 159 Pac. 851, 853; St. L. & S. F. Ry. Co. et al. v. Fitzmartin, 39 Okl. 654, 666, 136 Pac. 764. We believe that the better reasoning favors the sustaining of this and similar legislation. We agree with the Supreme Court of Missouri in the case of Cheek v. Prudential Ins. Co., supra, and we feel that the conclusion we have reached is in line with the decisions recognizing the necessity for the protection of the laborers. Holden v. Hardy, 169 U. S. 366, 391, 18 Sup. Ct. 383, 42 L. Ed. 780, 790; C., B. & Q. R. Co. v. McGuire, 219 U. S. 549, 566, 31 Sup. Ct. 259, 55 L. Ed. 328, 338; Erie R. Co. v. Williams, 233 U. S. 685, 34 Sup. Ct. 761, 58 L. Ed. 1155, 51 L. R. A. (N. S.) 1097.

The defendant's third specification of error is:

"The court erred in admitting incompetent, irrelevant, and immaterial testimony over the objections and exceptions of the defendant, and in excluding competent, relevant, and material testimony over the objections and exceptions of the defendant, although properly offered."

And his fourth specification of error is:

"The court erred in instructing the jury upon the question of damages, and was guilty of an abuse of discretion in overruling defendant's motion for new trial and sustaining the judgment for the amount of the verdict in favor of the plaintiff and against the defendant."

We will consider the third and fourth specifications of error together, and in doing so desire first to look to the issues joined in the pleadings and to the theory upon which the case was tried in the court below, and as to the character and nature of the testimony offered by the plaintiff and defendant upon the trial of the cause, and as to the instructions given to the jury by the court and those that were refused.

[5] The plaintiff alleged in his petition by proper averment the fact of his employment by the railroad company and the duration of the period that he served the company in the capacity of switchman, the fact of his injury while in such employment and the circumstances surrounding it, as well as to the nature of his injury, the settlement had with the company and what he was compensated for the same by the company, and that, when he had sufficiently recovered from the effects of the injury, he reported to the company for duty, as well as the fact of his dismissal from the service of the company, that he was refused re-employment, and that such re-employment was denied him, and that he asked for and obtained the service letter complained of, then charged the untruthfulness of the service letter, and that by reason of such untruthfulness of it he was blacklisted, and had never since been able to secure employment from any other railroad company in the capacity for which his experience had fitted him, and on account of same would be forever precluded from obtaining employment for which he was fitted with any railroad company, and that at that time he had a life expectancy of slightly in excess of 20 years—all of which were, at least in some degree, supported by the testimony by the plaintiff, which, if believed by the jury, would entitle him to a verdict at the hands of the jury.

The testimony offered by the defendant upon the trial only contradicted the testimony of the defendant in part. The testimony of the defendant did not contradict the testimony of the plaintiff as to the fact of the employment of the plaintiff by the defendant. the fact of the duration and character of his services, nor the fact of the injury of the defendant or the circumstances surrounding such injury, nor that the railroad company compensated the plaintiff for such injuries, and the issuance and delivery to the defendant of the service letter, and that the statement contained in the service letter as to why the defendant was dismissed from the service of the railroad company was untrue, and, further, that the testimony offered by the defendant as to the grounds upon which the dismissal of the plaintiff from the service of the railroad company and its refusal to again employ him in the capacity shown all tended strongly in a negative way to establish the untruthfulness of the statement contained in the service letter as to why the plaintiff was dismissed from the service of the company, in that such testimony tended strongly to show that such dismissal from the service of the company and its refusal

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to again employ him were on account of his age and other physical conditions that rendered him inefficient, and that this was by competent testimony, and, in viewing the entire record, we are not prepared to say that the trial court did not err in receiving or rejecting testimony upon the trial of the case; yet such error was not, in our opinion, sufficiently grievous as to authorize a reversal of the case upon that ground.

We will next notice the specifications of error as to the instructions of the court upon the question of damages. The court's instructions were as follows:

(3) "You are instructed, gentlemen of the jury, that even though you should find from the evidence that the service letter does not state the true cause for the discharge of the plaintiff from the service of the Chicago, Rock Island & Pacific Railway Company, nevertheless your verdict shall be for the defendant, unless you further find that the plaintiff has suffered damage by reason of his failure to obtain employment as a switchman on account of the statements in the service letter."

(4) "You are instructed that, before you can award any damages to the plaintiff, if any, the proof must show by a preponderance of the evidence: (1) That the contents of the said service letter was false; (2) that he was at the time he alleges he sustained the said damage a man of ordinary physicial ability, able to perform the work of an average man in the line in which he was making application; and (3) that he was prevented from obtaining said employment for which he at that time was making application by reason of the statements contained in the alleged false service letter, which has been set out and introduced in evidence before you, and if you find and believe from the evidence that the contents of the said service letter were true, or that he was not a man of ordinary physical ability, able to perform the work of an ordinary individual in the line of employment in which he was making application for work or that he was not prevented from obtaining from the parties to whom said application was made by reason of the statements contained in the said service letter herein set out, you are instructed that the plaintiff has failed to prove his cause of action as alleged, and your verdict should be for the defendant."

(5) "You are instructed that, if the plaintiff was issued a service letter as alleged in the petition, and that said letter contained a statement relative to the reason for the plaintiff's dismissal, and said statement was untrue, and that because of the issuance of said letter containing said untrue statement said plaintiff has been denied employment by other railroad companies, then your verdict should be for the plaintiff in such sum as you find from the evidence he has been damaged as the direct and proximate result thereof."

Paragraphs 3 and 4 of the court's instructions were the defendant's requested instructions 5 and 7, and certainly the defendant is not in position to complain of the actions of the trial court in giving the same, and while we think they perhaps stated the law correctly, yet we think they were less favorable to the plaintiff than they were to the defendant; further, that instruction 5 was called for upon the sole issue of fact made by the pleadings and the evidence of both the plaintiff and defendant, and is a correct statement of the law upon such issue made; that there was competent evidence tending to support the verdict of the jury, and that there was no prejudicial error against the defendant committed by the court in admitting and rejecting testimony, and in giving and rejecting instructions to the jury, and that the defendant was not deprived of any constitutional or statutory right, and the court has repeatedly held that under such circumstances the verdict and judgment in the trial court will not be disturbed on appeal. Talla v. Anderson, 53 Okl. 418, 156 Pac. 670; Bartlesville Zinc Co. v. James, 166 Pac. 1054; Oklahoma City Land & Dev. Co. v. Adams Engineering Co., 51 Okl. 763, 155 Pac. 496; Parker v. Hamilton, 49 Okl. 693, 154 Pac. 65; Cox v. Kirkwood, 158 Pac. 930.

The judgment is affirmed.

(16 Okl. Cr. 166)

JANUARY v. STATE. (No. A-2838.)

(Criminal Court of Appeals of Oklahoma. June 17, 1919.)

(Syllabus by the Court.)

1. HOMICIDE ⟸127—MURDER—INFORMATION.

The information in this case *held* to sufficiently charge the crime of murder.

2. JURY ⟸58, 116—DRAWING AND SELECTING JURORS—QUASHING OF VENIRE.

The law governing the selection of jurors and in drawing juries is directory, and a substantial compliance therewith is sufficient. To authorize the quashing of a venire, the defendant must show irregularities in connection therewith which are reasonably calculated to deprive him of a substantial right.

3. HOMICIDE ⟸228(1)—CORPUS DELICTI—PROOF.

Where expert evidence is not introduced to show the cause of death, and the undisputed evidence shows that the defendant shot the deceased three times in his body while the deceased was sitting in a buggy, from which he immediately jumped, took a step or two, fell upon the ground, and expired, it is sufficient to establish the corpus delicti as charged in the information.

4. CRIMINAL LAW ⟸822(1)—INSTRUCTIONS—SUFFICIENCY.

Instructions must be considered as a whole and when so considered, if they correctly charge the law, they are sufficient.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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5. CRIMINAL LAW ⟸722(2), 1037(2)—TRIAL—COMMENT ON DEFENDANT'S PERSONAL APPEARANCE—OBJECTION.

It is improper for a prosecuting attorney, when the defendant is not a witness in the case, to adversely comment upon the personal appearance of such defendant, but in order to have such comments reviewed on appeal they must be timely objected to and the court requested to direct the jury not to consider them.

6. HOMICIDE ⟸122 — DEFENSES — "UNWRITTEN LAW."

The so-called unwritten law, "the right to avenge wrongs done a female member of a defendant's family by killing the wrongdoer," does not exist in this state.

[Ed. Note.—For other definitions, see Words and Phrases, Unwritten Law.]

7. CRIMINAL LAW ⟸1114(1), 1182—PARDON ⟸4—APPEAL—MITIGATING CIRCUMSTANCES—EXECUTIVE CLEMENCY.

This court is governed entirely by the law as applied to the record, and where the record discloses the fact that a conviction resulted in a trial which was conducted in the lower court free from error, and there is ample proof to support the verdict of the jury and judgment of the court which imposed the minimum punishment provided by law, mitigating circumstances, if any, entitling the wrongdoer to relief from the results of his crime, must be sought through executive clemency.

(Additional Syllabus by Editorial Staff.)

8. CRIMINAL LAW ⟸1159(5) — PLEA OF INSANITY—APPEAL.

A plea of insanity by defendant charged with murder presented an issue of fact entirely for the determination of the jury, and where there was evidence of defendant's sanity at the time of the shooting, the Criminal Court of Appeals is powerless to set aside the jury's finding, as a verdict of conviction necessarily includes a finding that defendant was sane at time of the killing.

9. CRIMINAL LAW ⟸404(4) — EVIDENCE — CLOTHING.

The clothing worn by deceased when he was shot by defendant was properly admitted in evidence.

Appeal from District Court, Cleveland County; F. B. Swank, Judge.

W. D. January was convicted of murder, his motion for new trial was overruled, and he appeals. Affirmed.

B. F. Williams and J. E. Luttrell, both of Norman, and James A. Cowan, of Moore, for plaintiff in error.

S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

ARMSTRONG, J. The plaintiff in error, W. D. January, hereinafter called defendant, was informed against for the murder of Milton Keck, convicted, and sentenced to imprisonment in the penitentiary at hard labor for the term of his natural life. To reverse the judgment rendered he prosecutes this appeal.

The charging part of the information is as follows:

"That on the 14th day of January, 1916, in Cleveland county, state of Oklahoma, W. D. January, late of said county and within the jurisdiction of this court, did unlawfully, willfully and intentionally, maliciously and feloniously, and without authority of law, and with a premeditated design to effect the death of one Milton Keck, in and upon the body of said Milton Keck make a violent assault and battery, and with a certain and deadly weapon, to wit, a pistol, then and there had and held in the hands of him, the said W. D. January, shoot him, the said Milton Keck, and thereby inflicted three mortal wounds upon the body of him, the said Milton Keck, by him, the said W. D. January, as aforesaid. He, the said Milton Keck, did then and there immediately die, as was intended by him, the said W. D. January, he should, contrary to the statute in such cases made and provided, and against the peace and dignity of the state of Oklahoma."

The defendant demurred to the information upon the ground "that said information does not state facts sufficient to constitute a public offense against the laws of the state of Oklahoma."

The court overruled the demurrer to the information, and the defendant excepted. Thereupon the defendant filed a motion to quash the jury panel and introduced a volume of evidence, which we deem unnecessary to recite, in support of such motion. The court overruled said motion, and the defendant excepted.

The material evidence, which is not disputed, shows that the deceased, Milton Keck, was about 19 years of age, a man in size and weighing about 150 pounds; that for some time he had kept company with a daughter of the defendant, became engaged to marry her, and under promise of marriage seduced her and she became pregnant, and upon being notified by Keck that he would not marry her, on December 17, 1915, attempted suicide by taking carbolic acid; her life was saved, and on the 22d day of December, 1915, she miscarried; all of which said facts were well known to her father, the defendant, prior to the time Keck was shot; that the 14th day of January, 1916, was a very cold day, the ground being covered with ice, and that on the morning of said day the defendant walked to Moore, a town in the vicinity of the defendant's home, and there met Hetzel Drake; that Drake accompanied the defendant home, and that while so walking, and prior to reaching the defendant's home, the defendant and Drake met the deceased travel-

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ing in a single buggy; that he had gloves on and had a lap robe wrapped about his legs; that the buggy stopped and the defendant asked the deceased if he was Milton Keck, and Keck answered that he was; that the defendant approached to within about six feet from the deceased and shot him three times with a pistol; that the deceased jumped out of the buggy carrying the lap robe with him; that just after the first shot was fired Keck said "Oh, God damn you," and just after that the defendant said, "You have ruined my family;" that when Keck jumped out of the buggy he took one or two steps and fell on his left side on the frozen ground and died; that no shot was fired after Keck was out of the buggy; that Keck was driving very slow with his hands under the lap robe; that after the shooting was over the defendant went over and looked at Keck and said, "I believe he is dead," and that the defendant and Drake then walked on to Mr. Emory's; that nothing was seen in the buggy except a milk can; that no weapon was seen except the pistol that the defendant used; that on arrival at Mr. Emory's the defendant called him out and told him there was a dead man in the road up there and that he wanted him (Emory) to notify the authorities; that the defendant and Drake then walked on to the defendant's home, ate dinner, and the defendant had a team hitched up and he and Drake came on to Norman and he had a conversation with a deputy sheriff and surrendered.

The clothing worn by the deceased at the time of his death was, against the objection and exception of the defendant, admitted in evidence.

The defendant pleaded not guilty by reason of self-defense and insanity, and extensive testimony of experts and others was offered in support of and against the plea of insanity.

The defendant excepted to the giving of the fourth and twelfth paragraphs of instructions given, which said instructions are as follows:

"(4) You are further instructed that the presumption of innocence remains with the defendant and is thrown around him for his protection up to the moment when the killing is proved or admitted. When the killing is proved or admitted it then devolves upon the defendant to show any circumstances of mitigation to excuse or justify it by some proof strong enough to create in the minds of the jury a reasonable doubt of the defendant's guilt of the offense charged, unless the proof upon the part of the state shows the defendant was justifiable or excusable."

Excepted to by the defendant and exception allowed.

"(12) The law gives to every person the right to fight in his self-defense to protect himself from the unlawful attacks of his adversary, and if necessary to save his life or to prevent great bodily injury he may take the life of his assailant, and is not required to desist or cease from the use of force until his adversary has entirely abandoned the conflict or has been disabled to such an extent that further force is unnecessary on the part of the person inflicting the injury.

"The law of self-defense is given a person for his protection, and it cannot be pleaded as a defense by one who himself is the aggressor, or who enters voluntarily into a difficulty armed with a deadly weapon, no matter in how much danger he may be placed in the course of the difficulty, nor how imminent it may become.

"In this connection you are further instructed that if the defendant, W. D. January, armed himself with a deadly weapon for the purpose of having a difficulty with the said Milton Keck, and having reason to believe that it would or might result in death or serious bodily harm to defendant or said Milton Keck, or if said defendant sought to take the law into his own hands and kill said Milton Keck, then the defendant cannot plead self-defense in this case."

Excepted to by defendant and exception allowed.

The defendant also excepted to parts of paragraphs 6, 14, 15, and 16 of instructions given, which said parts complained of are as follows:

No. 6: "You are instructed that a design to effect death is inferred from the killing," etc.

No. 14: "If from all the evidence in the case there is a reasonable doubt in your minds as to the sanity of the defendant when he killed Milton Keck," etc.

No. 15: "If there is a reasonable doubt in your minds that the brain of the defendant, W. D. January, at the time he killed said Milton Keck," etc.

No. 16. "At the time he killed said Milton Keck," etc.

There were several requested instructions which were refused and their refusal excepted to, which we do not think essential to set out. The defendant moved for a new trial, which was overruled, and exceptions saved.

[1] The defendant insists that the court committed prejudicial error in overruling the demurrer to the indictment. With this contention we cannot agree. The information contains every averment essential to charge the crime of murder in plain, concise, and intelligent language, and informed the defendant precisely what he must be prepared to meet, was sufficient, and the court did not err in overruling the demurrer thereto. Teague v. State, 13 Okl. Cr. 270, 163 Pac. 954.

"An indictment is sufficient if the offense charged therein is clearly set forth in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended thereby." Starr v. State, 9 Okl. Cr. 210, 131 Pac. 542.

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In Deen v. State, 7 Okl. Cr. 150, 122 Pac. 341, Judge Doyle, speaking for the court, says:

"An information is sufficient which states the facts clearly and distinctly, in ordinary and concise language and without repetition, and which, construed under the ordinary rules of construction of the English language, would enable a person of common understanding to know what was meant, and apprise the defendant of the exact nature of the offense with which he was charged, although the same does not contain all the phraseology and technical language ordinarily used in criminal pleading."

A most careful reading and consideration of the evidence fails to convince us that the contention of the defendant "that legal evidence was excluded or that illegal evidence was admitted" to the prejudice of the defendant, is well founded.

[2] We do not think that the extraordinary probing by the defendant as to appointment of and action of the jury commissioners in drawing the panel against which the motion to quash was directed disclosed any irregularity which resulted in depriving the defendant of any substantial right, or was reasonably calculated to do so. The appointment of the jury commissioners and their action is merely directory, and a substantial compliance with the statute is sufficient. Section 3701, Revised Laws; Wadsworth v. State, 9 Okl. Cr. 84, 130 Pac. 808. The court did not err in overruling the motion to quash the jury panel.

[3] It is insisted that the corpus delicti was not proven beyond a reasonable doubt. With this insistence we cannot agree.

That the defendant shot the deceased as alleged in the information is not only conclusively shown by the evidence, but it is also shown that the defendant admitted the shooting, and that the deceased, after the last three shots were fired, jumped out of the buggy in which he was seated, took one or two steps, fell on the frozen ground, and expired almost immediately. The location of the bullets which entered the body of the deceased was shown, and were of the character to produce death. Certainly, notwithstanding that no expert testimony was introduced as to the cause of death, there was sufficient evidence to show beyond a reasonable doubt that the deceased came to his death at the hands of the defendant by shooting, and we think that the suggestion that the deceased may have come to his death by falling from the buggy upon the frozen ground is utterly untenable.

[8] The defendant complains that the evidence fully sustains the plea of insanity, and that the defendant should have been found not guilty on that ground. The plea of insanity presented an issue of fact entirely for the consideration and determination of the jury, and there being evidence of the sanity of the defendant at the time of the shooting, we are powerless to set aside the finding of the jury; there being necessarily included in their finding of guilty that the defendant was sane at the time of the killing.

[9] The clothing worn by the deceased at the time he was shot was properly admitted in evidence. Morris v. State, 6 Okl. Cr. 29, 115 Pac. 1030; Saunders v. State, 4 Okl. Cr. 264, 111 Pac. 965, Ann. Cas. 1912B, 766.

[4] Instructions must be considered as a whole, and certainly parts of paragraphs of instructions cannot be intelligently considered, and when this is done we are unable to see that the paragraphs 4 and 12 of the instructions are not fair statements of the law, or that paragraphs 6, 14, 15, and 16 of the instructions complained of invade the province of the jury. The cause of death not being an issue of fact in the case, the question was, Did the defendant act in self-defense or was he insane at the time of the killing? and the court might have properly so instructed the jury. Again, the cause of the death of the deceased is conceded by the defendant. Hence it cannot be said that the paragraphs and parts of paragraphs of the instructions complained of constituted fundamental error.

We have carefully considered the requested instructions refused, and are of the opinion that the court did not err in refusing to give either one of the requested instructions.

Under the holding of this court in Corliss v. State, 12 Okl. Cr. 526, 159 Pac. 1015, cited by the defendant, a technical error was probably committed in the admission of the rebuttal testimony complained of. If error was thereby committed, it was not such error as to prejudice any material right of the defendant, and therefore would not entitle him to a reversal of the judgment.

[5] It is finally complained that the county attorney was guilty of misconduct prejudicial to the defendant in his argument to the jury by adversely commenting upon the personal appearance of the defendant; he not being a witness in the case. We do not think that the remarks complained of were within the realm of legitimate argument, but the record does not disclose that the remarks were excepted to nor that the court was requested to instruct the jury to disregard them. Hence the question is not properly here for review.

[6] The unpardonable wrong done the defendant's daughter by the deceased does not constitute a defense to the crime for which the defendant was convicted. The so-called unwritten law referred to in the brief of counsel for the defendant, that is, "the right to avenge a wrong done a female member of one's family by killing the wrongdoer," does not exist in this jurisdiction.

[7] Neither do the courts of this state

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possess the pardoning power. If the due execution of the law has worked a result entitling the defendant to relief on account of the palliating circumstances in this case, such relief can only be had by way of executive clemency.

A reversal of a judgment of conviction in this class of cases can only be based upon legal grounds. There being no such error disclosed by the record in this case, the judgment of the trial court is affirmed.

DOYLE, P. J., and MATSON, J., concur.

(16 Okl. Cr. 164)

HOLLY v. STATE. (No. A-3192.)

(Criminal Court of Appeals of Oklahoma. June 17, 1919.)

(Syllabus by the Court.)

CRIMINAL LAW ⊂⊃1069(1) — EXTENSION OF TIME FOR FILING APPEAL—STATUTE.

An order made by a trial court extending the time within which to make and serve a case-made does not automatically extend the time within which to file the appeal. All such orders should cover both the time within which to make and serve case-made and the time within which to file the appeal, as provided in sections 5991 and 6007, Rev. Laws 1910. Both these sections must be complied with.

Appeal from County Court, Kiowa County; J. L. Carpenter, Judge.

Nate Holly was convicted of a violation of the prohibitory liquor law, and he appeals. Appeal dismissed, and cause remanded, with directions.

Thos. W. Conner and J. R. Hunter, both of Hobart, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error, Nate Holly, was convicted in the county court of Ottawa county on a charge that he did sell one-half pint of whisky to one J. T. Brown, and in accordance with the verdict of the jury was sentenced to be confined for 30 days in the county jail and to pay a fine of $50. On September 10, 1917, judgment was rendered on the verdict. On November 12th an appeal was attempted to be perfected by filing in this court on November 12, 1917, a petition in error with case-made.

The Attorney General has filed a motion to dismiss the appeal on the ground that the case-made contains no order extending the time beyond 60 days for filing an appeal in this court, citing section 5991, Revised Laws. Stumpf v. State, 6 Okl. Cr. 159, 117 Pac. 648; Hamlin v. State, 12 Okl. Cr. 321, 155 Pac. 904; Rhodes v. State, 13 Okl. Cr. 86, 162 Pac. 230; Gunter v. State, 13 Okl. Cr. 83, 162 Pac. 231.

In Pinchback v. State, 14 Okl. Cr. 302, 170 Pac. 714, this court held:

"An order made by a trial court extending the time within which to make and serve a case-made does not automatically extend the time within which to file the appeal. All such orders should cover both the time within which to make and serve case-made and the time within which to file the appeal, as provided in sections 5991 and 6007, Rev. Laws 1910. Both these sections must be complied with."

It therefore follows that the motion of the Attorney General to dismiss the appeal should be sustained. It is so ordered, and the purported appeal herein is dismissed, and the cause remanded to the trial court, with direction to enforce its judgment and sentence.

(16 Okl. Cr. 159)

Ex parte NICHOLS.

In re WAGNER, Sheriff.

(No. A-2720.)

(Criminal Court of Appeals of Oklahoma. June 14, 1919.)

(Syllabus by the Court.)

1. CONSTITUTIONAL AND STATUTORY PROVISIONS—"INDIRECT CONTEMPT."

Any willful disobedience of any process or order lawfully issued or made by any court in this state, not committed in the immediate view and presence of the court, is an indirect contempt of court. In such cases, the contemnor must be proceeded against by written accusation, and upon demand shall be granted a trial by jury.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Indirect Contempt.]

(Additional Syllabus by Editorial Staff.)

2. JURY ⊂⊃21(4) — INDIRECT CONTEMPT — TRIAL BY JURY.

Where a sheriff was ordered to produce the body of the petitioner in court as required by a writ of habeas corpus, and where it was first necessary for court to weigh evidence before it, to determine whether sheriff had power to obey the order, a violation thereof, if contempt, was not one committed in immediate view and presence of court, but was an indirect contempt, within Const. art. 2, § 25, and Rev. Laws 1910, § 2277, upon which respondent, under section 2279, was entitled to a jury trial.

Appeal from District Court, Wagoner County; R. P. De Graffenreid, Judge.

Bob Wagner, Sheriff of Wagoner County, Oklahoma, was found guilty of direct con-

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tempt of court by willfully disobeying the court's order to produce the body of one M. Nichols before the court, in compliance with a writ of habeas corpus obtained by Nichols, and sentenced to pay a fine of $150, and he appeals. Judgment reversed and respondent discharged.

Robert F. Blair, of Tulsa, for plaintiff in error.

R. McMillan, Asst. Atty. Gen., and J. Berry King, of Muskogee (J. S. Dickey, Jr., of Wagoner, of counsel), for defendant in error.

PER CURIAM. Bob Wagner, sheriff of Wagoner county, Okl., was fined $150 for direct contempt of the district court of Wagoner county, consisting in his willful disobedience of an order of said court to produce the body of one M. Nichols before said court on a certain date, in compliance with a writ of habeas corpus issued by the clerk of said court, by direction of the judge of said court given over the telephone, but after said judge had been informed of the nature of the application and the contents thereof, by hearing the petition read to him over the telephone, and thereby determining that said writ should issue. Numerous questions are involved by this appeal, but, in view of the disposition made hereof by the court, it is only necessary to consider one proposition of law.

[1] The respondent, Bob Wagner, was summarily proceeded against and fined for direct contempt of court, without a written accusation having been preferred against him, and without a trial by jury, although a jury trial was demanded by him. It is contended in his behalf that this is a case, if a case of contempt at all, of indirect contempt, and that the court erred in proceeding against him summarily without a written accusation, and in denying him a trial by jury.

Section 25, article 2, of the Constitution, provides:

"The Legislature shall pass laws defining contempts and regulating the proceedings and punishment in matters of contempt: Provided, that any person accused of violating or disobeying, when not in the presence or hearing of the court, or judge sitting as such, any order of injunction, or restraint, made or entered by any court or judge of the state shall, before penalty or punishment is imposed, be entitled to a trial by jury as to the guilt or innocence of the accused. In no case shall a penalty or punishment be imposed for contempt, until an opportunity to be heard is given."

Section 2277, Revised Laws 1910, provides:

"Contempts of court shall be divided into direct and indirect contempts. Direct contempts shall consist of disorderly or insolent behavior committed during the session of the court and in its immediate view and presence, and of the unlawful and willful refusal of any person to be sworn as a witness, and the refusal to answer any legal or proper question; and any breach of the peace, noise or disturbance so near to it as to interrupt its proceedings, shall be deemed direct contempt of court, and may be summarily punished as hereinafter provided for. Indirect contempts of court shall consist of willful disobedience of any process or order lawfully issued or made by court; resistance willfully offered by any person to the execution of a lawful order or process of a court."

Section 2279, Id., provides:

"In all cases of indirect contempt the party charged with contempt shall be notified in writing of the accusation and have a reasonable time for defense; and the party so charged shall, upon demand, have a trial by jury."

[2] In this proceeding, evidence was heard as to the power of the sheriff at the time of, and subsequent to, the service of the writ of habeas corpus upon him, to produce the body of the petitioner in court as required by the writ. This is not a case where the court had knowledge of the power of the sheriff to produce the body of the prisoner, but it was necessary for the court to hear evidence before a determination of that fact could be ascertained. In no sense, then, could this be considered a contempt committed in the immediate view and presence of the court. Under the definition of direct and indirect contempts of court contained in section 2277, supra, if the sheriff was guilty of contempt in this instance, it was of an indirect contempt of court, and under the Constitution and statutes aforesaid, before being proceeded against, there should have been an accusation in writing filed against him, and upon demand he should have been granted a trial by jury. The failure to proceed against him according to law was erroneous, and the judgment rendered is null and void, and the plaintiff in error is entitled to a reversal of the judgment and to be discharged.

For the reasons stated, the judgment is reversed, and the respondent (plaintiff in error) is ordered discharged.

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(16 Okl. Cr. 162)

RICHARDS v. STATE. (No. A-3200.)

(Criminal Court of Appeals of Oklahoma. June 17, 1919.)

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(Syllabus by the Court.)

1. CRIMINAL LAW ⊜1069(6) — APPEAL IN MISDEMEANOR CASES — RECORD OR CASE-MADE—DISMISSAL.

Procedure Criminal, section 5991, Rev. Laws 1910, provides that: "In misdemeanor cases the appeal must be taken within sixty days after the judgment is rendered: Provided, however, that the trial court or judge may, for good cause shown, extend the time in which such appeal may be taken not exceeding sixty days. *Held* that, when an appeal in a misdemeanor case is not taken within the 60 days prescribed by the statute, the record or case-made must affirmatively show that the trial court, or judge thereof, for good cause shown, extended the time; otherwise this court is without jurisdiction to review the judgment, and such appeal will be dismissed.

(Additional Syllabus by Editorial Staff.)

2. CRIMINAL LAW ⊜1099(13) — APPEAL — CASE-MADE.

Under Rev. Laws 1910, § 5242, it is necessary that the case-made be filed with the papers in the case in the court below, and, when that is not done, such case-made will be stricken from the files.

Appeal from County Court, Seminole County; D. G. Hart, Judge.

Joe Richards was convicted of a violation of the prohibitory law, and he appeals. Appeal dismissed.

M. A. Kennamer, of Konawa, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

DOYLE, P. J. Plaintiff in error, Joe Richards, was convicted in the county court of Seminole county on a charge that he did have in his possession one quart of alcohol with the unlawful intent to sell the same, and his punishment was fixed at six months confinement in the county jail and a fine of $250. From the judgment rendered on the verdict he appeals.

The Attorney General has filed a motion to dismiss the appeal for the following reasons:

First. That the same was not filed in this court within the time provided by law.

Second. The case-made was not filed in the court below, and therefore this court is without jurisdiction of the case.

[1] It appears from the record that the judgment in this case was rendered on the 31st day of July, 1917. The petition in error and case-made was filed in this court on November 14, 1917, 106 days after the rendition of the judgment and 46 days after the statutory time for filing the appeal had expired. The case-made contains no order extending the statutory time of 60 days for filing the appeal.

Our Procedure Criminal provides:

"In misdemeanor cases the appeal must be taken within sixty days after the judgment is rendered: Provided, however, that the trial court or judge may, for good cause shown, extend the time in which such appeal may be taken not exceeding sixty days." Section 5991, Rev. Laws.

It is the uniform holding of this court that, when an appeal in a misdemeanor case is not taken within the 60 days prescribed by the statute, the record or case-made must affirmatively show that the trial court or judge thereof extended the time; less otherwise this court is without jurisdiction to review the judgment, and such appeal will be dismissed. Gunter v. State, 13 Okl. Cr. 83, 162 Pac. 231.

[2] It also appears that the case-made was not filed in the court below as required by section 5242, Rev. Laws. Under the statute it is necessary for the case-made to be filed with the papers in the case in the court below. When this is not done, such case-made will be stricken from the files. See Johnson v. State, 5 Okl. Cr. 577, 114 Pac. 339.

It therefore follows that the motion of the Attorney General should be sustained.

It is so ordered, and the purported appeal herein is dismissed, and the cause remanded.

ARMSTRONG and MATSON, JJ., concur.

(107 Wash. 212)

LAMB-DAVIS LUMBER CO. v. STOWELL. PRENTIS v. SAME. CASHMERE MERCANTILE CO. v. SAME. (No. 15111.)

(Supreme Court of Washington. May 28, 1919.)

1. APPEAL AND ERROR ⊜539—STATEMENT OF FACTS — BILL OF EXCEPTIONS—CERTIFICATION.

Since the only method provided by statute for bringing up the evidence is by statement of facts or bill of exceptions certified to by the trial judge, where the purported statement of facts did not contain all the evidence submitted to the trial court, and was not certified by the trial judge, a stipulation, signed by counsel for appellants and respondent, reciting that the purported statement did contain all the material facts and might be treated and considered as if duly settled and certified by the trial judge, could be given no effect.

2. APPEAL AND ERROR ⊜987(1)—REVIEW OF EVIDENCE.

The Supreme Court has jurisdiction to review a judgment upon the evidence only when the evidence is brought before it in the manner provided by statute.

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Department 2.

Appeal from Superior Court, Chelan County; Wm. A. Grimshaw, Judge.

Consolidated actions by the Lamb-Davis Lumber Company, J. A. Prentis, and the Cashmere Mercantile Company, respectively, against E. F. Stowell, administrator de bonis non of the estate of Maude E. French, deceased. From judgments for defendant, plaintiffs appeal. Affirmed.

W. F. Whitney, of Wenatchee, for appellants.

Charles F. Wallace, of Cashmere, and Sam R. Sumner, of Wenatchee, for respondent.

FULLERTON, J. In these actions, which were consolidated for the purposes of trial in the court below and for the purposes of this appeal, the appellants sought to recover from the administrator de bonis non of the estate of Maude E. French, deceased, for certain articles of merchandise sold by them severally to the former administrator of the estate, which were alleged to be necessary expenses incurred by the then administrator in the conduct and management of the estate. The first of the causes of action was before this court on the question of the sufficiency of the complaint in Lamb-Davis Lumber Co. v. Stowell, 96 Wash. 46, 164 Pac. 593, L. R. A. 1917E, 966. On that appeal we held the complaint sufficient, reversing and remanding the cause for further proceedings. After the remand of that cause the other actions were commenced. The administrator de bonis non answered the complaints, putting in issue their principal allegations and setting up affirmative defenses thereto. The trial court made findings sustaining the administrator's contentions, and entered judgments accordingly. It is from these judgments that the present appeal is prosecuted.

[1, 2] The appellants present the appeal in this court as if the cause was before us for trial de novo. We find, however, from an examination of the record that the purported statement of facts does not contain all of the evidence submitted to the trial court, and is not certified by the judge of the trial court in any manner whatsoever. When this condition of the record was called to the attention of the appellants' counsel, he answered by submitting a stipulation signed by himself and the opposing counsel, reciting in effect that the purported statement does contain all of the material facts, and that the same may be treated and considered by this court as if duly settled and certified by the trial judge. But it is at once apparent that the stipulation cannot be given effect. This court has jurisdiction to review a judgment upon the evidence only when the evidence is brought before it in the manner provided by statute. Howard v. Ross, 3 Wash. 293, 28 Pac. 526; Madigan v. West Coast, etc., Ins. Co., 3 Wash. 454, 28 Pac. 1027; Ward v. Tucker, 7 Wash. 399, 35 Pac. 126, 1086; Oliver v. Lewis, 9 Wash. 572, 38 Pac. 139; Scott v. Bourn, 13 Wash. 471, 43 Pac. 372; Adams v. Columbia Canal Co., 51 Wash. 297, 98 Pac. 741.

The only method provided by statute for bringing the evidence into this court is by a statement of facts or bill of exceptions certified to by the judge of the trial court. Stipulations of counsel are not methods so provided, and hence cannot be recognized by the court.

It is of course open to the appellants to contend that the findings of fact made by the trial court require a judgment different from that entered by the court. But aside from the fact that the appellants seem not to seriously contend that the findings do not support the judgments, a perusal of the findings, it seems to us, leaves no doubt upon the question.

The first of the causes of action was for the purchase price of apple boxes sold to one J. H. French, who was then administrator of the estate. But while the court found that the boxes were purchased and used by French in marketing the apple crop growing upon premises belonging to the estate in the year 1914, it further found that they were sold upon the individual credit of French, not in his capacity as administrator of the estate, and at a time when his powers as such administrator were suspended by an order entered of record in the superior court. It further found that the proceeds of the apple crop were taken by French and credited to his individual account, and that on the settlement of his account with the estate he was duly credited with all sums of money coming to him from the estate. It may be that if French now had a claim against the estate for the purchase price of these boxes, the court would allow the vendor, since he has not been paid, although he dealt with French personally and not as administrator, to be subrogated to the claims of French. But since French has no such claim there is no room for subrogation, and the vendor must be relegated to the individual liability of French. Plainly, the vendor has no valid claim against the estate.

With reference to the second cause of action, the court also found that the claim was for goods and merchandise sold to French individually, and not in his capacity as administrator of the estate, and found that French had been allowed for all moneys due him in his settlement with the estate. It further found that as a claim against the estate the account was barred by the statute of limitations. We think that here also there is no basis for a recovery against the present administrator.

The findings concerning the other cause of action are substantially the same as the sec-

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ond, and in our view of their effect amply supports the judgment entered thereon.

It is unnecessary to pursue the inquiry further. The judgments are sustained by the findings, and must stand affirmed.

It is so ordered.

CHADWICK, C. J., and MOUNT, PARKER, and HOLCOMB, JJ., concur.

(107 Wash. 202)

PICCO et ux. v. RONEY et al. (No. 14629.)

(Supreme Court of Washington. May 28, 1919.)

1. APPEAL AND ERROR ⟸78(6) — ORDER GRANTING NEW TRIAL.

An order granting a new trial is not a final order, and is not appealable unless allowed by statute.

2. APPEAL AND ERROR ⟸345(1)—TIME FOR TAKING APPEAL — ORDER GRANTING NEW TRIAL.

Recitals in formal order of new trial, dated May 23d, *held* to show that appellants' attorney was present at the hearing and entry of the order, so that service and filing of notice of appeal as to such order on the following 28th day of July was not timely, under Rem. Code 1915, § 1716, subd. 6, and section 1718.

3. APPEAL AND ERROR ⟸627(2)—FAILURE TO FILE TRANSCRIPT—EXCUSE.

In view of Rem. Code 1915, § 1729, where the appellant fails to file any transcript, or order the same prepared, for more than 90 days, and, after motion to dismiss the appeal, prepares and files a transcript without giving any excuse for the delay, the appeal will be dismissed for failure to diligently prosecute it.

Department 2.

Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by Albert Picco and wife against Ned Roney and Milo J. Loveless. Verdict for plaintiffs, and from order granting defendant Loveless a new trial, and from judgment of dismissal notwithstanding the verdict as to defendant Roney, plaintiffs appeal. Appeal dismissed.

Vince H. Faben, of Seattle, for appellants.

A. J. Falknor and R. G. Sharpe, both of Seattle, for respondents.

PER CURIAM. Appellants instituted this action against respondents, as attorneys at law in copartnership, to recover damages for malpractice. The cause was tried before a jury, which brought in a verdict of $8,500 against respondents. Respondents moved for a new trial, a directed verdict, and for judgment notwithstanding the verdict in favor of respondent Roney. On May 12, 1917, the court granted the motion for new trial in behalf of respondent Loveless, and granted a judgment of dismissal notwithstanding the verdict in favor of respondent Roney. This order and the judgment were signed and entered May 23, 1917. The appellants assign as errors the granting of the new trial in favor of Loveless and the granting of judgment non obstante veredicto in favor of Roney. Appellants served notice of appeal on July 28, 1917.

At the threshold we are confronted with two motions by respondents to dismiss the appeal: (1) Loveless moves that the appeal be dismissed on the ground that the appeal from the order granting a new trial was not made until 66 days after the entry of said order. (2) Respondents move that the appeal be dismissed on the grounds: (a) That appellants have failed and neglected to diligently prosecute their appeal; (b) that appellants neither filed nor caused to be filed, either in the lower court or in this court, a transcript on appeal until February 27, 1918, and failed to serve and file their abstract of the record and opening briefs within the time allowed by statute.

[1, 2] An order granting a new trial is not a final order, and is not appealable unless allowed by statute. Rem. Code, § 1716, subd. 6, grants appeals on an order of new trial. Rem. Code, § 1718, provides that an appeal may be taken—

"from any order, other than a final order, from which an appeal is allowed by this act, within fifteen days after the entry of the order, if made at the time of the hearing, and in all other cases within fifteen days after the service of a copy of such order, with written notice of the entry thereof, upon the party appealing, or his attorney."

The formal order of May 23, 1917, granting a new trial to respondent Loveless, recites:

"The plaintiffs by their attorney at the time of the signing of the order, and at the time of the ruling and the decision, having taken their exception to the order and the judgment granting a new trial to the defendant Loveless, duly entered their exceptions thereto upon the ground and for the reason that the same is contrary to the law and not justified by the evidence and the records in the case, and their exception was duly entered and allowed. Done in open court this 23d day of May, 1917. ————, Judge.

"Filed in open court May 23, 1917. ————, Clerk, by ————, Deputy."

This seems to us to show that appellants' attorney was present at the hearing and entry of the order. Under the statute quoted supra, we must conclude that the service and filing of the notice of appeal on July 28, 1917, as to the order granting a new trial is not timely, and respondent Loveless' motion to dismiss the appeal in that respect must be granted.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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[3] Appellants' transcript on appeal was filed in the lower court February 28, 1918, and in this court March 1, 1918. Respondents on February 13, 1918, had served appellants with the motion to dismiss the appeal. In Ellis v. Bardin, 36 Wash. 122, 78 Pac. 677, it was held that, where the appellant fails to file any transcript, or order the same prepared, for more than 90 days, and, after motion to dismiss the appeal, prepared and filed a transcript without giving any excuse for the delay, the appeal will be dismissed for failure to diligently prosecute it. See, also, Humes v. Hillman, 39 Wash. 107, 80 Pac. 1104.

Rem. Code, § 1729, provides:

"Within ninety days after an appeal shall have been taken by notice as provided in this title, the clerk of the superior court shall prepare, certify and file in his office, at the expense of the appellant, * * * a transcript containing a copy of so much of the record and files as the appellant shall deem material to the review of the matters embraced within the appeal, said transcript to be so prepared, certified and filed, in the office of the clerk, at or before the time when the appellant shall serve and file his opening brief, as hereinafter provided. Within four months after said appeal shall have been taken by notice as aforesaid, the clerk of the superior court shall at the expense of appellant, send up to the Supreme Court said transcript together with the original briefs on appeal filed in his office. * * *"

On the strength of the foregoing cases and the statute, no excuse having been given for the delay in filing the transcript on appeal within 90 days, and a motion to dismiss the appeal having been made prior to the time of supplying the same, we reluctantly dismiss the appeal for failure to diligently prosecute it.

A motion is in the record to substitute Herbert Crowder as trustee in bankruptcy in place of the appellants herein. The motion is without merit, and will be denied.

Appeal dismissed.

(32 Idaho, 251)

TATE v. JOHNSON, City Treasurer.

(Supreme Court of Idaho. May 17, 1919.)

1. MUNICIPAL CORPORATIONS ⟸1009—COMMISSION GOVERNMENT — STATUTE — CITY COUNCIL.

Comp. Laws, § 148:60 (Sess. Laws 1913, c. 74, § 27), is not inconsistent or in conflict with any of the provisions of Comp. Laws, c. 162 (Sess. Laws 1911, c. 82), generally known as the Black Law, and therefore applies to and governs cities of the first class operating under the Black Law.

2. MUNICIPAL CORPORATIONS ⟸230—COMMISSION GOVERNMENT — EMPLOYMENT OF PRIVATE DETECTIVES.

The mayor of a city governed by the Black Law has no power to engage the services of private detectives for the purpose of aiding in discovering and prosecuting alleged violations of the ordinances of the city, in the absence of authority granted by the city council.

3. MUNICIPAL CORPORATIONS ⟸248(1) — COMMISSION GOVERNMENT — MAYOR'S EMPLOYMENT OF PRIVATE DETECTIVES—RATIFICATION.

Under the provisions of Comp. Laws, § 148:60 (Sess. Laws 1913, c. 74, § 27), the action of the council of Boise City ratifying, or attempting to ratify, the act of the mayor in engaging the services of private detectives, and ordering the payment of claims for such services, is void.

4. MUNICIPAL CORPORATIONS ⟸249 — IMPLIED CONTRACT FOR SERVICES—LIABILITY.

A city cannot be held liable under an implied contract for services, where power to make an express contract therefor is wanting.

Appeal from District Court, Ada County; Charles P. McCarthy, Judge.

Action by Joseph Sullivan against Louise Johnson, as Treasurer of Boise City, Idaho, to enjoin payments of claims against the city. Permanent restraining order issued, and defendant appeals, and on the death of plaintiff, Wilbur J. Tate was substituted as respondent. Affirmed.

J. P. Pope, City Atty., Harry S. Kessler, and Charles F. Reddoch, all of Boise, for appellant.

Perkey & Brinck, of Boise, for respondent.

RICE, J. This action was brought by one Joseph Sullivan to enjoin the city treasurer of Boise City from paying certain warrants issued by the city clerk in accordance with the order of the city council. In the trial court, judgment was entered enjoining the payment of the warrants. The appeal is from the judgment. After the appeal was perfected Sullivan died, and upon motion Wilbur J. Tate was substituted as respondent.

The warrants were issued to reimburse one J. R. Compton, a private citizen, for payments made by him of salaries and expenses of certain detectives whom he employed under an arrangement with the mayor of the city, without the consent or concurrence of the city council, for the purpose of disclosing violations of the ordinances of the said city.

After the presentation of the claims for the payment of which the warrants were issued, the council passed a resolution in terms ratifying the act of the mayor in authorizing the employment of the detectives in the manner above mentioned.

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[1, 2] It is admitted that Boise City is a municipal corporation, organized under C. L. c. 162 (Sess. Laws 1911, c. 82), known as the Commission Government Act, or the Black Law; also that the city derives its powers and authority from that act and the general laws of the state of Idaho relating to cities and villages, including C. L. c. 148 (Sess. Laws 1913, c. 74), which is the act providing for the organization, government, and powers of cities of the first class, where the same is not in conflict or inconsistent with the provisions of the Black Law.

C. L. § 148:60 (Sess. Laws 1913, c. 74, § 27), is as follows:

"The city council of such city shall never allow, make valid or in any manner recognize any demand against the city, which was not at the time of its creation a valid claim against the same; nor shall it authorize to be paid any demand which without such action would be invalid, or which shall then be barred by any statute of limitation, or for which the city was never liable; and any such action shall be void."

It is claimed by appellant that the provisions of the said section are inconsistent with the provisions of the Black Law. C. L. § 162:46 (section 11 of the Black Law), contains the following:

"The council shall have and possess, and the mayor and council and its members shall exercise all executive, legislative and judicial power and duties now had, possessed and exercised by the mayor, city council, board of public works, board of library trustees and other executive and administrative officers in cities, except as hereinafter provided. * * *

"The council shall, by resolution, determine the powers and duties to be performed by each member thereof, and assign them to the appropriate department; shall, by resolution, prescribe the powers and duties of all officers and employés; * * * and may make such other rules and regulations, or change such rules and regulations, as may be necessary or proper for the efficient and economical conduct of the business of the city. * * *"

However, C. L. § 162:9 (section 3 of the Black Law), has the following provision:

"It [the city] shall have and exercise all powers, functions, rights and privileges, now or hereafter given or granted it, and shall be subject to all the duties, obligations, liabilities and limitations now or hereafter imposed upon such municipal corporations by the Constitution and laws of the state of Idaho, and shall have and exercise all other powers, functions, rights and privileges usually exercised by, or which are incidental to, or inherent in, such municipal incorporations of like character and degree."

We do not think that the clause in section 162:46, authorizing the city council to prescribe by resolution the powers and duties of all officers and employés of the city, can be construed as an authorization to enlarge or extend the powers of the city council, or any member thereof, or any officer of the city, beyond the limits set by the statutes of the state. If there were any doubt as to this point, it is set at rest by C. L. § 162:9, which provides that cities organized under the Black Law shall be subject to all the duties, obligations, liabilities, and limitations now or hereafter imposed upon such municipal corporations by the Constitution and laws of the state of Idaho.

C. L. § 148:60 (Sess. Laws 1913, c. 74, § 27) was effective as a limitation upon the powers of the council of Boise City at the time the resolution attempting to ratify the action of the mayor was passed.

It is claimed by appellant that this section is nothing more than codification of the common law; that at common law a city council could not ratify any demand which was void, or ultra vires, or authorize the payment of any such invalid demand or any demand barred by the statute of limitations, or any fraudulent or illegal demands. The language of the section, however, is plain. It prohibits the recognition of any demand against the city which was not, at the time of its creation, a valid, i. e., an enforceable, claim against the city.

[3] In this case the action of the city council, assuming to ratify the action of the mayor, is therefore without effect, and the question presented is whether the claim against the city was a valid one without reference to any assumed ratification by the city council.

It is suggested by counsel for respondent that the city had no authority to employ private detectives to ascertain whether or not the ordinances of the city were being violated, and that any attempt to enter into a contract for such employment is ultra vires and void. The case of Flannagan v. Buxton, 145 Wis. 81, 129 N. W. 642, 32 L. R. A. (N. S.) 391, and Crofut v. City of Danbury, 65 Conn. 294, 32 Atl. 365, are cited as authority. Counsel for appellant cite in opposition the cases of Moore v. Hupp, 17 Idaho, 232, 105 Pac. 209; O'Dell v. Scranton, 126 Mo. App. 19, 103 S. W. 570; Abels v. Ingham Supervisors, 42 Mich. 526, 4 N. W. 206. Reference may also be made to the case of Sargent v. Inhabitants of Bristol, 2 Hash. 112, 21 Fed. Cas. 498.

We do not consider any of these cases decisive of the question. The case of Moore v. Hupp, supra, appears to have been decided upon the theory that the employment was of special police officers of the city of Moscow. In the case at bar, according to the pleadings, the claims were for payment of services as detectives and spies. A detective may be, but is not necessarily, a police officer. We do not find it necessary, however, to decide whether or not employment of private detectives by a city is ultra vires. We realize that the question may become, at times, one of great importance.

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[4] It is clear, however, that if it be conceded that the employment of private detectives is within the power of the municipality, such employment, to be valid, would require legislative action on the part of the city council. Provision is made in the statutes of this state, covering the organization of municipalities, for the apprehension of offenders against the law and for their prosecution and punishment. No provision of our statute has been pointed out, and we know of none, by which it may be claimed that the mayor has authority, express or implied, in the absence of legislative action by the city council, to employ private detectives to act in addition to the regular police force of the city. His action cannot be said to be the action of the city, because he is acting without the scope of his authority as mayor; neither could the city be held liable under an implied contract for payment of services rendered under such circumstances, for the reason that liability for services cannot be implied in a case where no power exists to make an express contract therefor. It would require the action of the council to accept such services so as to make the city liable to pay the value thereof, and until so accepted the services must be held to have been purely voluntary. But as we have seen, the city is prohibited from accepting such services after the same have been rendered so as to make itself liable therefor.

The judgment is affirmed. Costs awarded to respondent.

MORGAN, C. J., concurs.

BUDGE, J., sat at the hearing, but took no part in the opinion.

(32 Idaho, 261)

JENSEN v. AIKMAN.

(Supreme Court of Idaho. May 29, 1919.)

1. LIMITATION OF ACTIONS ⟸34(5)—LIABILITY OF STOCKHOLDER—CONTRACT—"CREATED BY STATUTE"—"CREATED BY LAW."

The liability of a stockholder for corporate indebtedness, to the amount unpaid upon the par value of his stock, is not "created by statute," within the meaning of Comp. Laws, § 4054, subd. 1, nor is it "created by law," within the meaning of section 4077, but is a debtor's obligation, created by the contract of subscription.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Liability Created by Law.]

2. CORPORATIONS ⟸241½ — LIABILITY OF STOCKHOLDER—UNPAID SUBSCRIPTION.

A stockholder's liability is binding, although he has paid no money, nor property, nor anything of value for stock for which he has subscribed and which has been issued to him.

Appeal from District Court, Ada County; Carl A. Davis, Judge.

Action by Lydia A. Jensen against Robert Aikman to enforce his liability for unpaid stock. Demurrer to complaint sustained, and judgment of dismissal entered, and plaintiff appeals. Reversed.

J. B. Eldridge and Charles F. Reddoch, both of Boise, for appellant.

Frawley & Koelsch, of Boise, for respondent.

MORGAN, C. J. It appears from the complaint that on October 3, 1914, appellant recovered judgment against the Owyhee Land & Irrigation Company, Limited, a corporation, in the sum of $1,000, with interest, upon the ground that by fraud and deceit its agents had induced her to pay to it $1,000 and to enter into a contract with it on December 28, 1909. This action is based upon the theory that the corporation is insolvent and unable to pay the judgment, that respondent was a stockholder at the time the liability was incurred by the corporation, and that his stock has not been paid for.

It is alleged in the complaint that respondent was one of the organizers of the corporation, and that at the time the contract was entered into he was a director thereof and was the owner of 2,000 shares of its capital stock; that he paid no money, nor property, nor anything of value for the stock, except, as is recited on information and belief, "that said Robert Aikman assisted in the organization of said corporation, and loaned his name as an incorporator thereof, attended meetings of the board of directors of said corporation and assisted in the promotion of the corporate enterprise as aforesaid in attending such meetings, and loaning the use of his name as aforesaid as a director thereof; that plaintiff is informed and believes, and upon such information and belief alleges the fact to be, that said stock of 2,000 shares was issued to the said Robert Aikman by said corporation in payment for said services and the use of the name of said Robert Aikman; that said services and the use of the name of said Robert Aikman is and was of the reasonable value of not to exceed 10 cents per share; that no part of the remaining 90 cents per share of the par value of said stock has ever been paid by the said Robert Aikman, or any one whomsoever."

Respondent moved to strike the allegation above quoted and demurred to the complaint. The motion was granted, and the demurrer was sustained. Appellant refused to plead further, and a judgment of dismissal was entered, from which this appeal was taken.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

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It will not be necessary to discuss the action of the trial judge in sustaining respondent's motion to strike, since, in view of the conclusion we have reached with respect to other points presented by the appeal, such action is not detrimental to appellant.

[1] By his demurrer respondent seeks to invoke the statutes of limitations, and relies upon Comp. Laws, § 4054, subd. 1, which provides a three-year period for the commencement of an action upon a liability created by statute, other than a penalty or forfeiture, and upon Comp. Laws, § 4077, which is as follows:

"This chapter does not affect actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created."

These sections of the statute do not apply to this case. The liability of a stockholder for corporate indebtedness, to the amount unpaid upon the par value of his stock, is not "created by statute," within the meaning of section 4054, subd. 1, nor is it "created by law," within the meaning of section 4077, but is a debtor's obligation, created by the contract of subscription. Feehan v. Kendrick, 179 Pac. 507.

[2] Respondent insists that, since there is an allegation in the complaint to the effect that he paid no money, nor property, nor anything of value for the stock, he never was a stockholder in the corporation, and therefore the demurrer, upon the ground that the complaint did not state facts sufficient to constitute a cause of action, was properly sustained. He relies upon article 11, § 9, of the Constitution, which provides:

"No corporation shall issue stock or bonds, except for labor done, services performed, or money or property actually received; and all fictitious increase of stock or indebtedness shall be void. * * *"

This contention is without merit. The transaction between respondent and the corportation did not constitute an increase of stock or of indebtedness on the part of the latter, and while an agreement that the stock was not to be paid for, if such agreement was made, may be void, the subscription is valid and the stockholder's liability is binding. Meholin v. Carlson, 17 Idaho, 742, 107 Pac. 755, 134 Am. St. Rep. 286.

The judgment is reversed. Costs are awarded to appellant.

RICE and BUDGE, JJ., concur.

(66 Colo. 367)

PEOPLE ex rel. MURPHY v. FIELD. (No. 9576.)

(Supreme Court of Colorado. June 2, 1919.)

1. CONSTITUTIONAL LAW ⟸15 — INSTRUCTION—AMENDMENT.

The Constitution, including all amendments thereto, must be construed as one instrument and as a single enactment.

2. CONSTITUTIONAL LAW ⟸24 — AMENDMENTS—REPEAL.

Repeals by amendments of provisions of the Constitution by implication will not be favored, and it is only in cases where there is such a conflict that the two enactments cannot consistently stand together that such doctrine will be invoked.

3. OFFICERS ⟸1 — CONSTITUTIONAL OFFICERS—LAND COMMISSIONERS.

A member of the state board of land commissioners, created by Const. art. 9, § 9, is a constitutional officer, deriving all his powers from constitutional authority.

4. CONSTITUTIONAL LAW ⟸12 — CONSTRUCTION—SPECIAL PROVISIONS.

Where there is a conflict between a general and special provision of the Constitution, the special controls that which it was intended to control.

5. CONSTITUTIONAL LAW ⟸13 — AMENDMENT—CONSTRUCTION.

To work an amendment of an existing constitutional provision, the intent to do so, which is to be gathered from the language employed, must be clear and unmistakable.

6. OFFICERS ⟸9—CIVIL SERVICE—BOARD OF LAND COMMISSIONERS.

Members of the state board of land commissioners, created by Const. art. 9, § 9, are not included and were not intended to be included in the operation of the civil service amendment to the Constitution (Const. art. 12, § 13).

En Banc.

Proceeding in quo warranto by the People of the State of Colorado, by Victor E. Keyes, Attorney General, upon the relation of William R. Murphy, against John E. Field. Judgment for relator.

Victor E. Keyes, Atty. Gen., and Charles Roach, Deputy Atty. Gen. (Charles W. Waterman, of Denver, of counsel), for the People.

Milton Smith, Charles R. Brock, W. H. Ferguson, and Karl F. Crass, all of Denver, for respondent.

SCOTT, J. This action is an original proceeding in quo warranto to determine the title to the office of member of the board of land commissioners of Colorado. The relator claims under and by virtue of an appointment by the Governor, confirmed by the Sen-

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ate, in compliance with the requirements of section 9, art. 9, of the Constitution. This provision of the Constitution was adopted as an amendment at the general election of 1910, and is as follows:

"Sec. 9. The state board of land commissioners shall be composed of three (3) persons to be appointed by the Governor, with the consent of the Senate, who shall have the direction, control and disposition of the public lands of the state under such regulations as are and may be prescribed by law, one of which persons shall at the time of his appointment be designated as president of the board and whose office shall expire on the second Tuesday of January, 1917, one of which persons shall at the time of his appointment be designated as register of the board and whose term of office shall expire on the second Tuesday of January, 1915, and the third member of said board shall at the time of his appointment be designated as the engineer of the board and shall always be professionally a civil engineer, who, for at least five (5) years, has been actively engaged in the practice of his profession and whose term of office shall expire on the second Tuesday of January, 1913; and the successor and successors of the first members of the board shall each be appointed for the terms of six (6) years. * * * The members of the board shall each receive a salary of three thousand dollars ($3,000) per annum until otherwise provided by law; but the salary of each member of this board is to be paid out of the income of the said state board of land commissioners."

The respondent claims under and by virtue of section 13, art. 12, of the Constitution, adopted as an amendment at the general election of 1918, and known as the "civil service amendment," and, in so far as applicable, is as follows:

"Appointments and employments in and promotions to offices and places of trust and employment in the classified civil service of the state shall be made according to merit and fitness, to be ascertained by competitive tests of competence, the person ascertained to be the most fit and of the highest excellence to be the first appointed. All appointees shall be qualified electors of the state of Colorado, except as to those offices or positions held by civil service commission to require special training and technical qualifications, in which case competitive tests need not be limited to qualified electors and may be held without the state.

"The classified civil service of the state shall comprise all appointive public officers and employés and the places which they hold, except the following: Judges of courts of record and one stenographer of each judge, one clerk for each court of record, persons appointed to perform judicial functions, receivers, jurors, members of boards or commissions appointed by the Governor and serving without pay, members of the state industrial commission, of the public utilities commission and of the state civil service commission, the Governor's private secretary and three confidential employés of his office, appointees to fill vacancies in elective offices, one deputy of each elective officer, the position involving the duties incident at present to the position of that deputy of the secretary of state, known as deputy commissioner of labor and the incumbent thereof, officers and teachers in educational institutions not reformatory or charitable in character, all attorneys at law serving as such, and the officers and employés of the General Assembly."

The respondent was duly appointed by the Governor and confirmed by the Senate to fill an unexpired term expiring on the second Tuesday in January, 1919, and was holding under such appointment at the date of the adoption of the civil service amendment and at its promulgation, both of which occurred prior to the expiration of the term for which he was appointed.

The only question to be determined is whether or not the office of member of the state board of land commissioners is one embraced and included in the civil service amendment as being subject to the provisions thereof.

[1] It has been frequently held by this court, and generally by all courts, that the Constitution, including all amendments thereto, must be construed as one instrument, and as a single enactment. So that for the purposes of this case we must consider the two constitutional provisions under consideration, together with all other provisions of the fundamental law, as having been originally written therein, and as stated in Dixon v. People, 53 Colo. 527, 127 Pac. 930:

"To reach a proper solution of the problem it is essential that we take the Constitution as it is, including every part thereof relating to the subject-matter under consideration, and construe the instrument as a whole, causing it, including the amendments thereto, to harmonize, giving to every word, as far as possible, its appropriate meaning and effect."

So construed then, does the civil service provision change, modify, or repeal section 9, art. 9, or is it so repugnant to that article as to justify the conclusion that the respondent is, and was intended to be, included within its provisions.

The civil service provision contains no repealing clause, and specific reference is nowhere made therein to the state board of land commissioners, nor to the members thereof.

Therefore, if it is to be held that the office of the respondent is included within the civil service provision, it must be because that article repeals section 9, art. 9, by implication, or that the latter article is so repugnant to the former that the two provisions may not be reconciled.

[2] We have held it to be a universal rule that repeals by implication will not be favored, and that it is only in cases where a conflict clearly and unavoidably exists may this doctrine be invoked. In re Funding Indebtedness, 15 Colo. 430, 24 Pac. 877. We have further held that such repugnancy

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must appear to be so clear and positive that the two enactments cannot consistently stand together. Upon this point we said in Schwenke et al. v. Union Depot Co., 7 Colo. 512, 4 Pac. 905:

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"The law does not favor repeals by implication; they will not be adjudged to follow, unless there is such a positive repugnancy that the two statutes cannot consistently stand together; the legislative intent to substitute the new for the old law must clearly appear; this intent is never prima facie presumed. Potter's Dwarris, p. 155, and cases cited; Bishop on Written Laws, § 154, and cases."

And in Lovelace v. Tabor Mines & Mills Co., 29 Colo. 62, 66 Pac. 892:

"Repeals of this character are not favored. Where there is an apparent conflict between two statutes, the latter, in the absence of a clear legislative intent to substitute the new for the old law, will not be adjudged to effect a repeal of the previous statute on the same subject, unless there is such a positive repugnancy that the two cannot consistently stand together."

The rule is stated with great clearness in Lewis' Sutherland on Statutory Construction, approved in Harrington v. Harrington, 58 Colo. 154, 144 Pac. 20, where it is said:

"If, by fair and reasonable interpretation, acts which are seemingly incompatible or contradictory may be enforced and made to operate in harmony and without absurdity, both will be upheld, and the later one will not be regarded as repealing the others by construction or intendment. As laws are presumed to be passed with deliberation and with a full knowledge of all existing ones on the same subject, it is but reasonable to conclude that the Legislature, in passing a statute, did not intend to interfere with or abrogate any former law relating to the same matter, unless the repugnancy between the two is irreconcilable. In the endeavor to harmonize statutes seemingly incompatible, to avoid repeal by implication, a court will reject absurdity as not enacted, and accept with favorable consideration what is reasonable and convenient. * * * The act being silent as to repeal and affirmative, it will not be held to abrogate any prior law which can reasonably and justly operate without antagonism. * * * It is a reasonable presumption that all laws are passed with a knowledge of those already existing, and that the Legislature does not intend to repeal a statute without so declaring."

It will be noted also that section 9, art. 9, is a special provision of the Constitution, and deals with a special object. It creates the state board of land commissioners, limits its membership to three, commands that one member shall be a professional engineer who shall have been actively engaged in his profession for five years, empowers the board to dispose of the public lands of the state, under statutory regulations, which in turn confer great powers and broad discretion, fixes the tenure of office, and specifically provides for the manner and method of appointment.

[3] A member of such board thus clearly is made a constitutional officer, deriving all his powers from constitutional authority.

[4] Plainly there is no such repugnance between these two provisions of the Constitution as to make them irreconcilable. If these two alleged conflicting provisions had been contained in the Constitution as originally adopted, the one dealing with a special and particular subject, the other general, and dealing with employés generally, can it be said that the special provision was not in the minds of the framers when drafting the general provision? Yet this furnishes the test to be applied in this case. The rule is well settled that, where there is conflict between a general and a special provision of the Constitution, the special controls that which it was intended to control.

This rule is stated in 12 C. J. 709, to be:

"When general and special provisions of a Constitution are in conflict, the special provisions should be given effect to the extent of their scope, leaving the general provisions to control in cases where the special provisions do not apply. And particular intent, incompatible with a general intent, will be treated as an exception."

And in Bishop on Written Laws, § 126:

"As already mentioned, the more specific provision controls the general without regard to their comparative dates; the two operating together, and neither one working a repeal of the other."

And by our own court in People v. Cassiday, 50 Colo. 503, 117 Pac. 357:

"The opinion ignores the fact that special and general provisions of the Constitution stand together. Neither destroys the other. The special controls that which it was intended to control, and to that extent displaces the general, while the general controls in all cases where the special provision does not apply."

It seems to be generally held that, when one section of the Constitution expresses a general intention to do a particular thing, and another expresses a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception. Smith v. Grayson County, 18 Tex. Civ. App. 153, 44 S. W. 921; McGrew v. Mo. P. Ry. Co., 230 Mo. 496, 132 S. W. 1076; Martin v. Election Com., 126 Cal. 404, 58 Pac. 932.

[5] But there is another rule of construction with which the respondent's contention does not meet the test. That is to say that, to work an amendment of an existing constitutional provision, the intent to do so, which is to be gathered from the language employed, must be clear and unmistakable. El Paso County v. Shelden, 59 Colo. 499, 149 Pac. 616.

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In this case there is no expressed intent to amend, repeal or modify the special provision relating to the method of appointment of the members of the state board of land commissioners. Neither do we think such an intent can be reasonably inferred from the language used. Perhaps there is no other Colorado state board charged with more important, independent, discretionary, or quasi judicial powers than the state board of land commissioners.

The stated exceptions from the operation of the law seem to include every other board with like important, or similar discretionary powers. These exceptions include not only judges of courts of record, and certain of their confidential employés, but members of state boards who serve without pay, and these include those who have charge of the state's educational, penal, and charitable institutions, involving the exercise of important discretionary powers. The exemption also extends to deputies of elective heads of executive departments; also the state industrial commission, the public utilities commission, the state civil service commission, and the deputy labor commissioner, all having quasi judicial and discretionary powers, but none more so than those of the state board of land commissioners.

It is more reasonable to assume that the latter board was omitted from the list of express exceptions by reason of the well-known constitutional provision fully providing for the method and manner of appointment, which does not obtain as to any other of the exceptions, rather than that this board was omitted from such list of exceptions because of any intent to include such board within the operation of the law.

Again we must take cognizance of the purpose, nature, and character of civil service laws involving the merit system in government. Their scope is generally limited by statutes so as to exclude from their operation certain classes of public officers and employés; such as those made by law subject to confirmation by legislative bodies, heads of departments, professional experts, positions of a confidential nature, and those involving the exercise of judgment and discretion in important matters, as well as judges, their clerks and confidential employés. 5 R. C. L. 615.

It must be assumed that those who framed and promulgated the constitutional provision had in mind the general purpose and practical operation of legislation of this character, and were, in the absence of contrary expression, without intent to include within the operation of the law officers and employés of the kind generally exempted, particularly those otherwise expressly provided for by specific constitutional enactment.

[6] The list of express exemptions tends to confirm this view. We must conclude, therefore, that the members of the state board of land commissioners are not included, and were not intended to be included, within the operation of the civil service amendment.

It is therefore ordered that the respondent, John E. Field, be, and is hereby, ousted and excluded from the office of member of the state board of land commissioners, and that the relator, William R. Murphy, be inducted into said office.

TELLER, J., not participating.

(66 Colo. 407)

STRATTON v. RICE et al. (No. 9222.)

(Supreme Court of Colorado. April 7, 1919. Rehearing Denied June 2, 1919.)

1. WILLS ⟸253, 271—COUNTY COURT—JURISDICTION—APPEARANCE.

Where the widow, brought into county court by citation to show cause why she should not be a party to proceeding for probate of will, engaged in the trial, the court had jurisdiction of her person, and, as the controversy involved the settlement of estate, it also had jurisdiction of the subject-matter.

2. COURTS ⟸475(2, 3) — COUNTY COURTS — CONFLICTING JURISDICTION—PENDENCY OF PROCEEDING.

A widow, brought into county court by citation to show cause why she should not be a party to proceedings for probate of will and settlement of estate cannot oust the court of jurisdiction by beginning suit in district court.

3. APPEAL AND ERROR ⟸581(1)—ABSTRACT OF RECORD.

Counsel not having preserved motion for continuance or any showing supporting it in their abstract of record, the question whether trial court erred in not granting motion is not before the Supreme Court.

4. CONTINUANCE ⟸22 — ABSENT WITNESS—DISCRETION.

Counsel making no claim that when case was tried any witness was absent who would have been present had a continuance been granted, there was no abuse of discretion in refusing to continue case.

5. JURY ⟸11(2)—PROBATE OF WILL—RIGHT TO TRIAL BY JURY IN COUNTY COURT.

Where respondent who was brought into county court by citation to show cause why she should not be a party to proceeding in said court for probate of a will set up that she was the widow of decedent, the court did not err in denying a trial by jury; the issue to be tried being that of marriage of respondent to decedent.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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6. JURY ⟸11(2)—RIGHT TO TRIAL BY JURY IN COUNTY COURT.

The jurisdiction exercised by courts of probate is purely statutory, and the constitutional provisions for trial by jury do not apply.

7. COURTS ⟸202(5)—COUNTY COURT'S DUTY TO CERTIFY QUESTIONS TO DISTRICT COURT.

Laws 1915, p. 487, does not make it the duty of county court to certify a cause to the district court when no stipulation to that effect has been made.

8. WITNESSES ⟸139(11), 140(10)—DISQUALIFICATIONS — SURVIVING SPOUSE — INTEREST IN ACTION—"PARTY TO ACTION"—"PARTY DIRECTLY INTERESTED."

Respondent, who was brought into county court by a citation to show cause why she should not be a party to proceedings in said court for the probate of a will, and who set up that she was the widow of decedent and entitled to one-half of his estate, was a party to the action, and directly interested in the event within Rev. St. 1908, § 7267, as amended by Laws 1911, p. 676, prohibiting party or person interested from testifying in his own behalf.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Directly Interested; Second Series, Party to Suit or Proceeding.]

9. WITNESSES ⟸140(2)—DISQUALIFICATIONS —INTEREST IN ACTION.

One to whom respondent, claiming to be the widow of deceased and entitled to one-half of his estate, had assigned a quarter interest in whatever she recovered from estate, would come within Rev. St. 1908, § 7267, as amended by Laws 1911, p. 676, relative to a party interested in event of action not being permitted to testify in his own behalf.

10. WITNESSES ⟸175(1)—DISQUALIFICATIONS —INTEREST.

Respondent, who was brought into county court by a citation to show cause why she should not be a party to proceedings in said court for the probate of a will, and who set up that she was the widow of decedent and entitled to one-half of his estate, was not made a competent witness by the introduction by defendant in error of deposit slips and checks in deceased's handwriting, the exception in the statute covering testimony by witnesses to "conversations and transactions."

Department 1.

Error to El Paso County Court; W. P. Kinney, Judge.

Controversy between Sophia Gertrude Stratton and D. H. Rice and others, executors of the estate of Winfield Scott Stratton, deceased. There was an adverse judgment as to Stratton, and she brings error. Affirmed.

John T. Bottom, Caesar A. Roberts, and Leslie M. Roberts, all of Denver, for plaintiff in error.

Chinn & Strickler, of Colorado Springs, and Tyson S. Dines, of Denver, for defendants in error.

TELLER, J. Plaintiff in error was brought into the county court of El Paso county by a citation, issued on the petition of defendants in error, to show cause why she should not be a party to the proceeding in said court for the probate of the will of W. S. Stratton and the settlement of his estate, and be required to set up therein any claim she might have to an interest in said estate.

Plaintiff in error, hereinafter designated as the respondent, filed a demurrer and an answer at the same time, challenging the jurisdiction of the court, and then setting up that she was the widow of said decedent, and entitled to one-half of his estate. The demurrer having been overruled, a reply was filed, denying that respondent was ever the wife of deceased.

The cause was set for trial on April 25, 1916, on the question whether or not respondent was ever married to said Stratton, deceased. Some days later, a stipulation between the parties was filed that said matter might be reset for trial on May 16, 1916, with the understanding that application to have said cause tried to a jury might be made on or before April 17, 1916. An application to have the question of respondent's marriage to Stratton tried to a jury was made and denied. A motion to transfer the case to the district court was then denied, as was a motion for a continuance, filed May 6, 1916. The cause having been reset for trial on May 16, 1916, and another motion for a continuance overruled, the trial of the cause proceeded. The court found against respondent on the question of her marriage to Stratton, and entered judgment accordingly. The cause is now before us on error.

[1] It is urged, first, that the court erred in overruling a demurrer to the citation above mentioned. One ground of the demurrer was that the court was without jurisdiction of the person of respondent or "the subject of the action." As the respondent appeared and engaged in the trial, the court certainly had jurisdiction of her person; and, as the controversy involved the settlement of an estate, the court had jurisdiction of the subject-matter.

[2] The second ground of demurrer, that there was an action pending between the same parties in the district court in Denver, is also without merit. The county court had jurisdiction of the probate of the will and the settlement of the estate, and the cause was pending in it long before the beginning of the suit in Denver. If respondent was in fact the widow of the decedent, the statute required that she be brought in by citation; and, manifestly, she could not, in any event, oust the county court of jurisdiction by beginning a suit in any district court.

Wright v. Wright, 11 Colo. App. 470, 53

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Pac. 684, cited on this point, has no bearing on this case. The court there held that the county court had no jurisdiction to determine a disputed question as to the existence of a partnership.

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The question here is not whether the respondent might sue in a district court, but whether or not the county court had jurisdiction, and so had authority to cite her to show cause why she should not be made a party to a proceeding therein pending, concerning an estate to a share of which she was making claim as widow of the testator. Hence the case of Hodgkins v. Ashby, 56 Colo. 553, 139 Pac. 538, is not in point.

[3, 4] Counsel also urge that the court erred in not granting respondent a continuance; but, as they have not preserved the motion for the continuance or any showing supporting it in their abstract of record, the question is not before us. In any event, it appears that respondent presented her case in great detail, and no showing is made that she was injured by the denial of the continuance. Counsel make no claim that when the case was tried any witness was absent who would have been present had a continuance been granted. There was no abuse of discretion in the refusal to continue the case.

[5] It is urged, further, that the court erred in denying a trial by jury. The issue to be tried was that of the marriage of respondent to W. S. Stratton. The fact of such marriage must have been established as the first step in respondent's case. It was a necessary element on the question of heirship and in the settlement of the estate, when once respondent had set up that she was the widow of the testator.

[6] The jurisdiction exercised by courts of probate was never exercised by common-law courts, and is purely statutory. The constitutional provisions for trial by jury do not apply. Moody v. Found, 208 Ill. 78, 69 N. E. 831; Ferris v. Higley, 20 Wall. 376, 22 L. Ed. 383. In probate proceedings issues are tried by jury only where it is so provided by statute. 24 Cyc. 104, and cases cited. There is no statute in this state giving a right to a jury trial in a case like this.

[7] There was no error in the order denying respondent's motion to have the cause certified to the district court. Chapter 173, Laws of 1915, does not make it the duty of the county court so to certify a cause, when no stipulation to that effect has been made.

[8] The testimony of the respondent as to matters before the death of Stratton was properly excluded. This court has held that the statute (§ 7267, R. S. 1908, as amended by chapter 229, Laws of 1911) applies in probate proceedings. In re Shapter's Estate, 35 Colo. 578, 85 Pac. 688, 6 L. R. A. (N. S.) 575, 117 Am. St. Rep. 216. The respondent was a party to the action, and directly interested in the event thereof, and hence within the bar of the statute.

[9] The Parker deposition was properly excluded under the statute, since it was found by the court that Parker had, by assignment from respondent, a quarter interest in whatever property she recovered from the Stratton estate. Were the deposition admissible it would be impossible to determine whether or not its exclusion was error, since the record does not advise us as to its contents.

[10] Plaintiff in error contends that she was made a competent witness by the introduction, by the defendants in error, of deposit slips and checks in Stratton's handwriting, and dated at times when respondent claimed he was in Texas. The exceptions in the statute cover testimony by witnesses to "conversations and transactions" with the deceased, and do not apply to the evidence mentioned.

It is further contended that the findings of the trial court are against the evidence, but a careful review of it satisfies us that it fully supports the findings.

The judgment is accordingly affirmed.

GARRIGUES, C. J., and BURKE, J., concur.

(68 Colo. 343)

LINDSEY v. PEOPLE ex rel. RUSH, Dist. Atty. (No. 8831.)

(Supreme Court of Colorado. April 7, 1919. Rehearing Denied June 2, 1919.)

1. CONTEMPT ⟸6, 52 — "DIRECT CONTEMPT" —SUMMARY PROCEEDINGS.

A contempt committed in the immediate presence of the court while sitting as such is a direct contempt, and punishment may be inflicted without affidavit, notice, rule to show cause, or other process.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Direct Contempt.]

2. CONTEMPT ⟸3—"CRIMINAL CONTEMPT"—OBSTRUCTION OF JUSTICE.

A contempt which disrespects the court or obstructs the administration of jutice is a criminal contempt.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Criminal Contempt.]

3. CONSTITUTIONAL LAW ⟸273 — CONTEMPT PROCEEDINGS—REFUSAL TO TESTIFY—DUE PROCESS OF LAW.

Witness fined for contempt for refusal to testify after court had directed filing of petition for citation and witness had been permitted to file answer, and upon it being held insufficient an amended answer, and thereafter a second amended answer, was not denied due process of law upon court striking the an-

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swer and entering judgment on the pleadings, since he could have been summarily punished.

4. WITNESSES ⟸216—PRIVILEGED COMMUNICATIONS—JUVENILE COURT JUDGE.

In prosecution of mother for the murder of the father, statement by 12 year old son to juvenile court judge was not privileged upon judge being called as witness, irrespective of statute, since benefit to be gained by correct disposal of the litigation was infinitely greater than any injury which could possibly inure to the relation by disclosure of communication.

5. WITNESSES ⟸216 — PRIVILEGED COMMUNICATIONS—STATEMENT TO JUVENILE COURT JUDGE.

Boy's statement to juvenile court judge that he killed his father was not privileged, upon trial of his mother for murder of father, under Rev. St. 1908, § 586, as amended by Laws 1909, p. 334, where statement was made before delinquency proceedings had been instituted against the boy; the boy not having become ward of court until institution of proper proceedings, notwithstanding Rev. Codes, §§ 1590 and 1607, Laws 1909, p. 478, § 1, and Laws 1913, p. 152.

6. WITNESSES ⟸216—PRIVILEGED COMMUNICATIONS—PUBLIC OFFICERS.

Juvenile court judge is not entitled to have statement to him regarded as privileged communication under Rev. St. 1908, § 7274, par. 5, making communications to public officer in official confidence privileged when public interests, in judgment of the court, would suffer; the presiding judge and not witness being sole judge as to necessity regarding communication as privileged.

7. WITNESSES ⟸199(1)—PRIVILEGED COMMUNICATIONS—JUVENILE COURT JUDGE.

In view of Rev. St. 1908, § 1595, prohibiting juvenile court judge from acting as attorney, statement to juvenile court judge by a boy before he became ward of the court was not privileged on ground of its being a confidential communication between attorney and client.

8. WITNESSES ⟸216, 217—PRIVILEGED COMMUNICATIONS—JUVENILE COURT JUDGE.

Boy's statement to judge of juvenile court was not privileged, upon mother's trial for murder, by reason of supposed powers and duties conferred by state in its capacity of parens patriæ upon the judge and his assumed position in loco parentis, and if such privilege existed it was for the benefit of the boy, and not his mother or the judge.

Bailey, Scott, and Allen, JJ., dissenting.

En Banc.

Error to District Court, Denver County; John A. Perry, Judge.

Ben B. Lindsey was adjudged in contempt of court, and he brings error. Affirmed.

From a judgment of the court below imposing a fine upon plaintiff in error (who is, and at all times hereinafter mentioned was, judge of the juvenile court of the city and county of Denver) for contempt of court in refusing to testify, he prosecutes this writ.

The case of the People v. Bertha Wright was on trial in the criminal division of the district court of the city and county of Denver. The defendant in that case was being prosecuted on the charge that she had murdered her husband, John A. Wright. In the course of the trial Neal Wright, the 12 year old son of Bertha Wright, was called as a witness and testified in her behalf. Thereupon the prosecution called the plaintiff in error for the purpose of discrediting the said Neal Wright by showing that he had made admissions to plaintiff in error contrary to his sworn testimony. Counsel for the defendant, Bertha Wright, first objected, on her behalf, to the plaintiff in error testifying at all, on the ground that any statement made to him by Neal Wright was made in confidence. The objection was overruled. Plaintiff in error thereupon testified, in substance, that he first met Neal Wright early in May when he came to plaintiff's chambers in company with a friend to discuss matters connected with the murder case; that he again saw Neal Wright at the latter's home about May 18th and had a further talk with him on the same subject; that thereafter, on the same day and in the same place, he had a conference with said Neal Wright at which no third person was present. Plaintiff was then asked the following question, "During that time that you had him separate and apart from the others, state whether or not he told you that at the time his father was shot on the 18th day of April, 1915, at this same house, his mother was standing with the gun, holding it with both her hands as she fired the shot, and that Neal was then standing in the doorway of the folding doors between the parlor and the hall, or in substance that?" to which question plaintiff replied, "That, if your honor please, brings me into a conversation that I had in confidence with this boy, and I will not state whether I did or did not, or anything he said to me, and I would like to give my reasons why I consider it a privileged communication." Plaintiff further stated that the communications made by the boy to him at the time in question were "indirectly" in a case pending before him; that such a case was now pending; that at the time the communications were made he anticipated there would be such a case; that he did not think there was a case pending but that he considered "a child becomes a ward of the state when an offense is committed;" that the communication in question was in absolute confidence. Assured by the district attorney that when Neal Wright was on the witness stand he had consented to plaintiff"s answering this question, plaintiff

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replied: "I contend that he has no right to weigh what I wish to do." The court thereupon ruled plaintiff to answer, and he refused. Warned by the trial judge that he was disobeying an order of court, he answered: "I differ with your honor on the law." Again ordered to answer the question, he again refused, expressly upon the ground that the communication thus called for was privileged. Thereupon a petition for a citation in contempt was prepared and filed by the district attorney by order of court; the citation was issued and respondent moved to strike certain portions thereof. This motion was sustained in part and denied in part. Thereupon an oral motion was made to dismiss the petition for want of sufficient facts, which motion was overruled. Plaintiff in error then answered, to which answer a demurrer was filed and sustained. An amended answer was filed, and a motion to make the same more specific, which motion was sustained, and an amendment to the said amended answer filed. The district attorney thereupon filed a motion to strike this amendment from the files as evasive, not responsive, inconsistent with facts theretofore specifically pleaded by plaintiff in error, and inconsistent with his sworn testimony, and for judgment on the pleadings. This motion was sustained and judgment entered imposing a fine upon plaintiff in error for "willful, deliberate, and gross contempt."

The answer, amended answer, and amendment to the amended answer of plaintiff in error are largely statements of conclusions of law and arguments thereon. Aside from such, these pleadings set forth the following facts:

Early in May, 1915, Neal Wright came to the chambers of plaintiff in error in company with a friend, and in the presence of both stated that he fired the shot which killed his father. May 15, 1915, plaintiff in error went to the home of Neal Wright where, in the presence of other persons, said Neal Wright repeated in detail this statement. On the suggestion of plaintiff in error he then held a conference with the boy apart from the others. This conference was had by the consent of his mother, Bertha Wright, her friends, and her attorney, and upon the assurance that whatever was said would be accepted as confidential. In that conference he assured Neal Wright that whatever he then said could not be used against him and could not be used in any court against his mother. During the conference Neal Wright once or twice said, "They couldn't make you testify as to what I am telling you, could they?" and was each time assured that they could not. In addition to the foregoing, the amendment to the amended answer recites, in substance, that on the 18th day of April, 1915, Neal Wright said to the plaintiff in error: "I killed my father. He beat up my mother and I made up my mind that sooner or later I would have to lay him out." That thereupon he was taken in charge as a delinquent child, and proceedings were instituted (no date is given) against said Neal Wright, and from that date he was declared a delinquent child; that such proceedings have ever since been pending and are still pending (at the time of the filing of the pleading) against the said Neal Wright, and appear upon the docket of said juvenile court for trial as of the 14th day of October, 1915; "that at the date mentioned, under and by virtue of the law of Colorado designed to protect delinquents from publicity, pending investigation in the case, no proceedings were entered of record, but that the same remained in the breast of this respondent, as chancellor, and were pending without number and date, under the rules and policy of said juvenile court, and are now pending, by number and date, as by the records of said court, ready to be produced, will more fully appear."

O. N. Hilton and C. A. Roberts, both of Denver, for plaintiff in error.

Leslie E. Hubbard, Atty. Gen., and Bertram B. Beshoar, Asst. Atty. Gen., for the State.

BURKE, J. (after stating the facts as above). [1, 2] Plaintiff in error contends that he has been denied due process of law. A contempt committed in the immediate presence of the court while sitting as such is a direct contempt. 13 Corpus Juris, 5. A contempt which disrespects the court or obstructs the administration of justice is a criminal contempt. Wyatt v. People, 17 Colo. 252–258, 28 Pac. 961, citing Rapalje on Contempts, § 21. Where the contempt is in the immediate presence of the court, summary punishment may be inflicted without affidavit, notice, rule to show cause, or other process. 13 Corpus Juris, 63.

[3] If plaintiff in error in this case was guilty of contempt it was a direct criminal contempt. It interfered with the due course of the trial and the administratidon of justice, and might have, and may have, resulted in a gross miscarriage of justice. It could have been punished summarily. Instead, the trial judge directed the filing of a petition for citation, as to the sufficiency of which respondent was heard. He was permitted to file an answer, which was held insufficient. He was permitted to file an amended answer, which, failing to comply with the ruling of the court, he was given leave to make more specific. His amendment to the amended answer was stricken, and judgment entered on the pleadings. His claim of denial of due process of law could not have been upheld had he been punished summarily. He was thrice given an oppor-

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tunity to present a defense, and, by the ruling of the trial court, he thrice failed. Unless the communication called for was privileged, the judgment must stand.

The claim of privilege made by plaintiff in error is based primarily upon three contentions:

[4] First. That the communication was privileged, under the general rule concerning such communications, irrespective of any statute.

Assuming, but not deciding, that communications other than those specifically mentioned in any statute on the subject may be now held privileged, the general rule is well laid down in Wigmore on Evidence, § 2285, as follows:

"(1) The communications must originate in a confidence that they will not be disclosed; (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation must be one which, in the opinion of the community, ought to be sedulously fostered; and (4) the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation."

Considering the importance of the case on trial to the defendant as well as the people, and the rare instances in which courts are likely to be confronted with a similar situation, it appears to us beyond question that the benefit to be gained by the correct disposal of the litigation was so infinitely greater than any injury which could possibly inure to the relation by the disclosure of the communication that the requirements of the fourth section of the rule were not met, and the rule is inapplicable.

[5] Second. Plaintiff in error contends that the communication was privileged by reason of the provisions of certain sections of the juvenile law of Colorado. The only sections relied upon and which seem to require any consideration are sections 586, 1590, and 1607, of the Revised Statutes of Colorado 1908; section 1, chapter 199, page 478, Laws of 1909; chapter 51, page 152, Laws of 1913; and chapter 156, page 334, Laws of 1909, amending section 586, Revised Statutes 1908. From these sections plaintiff in error draws the following conclusions: That the instant an offense was committed by Neal Wright plaintiff became in loco parentis during the child's minority; that the moment Neal Wright told him he killed his father the child became a ward of the juvenile court; that his jurisdiction attached without any proceedings being entered of record; that such proceedings, until so entered of record, remained in the breast of respondent and were pending without number or date; that he alone could decide when Neal Wright was within the jurisdiction of the juvenile court; that he was the sole judge as to whether the interests of the public or the interests of the child, or its parents, or public justice, would suffer by his disclosing the communication in question.

Said section 586 provides that a "delinquent child" shall include any child 16 years of age or under who violates any law of this state; that "any child committing any of the acts herein mentioned shall be deemed a juvenile delinquent person, and shall be proceeded against as such in the manner hereinafter provided"; that "a disposition of any child under this act, or any evidence given in such cause, shall not in any civil, criminal or other cause or proceeding whatever in any court be lawful or proper evidence against such child for any purpose whatever, excepting in subsequent cases against the same child under this act."

Said section 1590 provides that the juvenile court "shall have original jurisdiction in all criminal cases or other actions or proceedings in which the disposition, custody or control of any child or minor, * * * may be involved under the acts concerning delinquent, dependent or neglected children, * * * or which may in any manner concern or relate to the person, liberty, protection, correction, morality, control, * * * of any infant, child or minor. * * *

Said section 1607 vests the power and authority to exercise jurisdiction over minors under the acts concerning delinquent children "or which may in any manner concern or relate to the person, liberty, protection, correction, morality, control, adoption or disposition" of any such child in the juvenile courts created by the act of which this section is a part.

Section 1, chapter 199, Laws of 1909, provides that that act "shall be construed to be an effort of the state under its police powers and in its character of parens patriæ to care for and provide for the protection of the morals and well-being of its citizens and where practicable to avoid proceedings tending to degrade and, under the provisions of this act, to endeavor to redeem to good citizenship persons drifting into crime. * * * This act shall only apply to cases of persons whose acts or offenses in a criminal proceeding would constitute a misdemeanor."

Chapter 51, section 1, page 152, Laws of 1913, provides that "in any case in any court against any person for the violation of any statute against rape, or of the contributory delinquency or dependency law, or any other law of this state for the correction or protection of children, it shall be unlawful for any person to print or publish in any daily or weekly newspaper, magazine, or other periodical, the picture or name of any child who may be involved therein or called as a witness."

Section 4 of the same act provides that "in any such case mentioned in section 1 of this

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act, the court may, in the interest of public morals and for the protection of children, enter an order forbidding the publication of all, or any part, of the proceedings in such case, and a violation of such order shall be deemed contempt of court."

That section 586 is applicable because the moment an offense was committed, or presumed to be committed, by Neal Wright, he that moment was "deemed a juvenile delinquent person," and for that reason the jurisdiction of the juvenile court attached instantaneously, is an absurdity.

Section 1786, Revised Statutes 1908, provides that any person who commits any offense therein defined "shall be deemed a bunco steerer."

Section 1787, that any person who commits any offense therein defined "shall be deemed a confidence man."

Section 1788, that any person who commits any offense therein defined "shall be deemed a fakir."

Many other statutes use similar language. The district courts of the state are given jurisdiction of these offenses, but it will not be contended that as soon as any such offense is committed the court or judge may, without complaint or information, take personal charge of the supposed offender. No more can the juvenile judge in cases of presumed juvenile delinquency. To do so would be a gross violation of the rights of childhood and an outrage upon parenthood. In case of the violation of any of the criminal laws above mentioned, the supposed offender must be proceeded against as provided by law; and juvenile delinquents must be proceeded against "in the manner hereinafter (in the statutes) provided." This proceeding is defined by section 3, chapter 156, page 334, Laws of 1909, as follows:

"All proceedings under this act shall be by written petition. * * * The petition shall be verified. * * * Upon the filing of such petition, * * * the judge or clerk of said court shall issue a notice, which may be in the form of a citation or summons * * * which shall be served upon one or both such parents, or guardian, * * * requiring them to appear * * * and show cause, if any, why said child should not be declared by the court to be a delinquent child. * * * In case it shall appear * * * the court may thereupon proceed to the examination and hearing provided for, and determine its delinquency. * * *"

We search this section in vain for any authorization of instantaneous jurisdiction or proceedings pending in the breast of the judge. It clearly appears from an examination of these statutes that at the time the communication in question was made to plaintiff in error there was no case pending against Neal Wright, and the juvenile court had no jurisdiction over him. For the reasons given, the further provisions of section 586 prohibiting the giving of evidence in such juvenile delinquency cases against the delinquent or any witness in the case in any other court or proceeding have no application. This portion of the section contemplates a case pending, and a hearing thereon, and prohibits the giving of the evidence taken in such hearing "against such child." There was no case pending against Neal Wright; there was no hearing upon any such case; the evidence sought from plaintiff in error had not been given in any such case, and it was not sought to be introduced against Neal Wright in any sense of the word as used in this act.

It is perfectly clear that under section 1590 the juvenile court would have jurisdiction when such a case was pending, and that it would have jurisdiction under the provisions of section 1607. That section 1, chapter 199, page 478, Laws of 1909, has no application is so apparent from its wording that it is unnecessary to more than point out that it applies only to misdemeanors. If Neal Wright committed any offense, or was charged with any offense, which gave the juvenile court jurisdiction over him, that offense certainly was not a misdemeanor.

That chapter 51, Laws of 1913, has no application is equally apparent. Section 1 thereof is solely a prohibition upon the publishers of newspapers, magazines, and periodicals. Section 4 of the same act authorizes the juvenile court to enter an order prohibiting the publishing of all or any of the proceedings in cases therein mentioned, but as no such proceedings were pending in the juvenile court in the instant case, and no claim is made that any such order had been entered, it is wholly inapplicable.

It follows that the privilege claimed cannot be sustained under any of the provisions of the juvenile law of Colorado.

[6] Third. Plaintiff in error contends that the communication in question was privileged by reason of the provisions of paragraph 5, section 7274, Revised Statutes of Colorado 1908. This paragraph reads as follows:

"A public officer shall not be examined as to communications made to him in official confidence, when the public interests, in the judgment of the court, would suffer by the disclosure."

The entire argument upon this contention is based upon the theory that in construing this section the court must absolutely strike out of it the words "in the judgment of the court." Such a construction is indispensable to the application of the paragraph to the claim of privilege now made by plaintiff in error. Otherwise, the judgment of the court has been exercised against the claim, and the paragraph affords no protection. Every decision on the question of the disclosure by public officials of communications made to them in official confidence, not taking into consideration this language of our statute,

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must be disregarded. The act itself makes the trial court the sole judge as to when the public interests would suffer by the disclosure. When a public officer is called upon on the witness stand to disclose such communications, his opinion that such disclosure is improper, and the reasons therefor, are matters to be presented to the court and are for the determination of the court—not the witness. If there are exceptions to this statute, they are only such as fall within those stated by Stephens' Evidence, art. 112, p. 163:

"The executive of the nation, or of a state, and cabinet officers (and perhaps others falling in the same general class) are entitled, in the exercise of their discretion, to determine how far in a judicial inquiry they will produce papers or answer questions as to public affairs."

[7] In addition to the foregoing, it is argued that a judge of a court of record ought not only be exempted, but prohibited, from testifying. There is no such law in this state. It is argued that communications of the nature of those here in question partake of the character of confidential communications between attorney and client, and are therefore privileged. The contrary is true in Colorado, for the very good reason that judges generally are prohibited from acting in any such capacity, and section 1595 expressly prohibits the judge of the juvenile court from acting "as attorney or counsellor at law." The rule which excludes a judge from testifying in a case on trial before him, and the cases cited in support thereof, have no application.

[8] An interesting argument is presented in favor of the claim of privilege based upon the supposed powers and duties conferred by the state, in its capacity of parens patriæ, upon plaintiff in error, and his assumed position in loco parentis. There is no law to support this argument, and the provilege claimed by it is one which is denied a natural parent.

If the privilege existed at all, it existed for the protection of Neal Wright—not for the benefit of plaintiff in error or the defendant, Bertha Wright. So far as it could be said to exist for the benefit of the state, a waiver was tendered by the state's representative charged with the prosecution of cases of juvenile delinquency, the district attorney, and that waiver was admitted by the state's judicial officer, the trial judge. It was a privilege which had to be claimed by Neal Wright, or some one for him. If it could be claimed by him it could be waived by him, and he had expressly waived it. It has been said that the proper person to claim or waive the privilege as to a minor is the natural guardian of such minor—in this case his mother. State v. Depoister, 21 Nev. 107, 25 Pac. 1000. Bertha Wright sat in court with her counsel at the time of the trial and attempted to claim the privilege as a defendant, which was clearly not her right. She made no attempt to make the claim as natural guardian of her son, and by her silence she waived it.

Much is said of the unique position of the juvenile court, of the vital interest of the state in the unhampered exercise of its functions, of the powers and duties of its judge and his influence for good over wayward children, all of which meets with our unqualified approval; and, viewing the instant case apart from the important issue involved in the case of the People v. Bertha Wright, apart from the general rule and all statutory enactments touching privileged communications, these very considerations demand an affirmance of this judgment in the interest of Neal Wright. He had charged himself with the murder of his father; that charge had been disclosed and made public. If, in the communication in question, he had reaffirmed his guilt of that crime, no possible reason existed for not disclosing it. If, on the other hand, he had denied it and admitted that he was making a false confession to shield his mother, a disclosure of such admission would be for his benefit as tending to remove from his life that frightful blot. In the one case it could not possibly do harm to reveal what already was public; in the other a failure to reveal would do incalculable harm to the very child in whose behalf the privilege was ostensibly invoked, sending him across life's threshold branded as a parricide.

For the reasons herein given the judgment is affirmed.

BAILEY, SCOTT, and ALLEN, JJ., dissent.

BAILEY, J. (dissenting). I cannot bring myself to assent to the reasoning advanced or the conclusion reached in the majority opinion for the affirmance of the judgment in this case. Seldom if ever does a dissenting opinion serve a useful purpose, it being at best only the opinion of one or more of the individual judges, in which the public has or can have but little intimate interest as against the opinion of a majority of the Court. The matter herein involved is, however, so highly important and of such wide and general concern that I regard it a duty to give expression to the views for permanent record of the judges not in accord with the ones announced in the majority opinion.

The case is before us on writ of error to review a judgment of $500.00, assessed as for contempt of court. As judge of the juvenile court of the City and County of Denver plaintiff in error, defendant below, had an interview at his chambers with a boy about twelve years old in reference to the killing of the latter's father which occurred just prior to

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such interview. In the following month the mother of the boy was put upon trial charged with homicide. At the trial the son testified in her behalf. In an attempt to impeach his testimony defendant was called by the State and questioned in regard to the above mentioned interview. The judge declined to disclose any matter communicated to him by the boy on the ground that it was given him in confidence as judge of the juvenile court and was therefore privileged. For such refusal the fine above indicated was imposed.

Several reasons are urged why such communications should be classed as privileged, but in our opinion only one is entitled to consideration. This is the claim that the judge of the juvenile court, standing as parens patriæ to those within its jurisdiction, is protected by the law from divulging anything communicated to him in confidence, as such judge. The question for consideration is one of first impression. Neither party has cited an authority directly in point, nor have we been able to find one, and must therefore rely upon those which appear to be analogous in principle.

It may be admitted that courts as a rule have not been disposed to recognize claims of privilege when interposed by witnesses to escape answering questions on the stand, except where it is clear that they are entitled to be so held. The tendency is to limit such privilege, rather than to extend it. The result is that relations which at one time made communications privileged between the parties are no longer recognized as having that effect. There no doubt are, however, circumstances and conditions which do and should attach to certain communications of that characteristic. The general principles governing such communications are laid down and discussed in Wigmore on Evidence, section 2285, as follows:

"Looking back at the principle of privilege, as an exception to the general liability of every person to give testimony to all facts inquired of in a court of justice, and having in view that preponderance of extrinsic policy which alone can justify the recognition of any such exception, * * * four fundamental conditions may be predicated as necessary to the establishment of a privilege against the disclosure of communications between persons standing in a given relation. (1) The communications must originate in a confidence that they will not be disclosed; (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) the injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation. These four conditions being present, a privilege should be recognized, and not otherwise."

The mere reliance upon the fact that a communication was made in consequence of some confidential or official relation will not in and of itself alone make such communication privileged. This is but one of four essentials. That particular condition undoubtedly was present relative to the communication under consideration. To determine the presence of the second condition, to-wit: that the element of confidentiality must be essential to the maintenance of the relation of the parties, we need only to refer to the statute creating juvenile courts. Chapter 158, Laws 1909, in defining the powers and duties of juvenile courts, in the cases of juvenile delinquency, begins as follows:

"Section 1. In all cases of dependent children, and in cases of delinquent children who are, as defined by section 12 of the act concerning delinquent children, to be treated not as criminals, but as needing aid, assistance, encouragement, help and education, and therefore where practicable to be tried under the chancery rather than the criminal jurisdiction of the court, as wards of the State. * * *"

The jurisdiction thus conferred in general terms is that of the English Court of Chancery. 16 Cyc. 28. This jurisdiction, so far as it applies herein, is discussed in 10 R. C. L. 340, as follows:

"Equity has full and complete control over the persons and property of infants, and all other persons laboring under legal disabilities, as idiots, lunatics and married women. The jurisdiction in these cases is plenary, and potent to reach and afford relief in every case where it may be necessary to preserve their estates and protect their interests. While the source of this jurisdiction is admittedly involved in some uncertainty, the doctrine now commonly maintained is that it represents a delegation to the chancellor by the crown of its rights as parens patriæ to interfere in particular cases for the benefit of such as were incapable of protecting themselves, that it belonged to the court of chancery and was exercised by it from its establishment, and that the jurisdiction exists in the United States by inheritance from the English courts of chancery, and not because equitable rights or titles are involved. While this is indeed a special exercise of equity jurisprudence, it is beyond question that by virtue thereof purely personal rights are frequently protected. Thus the protection of infants from their own parents is a well established exercise of equity jurisprudence for the protection of personal rights."

The relationship thus created between the parties is in the nature of that of guardian and ward, or parent and child, but without limitations of law, and is brought about by legal process for the purpose of aiding and uplifting delinquent and wayward children, in an effort to make them assets to the State rather than liabilities. This is a humane field of boundless possibilities for good, in which plainly the element of confidentiality between the judge of the juvenile court and

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such children is essential to the success of the enterprise.

The last two essentials referred to by Wigmore, supra, namely, that the relationship should be one which in the opinion of the community should be sedulously fostered, and where the injury to accrue by disclosure is likely to be greater than the benefit derived by non-disclosure, will be discussed together. The manifest purpose of the act is the reformation of wayward and delinquent children, in order to make worthy citizens of those who otherwise probably would become criminals. The jurisdiction of the court has been strictly and specifically limited to cases of this sort. Colias v. People, 60 Colo. 230, 153 Pac. 224; In re Songer, 177 Pac. 141. That this jurisdiction should be upheld and the relationship thereby created be fostered is manifest from the mere fact that, with general approval, the law creating such tribunal has been enacted and provision made for its support and maintenance. Plainly to destroy this relationship would in effect be to nullify and set aside the chief end and purpose of the enactment itself. It seems plain that anything which would probably bring about such a disaster would do more harm than could possibly be accomplished in good by allowing such testimony to be received because not privileged.

In discussing a juvenile court law similar to the one now under consideration here, in State v. Scholl, 167 Wis. 504, at page 508, 167 N. W. 830, at page 831, the Supreme Court of that State said:

"A democracy cannot long exist unless the great body of its voters be not merely intelligent, but moral. The children of to-day are the voters of to-morrow. It is the greatest concern of the State, therefore, that its children be preserved from vicious habits, for the vicious child is the father of the vicious man. The law before us may be said to be founded on these propositions. Its aim is to keep something like a parental watch over children who are neglected or wayward or both, and hence are subject to vicious influences; to bring them and their parents or guardians before an experienced and humane judge, who shall inquire into the situation, not with the awe-inspiring and frigid methods of a criminal court, but informally and intimately, like a wise and gentle elder brother, or like the good Samaritan of holy writ, and who shall, when fully advised, do that which is best for the child's future, either by way of sending it to an institution or by providing for kind and tactful but in no sense degrading surveillance for a limited time at home. It would be a public misfortune to set aside a law so designated, even though it were not perfect in details. Only the most weighty, and convincing considerations could justify such action, and we do not think they exist here. * * *

"It is sufficient to say on this point that the proceedings under this law are in no sense criminal proceedings, nor is the result in any case a conviction or punishment for crime. They are simply statutory proceedings by which the State, in the legitimate exercise of its police power, or, in other words, its right to preserve its own integrity and future existence, reaches out its arm in a kindly way and provides for the protection of its children from parental neglect or from vicious influences and surroundings, either by keeping watch over the child while in its natural home, or, where that seems impracticable, by placing it in an institution designed for the purpose."

In Illinois, the State which furnished the model for the juvenile courts of this State, the Supreme Court in upholding the constitutionality of the statute creating such court in Lindsay v. Lindsay, 257 Ill. 328, 100 N. E. 892, 45 L. R. A. (N. S.) 908, Ann. Cas. 1914A, 1222, said:

"The purpose of this statute is to extend a protecting hand to unfortunate boys and girls who, by reason of their own conduct, evil tendencies or improper environment, have proven that the best interests of society, the welfare of the State and their own good demand that the guardianship of the State be substituted for that of natural parents."

No more important and wholesome benefit in general is possible of attainment than that of making wayward and delinquent children clean, upright and useful citizens. That any relationship which tends to promote this highly desirable object should be encouraged goes as a matter of course. It is equally plain that anything which tends to destroy the trust of the child in the court which has jurisdiction over such matters must necessarily nullify all possibility of good which otherwise might thereby be accomplished. To permit the violation of a confidence made by a delinquent to the judge of the court having such matters in charge would at once remove the cornerstone of his faith in the one to whom he is authorized to appeal for help and protection. It may be that the broad powers and authority conferred by statute upon judges of juvenile courts are such that, in rare and exceptional cases, some judges may take advantage of them for ulterior motives, still, in determining the questions involved we are not dealing with isolated cases, or with any individual judge, but in a general way, with a most important system of jurisprudence, highly designed to promote the public welfare through the reclamation and betterment of delinquents, and which as maintained and ordinarily administered, is a vast power for good, concerning which no narrow construction should be indulged tending to weaken or discredit its work. In view of the wise and humanitarian object of the statute, which should be supported and upheld to the utmost legal extent, we are of the opinion that the communication in question falls within well recognized limitations governing privileged communications, and should,

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in the interest of the general good, be so treated by the courts.

It is argued, however, that the interview referred to was had before proceedings had been commenced in the juvenile court. The killing of the father took place about the middle of April, 1915. On May 18, the son was sent, either by the prosecuting attorney or by a minister of the gospel, who had interested himself in the case, to the juvenile court, where the interview in question with the judge was had. Between that date and the 8th of June no formal proceedings were instituted in the court against the boy. On the latter date the judge was called upon to state what took place between himself and the boy at that interview. It is contended that no official relation whatever had been established between the two and therefore the communication was not priveleged. It seems to be conceded, had such official relation been established, that then the communication would have been of that character.

The statute provides that all juvenile proceedings shall be informal, and that no record thereof shall be published. That the wards of the court are not criminals, but children needing helpful advice and kindly assistance. It is clear that these children are not to be dealt with formally, or in a distant and repelling manner. Upon the whole record it is manifest that the boy appealed to the court for the purpose of invoking its jurisdiction. He came in voluntarily, submitted all the facts to the judge of the juvenile court, seeking his advice and protection, and was therefore as much in court as if complaint had been filed against him and process duly issued and served. The plaintiff in error in his capacity as such judge therefore unquestionably acted in a confidential and official capacity and not otherwise. Upon the undisputed facts the communication in our opinion should be held privileged even under the terms of the fifth paragraph of section 7274, R. S. 1908, relative to that subject, as follows:

"Fifth. A public officer shall not be examined as to communications made to him in official confidence, when the public interests, in the judgment of the court, would suffer by the disclosure."

In any event it is apparent from the record that the relations established between the parties were such as to render the communication in question, in the strictest sense privileged, independent of statutory provision. To hold otherwise would be to declare that a judge of a juvenile court might, by fair promises, gain the trust and confidence of a child, and then betray it. This is not only repugnant to good morals, but to every principle of fairness and common justice. Such a rule would go far to utterly destroy the highly important object for which that court, with its special and peculiar jurisdiction, was primarily created.

A close analysis of the majority opinion plainly discloses that it is highly technical in character, narrow in construction, and little calculated to give helpful or any assistance in the enforcement of the juvenile court law, but rather to needlessly hamper and belittle it, to the end that its wise and humane purposes are in the main apt to be utterly defeated. I am distinctively of the opinion that the construction to be accorded this statute should in the very nature of things be broad and liberal. It is manifest that the one announced by the majority of this court fails utterly to take into consideration the material progress which has been made in judicially providing for the care, management and uplift of delinquent and wayward children through the establishment of courts like the one under consideration, and that consequently the construction given the act by the majority opinion is not in harmony with modern and enlightened jurisprudence. The judgment therefore of the trial court should be reversed and the cause dismissed.

I am authorized to state that Justices SCOTT and ALLEN concur in this dissenting opinion.

(66 Colo. 364)

VAN GILDER et al. v. EAGLESON.
(No. 9207.)

(Supreme Court of Colorado. June 2, 1919.)

1. CORPORATIONS ⟸170 — "STOCKHOLDER" — SUBSCRIBERS NOT RECEIVING CERTIFICATES.

Subscriber to stock in a corporation, who made payment on his subscription, was a "stockholder," whether or not he received his stock certificate, and if he had any equities as against the company they were inferior to the rights of creditors who became such after the date of his subscription.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Stockholder.]

2. CORPORATIONS ⟸80(11)—SUBSCRIPTION TO STOCK — ACTION FOR CANCELLATION—EVIDENCE.

In an action against a corporation by a subscriber to its stock to recover the money paid and to cancel the contract, evidence on behalf of the company and its receiver that debts in excess of a certain sum had been incurred by the company after plaintiff's subscription was competent.

3. CORPORATIONS ⟸80(10)—SUBSCRIPTION TO STOCK—RESCISSION FOR FRAUD—LACHES.

Where a subscriber to corporate stock, claiming he was induced to subscribe by fraud, took no action toward rescinding the subscription for two years, when he began suit, it will

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be presumed that in the two years credit was given the company, and his suit is barred by laches involving creditors of the company.

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Error to District Court, City and County of Denver; John T. Shumate, Judge.

Action by Joseph I. Eagleson against Hal D. Van Gilder, as receiver of the German-American Indemnity Company, and the German-American Indemnity Company. To review judgment for plaintiff, defendants bring error. Judgment reversed, and cause remanded, with directions to enter judgment for defendant as to its money demand, etc.

D. J. Davies and Percy S. Morris, both of Denver, for plaintiffs in error.

John R. Smith and H. B. Woods, both of Denver, for defendant in error.

TELLER, J. Defendant in error had judgment in an action to rescind a contract with plaintiff in error the German-American Indemnity Company on the ground of fraud.

The complaint, as amended, sets up a contract of employment of the plaintiff to sell stock for the company, with a provision that it might be canceled at the end of 60 days, in which case $1,500, paid on a subscription for 500 shares, and two notes of $750 each, paid for 500 additional shares, were to be returned to him. It was further alleged that the contract was obtained by fraud, and that the prescribed notice had been given, but neither money nor notes had been returned. The prayer of the complaint was for judgment for $1,500, with interest from the date of said notice, the return of the promissory notes, and the annulment of the contract.

The receiver filed an answer and cross-complaint, setting up, among other things, that there were claims against the company exceeding the amount agreed to be paid by plaintiff for his stock, which claims were obligations of the company incurred subsequent to plaintiff's subscription to the stock. In the cross-complaint demand was made for judgment on the two notes. In the answer to the cross-complaint it was alleged that the stock subscription was obtained by false representation.

Plaintiff had judgment for $1,500 and the surrender of his said notes. On the trial the receiver offered evidence that debts in excess of $3,000 had been incurred by the company after plaintiff subscribed for the stock, and that said debts were still unpaid. This evidence was rejected.

The refusal of the court to admit this evidence is assigned as error, as is also the court's refusal to hold that plaintiff could not rescind his contract for the purchase of stock as against the receiver, representing said creditors; the corporation being insolvent. If the last assignment is good, the first one is necessarily so.

The rule upon which counsel rely to show error is that a subscription to the capital stock of a corporation is, equally with money paid in on such subscription, a fund to which creditors may look for payment, and that, when the company is insolvent, the equities of creditors, who became such after a subscription was made, are superior to the rights of the subscriber, although he was induced by fraud to make the subscription. This is the settled doctrine of the federal courts, and is supported by the great weight of authority in state courts. Sanger v. Upton, 91 U. S. 56, 23 L. Ed. 220; Ogilvie v. Knox Ins. Co., 22 How. 380, 16 L. Ed. 349; Chubb v. Upton, 95 U. S. 665, 24 L. Ed. 523; Morawetz on Corps. § 108; Mehollin v. Carlson, 17 Idaho, 742, 107 Pac. 755, 134 Am. St. Rep. 286; Jones on Insolvent and Failing Corps. § 399; 10 Cyc. 441; Clarke v. Thomas, 34 Ohio St. 46; Turner v. Grangers' Ins. Co., 65 Ga. 649, 38 Am. Rep. 801; Bissell v. Heath, 98 Mich. 472, 57 N. W. 585; Scott v. Deweese, 181 U. S. 202, 21 Sup. Ct. 585, 45 L. Ed. 822. It is the universal rule in the English courts. Tierney v. Parker, 58 N. J. Eq. 117, 44 Atl. 151.

The basis of the doctrine is announced in C. F. & I. Co. v. Smelting Co., 13 Colo. App. 474, 59 Pac. 222, where it is said:

"The stocks of corporations, and particularly unpaid subscriptions, are a trust fund, sub modo, for the benefit of general creditors."

[1, 2] Plaintiff, having subscribed for stock and made payment on his subscription, was a stockholder, and it is immaterial whether or not he received the evidence of his interest in the company by way of a stock certificate. If he has any equities as against the company, they are inferior to the rights of the creditors who became such after April 12, 1912, the date of the stock subscription. The offered evidence as to creditors was, therefore, competent, and its rejection was error.

[3] It is further urged that the plaintiff is guilty of laches, by reason of which he has no right of action. He testified that his suspicions became aroused during May, 1912, but he took no action toward rescinding the subscription contract until May, 1914, when he began this suit. It will be presumed that in the said two years credit was given the company, even if there be no evidence of the fact, and in such case it is too late for him to assert a right to rescind. 10 Cyc. 442.

The rule is elementary that one claiming fraud in a contract must act promptly after he discovers the fraud, and he cannot delay action and speculate as to the outcome of the transaction, and repudiate it if it finally proves unprofitable.

The assignment of error on the ground that plaintiff was guilty of laches is good, and for that reason, also, the judgment cannot stand.

The judgment is accordingly reversed, and the cause remanded, with directions to enter

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judgment for the defendant as to the $1,500 demand, and for the amount of the two notes and interest as prayed in the cross-complaint.

GARRIGUES and BURKE, JJ., concur.

(66 Colo. 375)

SHARSHEL et al. v. SMITH et al.
(No. 9274.)

(Supreme Court of Colorado. June 2, 1919.)

1. ACTION ⟸25(2)—NATURE AND FORM—UNLAWFUL DETAINER—SPECIFIC PERFORMANCE.

Where an action was apparently intended as unlawful detainer, but both parties pleaded title and manner of deraignment, and defendants, though admitting a lease from one of the plaintiffs, claimed under a contract with such plaintiff's husband and asked for specific performance, and the judgment vested title in plaintiffs, the action will be deemed as for specific performance, and the issue of notice to quit was immaterial.

2. LANDLORD AND TENANT ⟸64—TENANT'S ESTOPPEL TO DENY LESSOR'S TITLE—CLAIM OF TITLE BY TENANT'S WIFE.

Where an owner contracted to convey to a married woman and her husband took a lease from the owner's wife, the rule that a tenant cannot deny lessor's title did not apply to the married woman's assertion of her right under the contract to convey against others, claiming through the owner with notice of the contract.

3. HUSBAND AND WIFE ⟸137(1) — WIFE'S SEPARATE ESTATE—HUSBAND'S AUTHORITY TO BIND WIFE.

The wife may acquire, hold, and dispose of her separate property independent of the will of her husband, and is not bound by his independent acts and conduct in relation thereto.

4. WITNESSES ⟸148 — TRANSACTIONS WITH DECEDENT—INTEREST OF HOLDER OF DEEDS IN ESCROW.

The holder of deeds in escrow had no such interest in the transaction that, after his death, a party to the deeds could not testify that he went to such holder and offered to perform the conditions entitling him to delivery of the deeds.

5. VENDOR AND PURCHASER ⟸121—ABANDONMENT BY VENDEE'S FAILURE TO PERFORM CONDITIONS OF ESCROW.

Where an agreement placed deeds in escrow until owner of the homestead sold should receive the receiver's certificate, and stipulated for a payment by purchaser on certain date, at which time payment was offered, but the certificate had not been issued and the owner was a fugitive from justice, there was no abandonment of the contract by the purchaser.

6. VENDOR AND PURCHASER ⟸78—TIME AS ESSENCE OF CONTRACT.

Where obligations of parties to contract of sale were concurrent, and time was not made the essence of the agreement, it cannot be so construed.

7. VENDOR AND PURCHASER ⟸185 — CONTRACT—FORFEITURE.

A forfeiture is strictly construed against the one who asserts it.

En Banc.

Error to District Court, Yuma County; H. P. Burke, Judge.

Action by John H. Smith and others against J. W. Sharshel and another. Judgment for plaintiffs, and defendants bring error. Reversed and remanded with permission to amend pleadings.

Wm. W. Garwood, Omar E. Garwood, George O. Marrs, and Wm. H. Gabbert, all of Denver, and Edward B. Simmons, of Wray, for plaintiffs in error.

M. M. Bukeley, of Wray, and Isaac Pelton, of Akron, for defendants in error.

SCOTT, J. This action was instituted by defendants in error as plaintiffs, against plaintiffs in error as defendants, and for convenience the parties will be so designated. The action was apparently intended as one in unlawful detainer, but both parties pleaded title and the manner of deraignment thereof, and judgment was rendered, vesting title to the premises involved in the plaintiffs, so that the action was in fact tried as one to quiet title.

The complaint alleged that the defendants Sharshel, entered into possession of the premises, being a quarter section of land in Yuma county, under a written lease from the plaintiff Myrtle Kuhring for a period of one year dated March 12, 1914; that defendants held over under a verbal lease for an additional year, and that, though due notice was given to quit, they refused to do so, and still unlawfully hold possession.

It was further alleged that the land had been the homestead of John F. Kuhring; that Kuhring submitted his final government homestead proof on October 27, 1913; and that final homestead receipt was issued to Kuhring on February 21, 1914, and that government patent issued later.

The complaint further alleged that the plaintiff Myrtle Kuhring, wife of the homestead entryman, instituted suit in the district court of Yuma county against Kuhring, and attached and was decreed a two-thirds interest in the premises.

Further, that J. B. Campbell filed suit in the county court of Yuma county against Kuhring and attached the land; that the plaintiffs John F. Heiserman & Son intervened in said suit, and that Campbell and Heiserman & Son obtained judgment against Kuhring; that a one-third interest in said land was sold under execution to Campbell

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and Heiserman & Son, to satisfy said judgment, who thus became and have ever since been the owners thereof.

The complaint further alleged that Myrtle Kuhring had sold the two-thirds interest in the premises to plaintiff John H. Smith, who is the owner of the same; that J. B. Campbell has since died; and that plaintiff Ella Campbell is the executrix and sole heir of Campbell.

The separate answer of the defendant Lizzie A. Sharshel was a general denial, and an affirmative defense alleging that on the day that Kuhring made his final proof, November 11, 1913, he entered into a written contract of sale and purchase with the defendant, for the premises, whereby Sharshel conveyed to Kuhring certain town lots in Red Cloud, Neb., by warranty deed, subject to an incumbrance of $1,500, and that Kuhring conveyed to defendant by warranty deed the homestead lands in question; that the two deeds were deposited with the First National Bank of Yuma on the same day, together with the written agreement, which included, among other things, the following:

"It is agreed by both parties that as yet the said party of the first part has not received the Register's duplicate certificate for said land for the reason that the land as above described is in the territory withdrawn from settlement on account of the resurvey, and that this deed with a copy of this contract shall be held in escrow by above said bank until said receipt is received by the said first party and placed on record.

"It is agreed by all parties herewith concerned that from the date of November 20, 1913, that each party is to take possession of the property as agreed to exchange, and to use and enjoy same from said date until this contract is completed. And in case the above party of the first part shall fail for any reason to comply with his part of this contract that the possession of said premises shall revert to the present owners.

"It is agreed that this contract shall be completed as soon as the above-mentioned register's duplicate certificate is received."

The escrow agreement further provided for a cash payment by Mrs. Sharshel of $500, but later amended to provide that this payment should be made within 30 days from the date of the agreement. It was further provided that Mrs. Sharshel should execute and deliver to Kuhring a mortgage for $1,500 on the homestead lands.

The answer then alleges that the defendant, at once and under and by virtue of said agreement, entered into possession of the premises herein involved, and has since remained in exclusive, open, and notorious possession thereof.

Further, that Kuhring immediately left the county, and has ever since been absent; that on the 30th day of December, 1913, Myrtle Kuhring commenced her action against John Kuhring for divorce, and under service by publication, and that a decree was rendered divorcing the parties and decreeing a two-thirds interest in the premises to Myrtle Kuhring.

The answer admits the sale under execution to Campbell and Heiserman & Son, as pleaded in the complaint.

It is alleged that all parties had full notice of the contract between the defendant Lizzie A. Sharshel and Kuhring under such contract; further, that defendant had demanded such contract from the bank for the purpose of recording the same, and had been refused; that Campbell was president of the bank, and knew of such agreement, but did not make the defendant a party to the suit against Kuhring, and that she had no knowledge that her title was involved in either suit.

It was further alleged that the defendant has at all times, and does now, stand able, ready, and willing to perform her obligations under the contract, and that Kuhring, being a fugitive from justice, defendant is unable to recover the property conveyed to him, or to recover damages.

That the only remedy of the defendants is a specific performance of the contract, which she prays, and that title be quieted in her.

Defendant J. W. Sharshel filed a similar answer. At the close of defendant's testimony the court directed judgment for plaintiffs.

The contract and deeds were proven as pleaded. There was a lease executed by Myrtle Kuhring to J. W. Sharshel as pleaded, except that it was not to the defendant Lizzie A. Sharshel. This was dated March 12, 1914, and while the Sharshels were occupying and living upon the premises and under the contract, as claimed by them.

The court found that in legal effect the defendants were occupying the premises under the lease from Myrtle Kuhring to J. W. Sharshel, saying:

"The husband is supposed to arrange for the domicile of the family, and he was arranging it in this instance, and he was living with his wife, and he as the head of that family entered into a contract or lease for the premises."

Judgment was rendered, declaring the plaintiffs to be the owners of the land, and so entitled to possession.

[1] There is much discussion in the briefs concerning the sufficiency of the notice to quit, alleged to have been served prior to the commencement of the action. But under our view of the case this is not important. The action was tried, and judgment rendered as in an action to quiet title, and will be so considered.

So far as we observe, the court ignored all other questions in the case save and except that of the lease. The rights of the defendant under her contract of purchase and the validity of the title under which plaintiffs claim seem not to have been considered.

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There can be no question under the testimony but that all plaintiffs claiming title, or through which title is claimed, by them, had actual notice of the agreement between Kuhring and Mrs. Sharshel, or at least sufficient notice to put them on inquiry.

Mrs. Sharshel was not a party to the lease, and under the circumstances of this case cannot be held to be bound by her husband's action in signing that instrument.

[2, 3] Therefore the doctrine that a tenant is estopped to deny the title of his lessor can have no application. She claims under her individual contract with the original owner of the land, for the purchase of the same, and if she has not forfeited that contract, then whatever rights or interests the plaintiff or either of them may have in the premises are subject to her rights under the contract, having taken with actual notice. In this state the wife may acquire, hold, and dispose of her separate property independent of the will of her husband, and is not bound by his independent acts and conduct in relation thereto.

The rule in this respect is well stated in Shew v. Call, 119 N. C. 450, 26 S. E. 33, 56 Am. St. Rep. 678, where it is said:

"The case states that the husband rented and paid rent to defendant's devisor. But this does not make the plaintiff his tenant. Tenancy is the result of a contract between the landlord and the tenant, whereby in legal contemplation the tenant admits the title of the lessor, and will not allow him to dispute this title while he still remains in possession. And it is true that this estoppel is held to apply to privies as well as to the original lessee. But it is the contract, followed by possession, that creates the estoppel. Possession without the contract will not.

"But the plaintiff is not affected by this rule. She made no contract with Call. It is not contended she did. And though she is the wife of Peyton Shew, she is no privy in estate, under or through him. She claims no estate through, by, or under his contract with Call. Privy means a privity in estate—a property right acquired from the lessee by contract or inheritance. Bigelow on Estoppel, p. 142. A. may be the son of B., but this creates no estoppel unless A. takes some estate under B., either by purchase or inheritance.

"We therefore hold that the plaintiff is not the tenant of the defendant, nor is she a privy in the estate under her husband, and is not estopped to bring and prosecute this action."

Mrs. Sharshel claims under an undisputed contract of purchase, and her rights must be determined under that contract alone. If that contract has not been forfeited, she has, under the circumstances of the case, the clear right to rely on it and to demand its specific enforcement.

In her affidavit to secure publication of summons in the divorce suit, Myrtle Kuhring alleged that her husband was a fugitive from justice, and that she knew nothing of his whereabouts since December 28, 1913, and that he was negotiating with a gentleman from Red Cloud, Neb., for the sale of his homestead. This affidavit was made February 3, 1914.

While the date of the judgment for divorce and alimony does not appear, yet from the date of this affidavit of publication it is made clear that such judgment could not have been rendered until after the date of the lease to J. W. Sharshel, March 12, 1914, and therefore at the time of its execution Myrtle Kuhring could have had no right or title to the premises.

We now come to the question as to whether or not under the testimony appearing in the case the defendant Lizzie A. Sharshel had forfeited her contract of purchase, at the time of the institution of this suit.

The contract provided that the deeds were to be held in escrow until Kuhring should receive and record his final receipt. This receipt was not issued until February 1, 1914. On that date Kuhring was a fugitive from justive and has been such ever since.

[4] Apparently it was assumed when the contract was executed, that the receipt would be received within the 30 days in which the $500 was to be paid. But during that period, under all the testimony, Kuhring was a fugitive from justice. The defendant offered to prove by two witnesses, J. W. Sharshel and one Higgins, that Sharshel, as her agent, went to the First National Bank of Yuma on the 27th day of December, 1913, for the purpose of, and ready and willing to, make the $500 payment on the contract, and offered to do so, and that such offer was rejected by the court, apparently for the reason that the officer so refusing was Mr. Campbell, the president of the bank, and at the time of the trial deceased. This was clearly error, and was not a case within the statute. The testimony went to the matter of the effort to comply with a contract, in which Mr. Campbell had no sort of personal interest whatever.

[5] This testimony was not only competent, but, if true, would have established that the defendant has made every reasonable effort to perform her part of the agreement. This offer to pay to the bank which held the escrow agreement was made before the issuance of the receiver's receipt, and therefore before the agreement could be fully completed. The bank refused to receive payment, and Kuhring was a fugitive.

The defendant therefore was refused acceptance of the payment by the escrow holder, and Kuhring had absconded. The failure to perform in that respect was not the fault of defendant, but was the fault of the other party to the contract. She cannot be held liable. Smith v. Roe, 7 Colo. 95, 1 Pac. 909.

[6] By the terms of the contract, the ob-

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ligations of both parties were concurrent. Time was not made the essence of the agreement, and therefore it cannot be so construed. Byers v. Denver Circle R. Co., 13 Colo. 552, 22 Pac. 951. Kuhring is not a party to this action. He and no other person has demanded the payment of the $500, and he has not asked to be released because of any failure upon the part of Mrs. Sharshel to comply with any condition of the agreement.

[7] A forfeiture is strictly construed against the one who asserts it. Placer Co. v. Maxwell, 24 Colo. 87, 48 Pac. 815.

Under the state of facts Mrs. Sharshel is clearly in position to demand, in a proper proceeding for that purpose, the specific performance of the contract. It will be observed that the contract does not provide for forfeiture, and none will be inferred.

The sum of $500 and the agreed incumbrance of $1,500 upon the property is the only interest that Kuhring can have in the premises under the contract, until that contract shall have been lawfully declared to be forfeited.

There are two questions argued which we do not find it necessary or proper to determine at this time. It is first urged that a personal judgment for alimony cannot be recovered in a divorce proceeding upon constructive service, and, further, that the judgment claims of Campbell and Heiserman & Son are invalid as being based upon debts contracted prior to the issuance of the homestead patent in violation of the federal statute.

However these matters may be finally determined, under our view of the case the rights of the parties are subject to the determination of the rights of Mrs. Sharshel under her contract.

The judgment is reversed, and the cause remanded, with permission to the parties to amend their pleadings as they may be advised.

ALLEN, J., dissenting.
BURKE, J., not participating.

(105 Kan. 29)

NELSON v. ELGIN STATE BANK.*

(No. 21848.)

(Supreme Court of Kansas. June 7, 1919.)

(Syllabus by the Court.)

1. BANKS AND BANKING ⟸112—CRIMINAL ACT OF CASHIER—RATIFICATION BY DEPOSITOR.

The criminal act of a bank cashier in abstracting funds of his bank is not capable of ratification by a defrauded depositor to whose account the funds were charged.

2. BANKS AND BANKING ⟸154(8)—DEPOSITS—LOAN BY CASHIER—AUTHORITY—RATIFICATION.

The evidence examined, and *held* sufficient to sustain a verdict implying that a bank cashier was without authority to lend the funds of a depositor, and that the depositor did not ratify loans which he claimed he did make.

Appeal from District Court, Chautauqua County.

Action by Minnie Loyd Nelson against the Elgin State Bank. Judgment for plaintiff, and defendant appeals. Affirmed.

J. A. Ferrell, of Sedan, for appellant.
A. D. Neale, of Chetopa, and J. E. Brooks, of Sedan, for appellee.

BURCH, J. The action was one to recover a bank deposit. The defense was that the deposit was fully paid out to the plaintiff personally, or upon her specific order and direction. The plaintiff recovered, and the defendant appeals.

[1, 2] The defendant collates with care, and urges upon the attention of the court testimony and circumstances tending to prove the plaintiff authorized the defendant's cashier to lend the money standing to her credit on the books of the bank, which he did. The plaintiff points to testimony and circumstances tending to disprove the conferring of any such authority. The debate which took place before the jury is renewed here, with the result which always attends debates of that kind. The evidence was indeed conflicting. If the testimony of the plaintiff were not fully consistent in all details, it seems the defendant's chief witnesses were scarcely believed at all. The jury has resolved the matter. All this court can do is to ascertain whether or not there was substantial evidence which, if credited, supported the verdict, and there was.

The defendant contends that if the cashier did not in fact possess antecedent authority to lend the plaintiff's money, the plaintiff ratified loans which he did make. Knowledge of the facts relating to the transactions was essential before intention to be bound by the cashier's conduct could be imputed to the plaintiff, and the court so instructed the jury. The story of how the plaintiff's money was actually used, of how she was kept in ignorance of the truth despite repeated efforts to secure an explanation of what had been done, and of how the defendant tried to overreach her at the end, is a sordid one, the details of which will be omitted. It is sufficient to say the jury was well within its province when it declined to bind the plaintiff by ratification.

The cashier's name was Black. He claimed he lent the plaintiff's money to two men, Mallonee and Thompson. The books of the

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes
* Rehearing denied July 5, 1919.

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bank disclosed that the money was transferred from the plaintiff's account to the account of Mallonee and Thompson. There was evidence that Mallonee and Thompson were heavily indebted to Black, to the bank, and to others, and needed the money. There was ground for the inference that the notion of a loan of the plaintiff's money to Mallonee and Thompson by virtue of authority given Black was a subterfuge and an afterthought. The court instructed the jury as follows:

"If you believe from the evidence that R. W. Black abstracted from the bank money for the purpose of crediting the account of Mallonee and Thompson on the books of the bank, but that Mrs. Nelson had not directed Black to loan her money, then you are instructed that the question of ratification will not be considered by you."

The defendant complains of this instruction, which was based on section 44 of the banking act, making it a felony for the cashier of a bank to abstract moneys of the bank. Gen. Stat. 1915, § 557.

In the case of Howell, Jewett & Co. v. McCrie, 36 Kan. 636, 14 Pac. 257, 59 Am. Rep. 584, this court definitely and positively declined to recognize ratification of a criminal act, done without authority, in such a way as to give it a status equivalent to that of an act done by previous authority. The signature to a mortgage upon a woman's homestead was forged, and a certificate of her acknowledgment of execution of the instrument was forged. In the opinion it was said:

"We will not stop to discuss the question as to whether the act of Stoner in signing the name of his wife to the mortgage, or procuring some other person to do so, is a void or a voidable act, and if void not subject to ratification. * * * A criminal act is not capable of ratification. * * * We will not temporize or refine with this question. It may be said that the wife should be permitted to ratify the mortgage so far as the innocent mortgagee is concerned, he having no knowledge of the fraud; but the answer to this is that both the signatures to and the certificate of the execution and acknowledgment of the mortgage are criminal acts, and cannot be ratified for any purposes. It is always the case that some innocent persons suffer by reason of the commission of a criminal act, for no good results can flow from it, nor any rights be acquired by it or in consequence of it. We cannot conceive of any state of facts or any chain of circumstances, except it possibly be by estoppel, whereby any person can acquire any interest, estate, or lien upon real estate by an instrument to which signatures are forged, and a false certificate of acknowledgment is attached." 36 Kan. 653, 654, 14 Pac. 266, 59 Am. Rep. 584.

The doctrine announced in the McCrie Case was approved and applied in the case of Redden v. Tefft, 48 Kan. 302, 29 Pac. 157, which likewise involved forgery. The public policy which underlies the doctrine makes it peculiarly applicable to crimes committed by bank officers in dealing with funds of their banks.

The intimation in the opinion in the McCrie Case that one who has been represented by another without authority may become bound by estoppel, although the transaction involved crime, is in accord with the authorities. 2 C. J. 472. In this instance estoppel was neither pleaded nor proved, and the instruction was properly given.

The judgment of the district court is affirmed.

All the Justices concurring.

(105 Kan. 59)

DOLNAK v. SONS AND DAUGHTERS OF JUSTICE et al. (No. 22013.)

(Supreme Court of Kansas. June 7, 1919.)

(Syllabus by the Court.)

1. INSURANCE ⟸792—FRATERNAL BENEFIT SOCIETY—ACTION ON CERTIFICATE—DEMURRER TO EVIDENCE.

In an action against a fraternal beneficiary society upon a certificate payable upon the death of the holder, the defense interposed was that the beneficiary had accepted a payment of a part of the amount named in full satisfaction of his claim. The plaintiff in reply alleged that the settlement was induced by fraud. On the trial of this issue the plaintiff's evidence showed that the society had refused payment of the full amount under a claim on its part that it could show that he was not a relative of the person to whom the certificate had been issued, although described therein as her nephew, and that he had been instrumental in her death; that he knowingly accepted the less amount in full satisfaction of his demand, and was induced thereto in part by the consideration that if he was compelled to bring suit delay and expense would result. *Held*, that a demurrer to the evidence was properly sustained, there being nothing to show fraud or mistake.

2. COMPROMISE AND SETTLEMENT ⟸18(3)—FRAUD—TENDER.

Where the sole defense interposed in an action on a money demand is that a settlement in full had been made in consideration of the payment of a part thereof, the plaintiff is not required to tender the amount received in order to be heard upon a reply seeking to avoid the effect of the settlement on the ground that it was procured by fraud.

Appeal from District Court, Wyandotte County.

Action by Vinka Dolnak against the Sons and Daughters of Justice, A. V. Lodge, as National President of the Sons and Daughters of Justice, A. V. Lodge, and Henry C.

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Myers. Demurrer to plaintiff's evidence sustained, and he appeals. Affirmed.

Ward & Glandon and David F. Carson, all of Kansas City, for appellant.

J. B. Tomlinson, of Independence, for appellees.

MASON, J. Kata (or Katie) Zebic died while a member of the Sons and Daughters of Justice, a fraternal beneficiary society, her certificate for $1,650 being made payable to Vinka Dolnak, described as her nephew. The society paid Dolnak $1,000, taking from him a receipt acknowledging that this sum was accepted by him in full satisfaction of his claim. Later Dolnak brought action against the society for $650 as the balance due him. The society pleaded the settlement referred to, to which the plaintiff replied that it had been obtained by "fraud, misrepresentations, and impositions." A demurrer to the plaintiff's evidence was sustained, and he appeals.

The plaintiff has some knowledge of English, but is not proficient in it. His testimony was given in part with and in part without the aid of an interpreter. Neither portion as preserved in the record reads very smoothly, but there is no real difficulty in arriving at the essential meaning of either. The interpreter gave this version of his statement of the reason why he took the $1,000 in lieu of $1,650:

"He said they scared him; he said he told him that the lawyers would get half and maybe more, and he said that he never been in court before and they just got him scared; that is why he took the money, the $1,000. * * * He said that Dr. Lodge [the society's representative] scared him with this, there were quite a few people that were against him, that they were going to prove that he was not any relation at all to this woman; not only that, but that he maybe killed her; and that scared him, and he said he just took the money."

Speaking for himself, the witness said:

"I says, 'I want my money.' He [Dr. Lodge] says I can't give that money somebody against me, I don't know who, I can't get that money, but maybe that money go in courthouse, maybe stay about two years and maybe more, and he don't want trouble with you, you know I stick to you, something like that, he says; the best thing you do to settle the insurance. * * * He says somebody against me, maybe I kill that woman, something like that, when she get killed, you know. Lots of people against me, he says. like that. He don't know who against me, nobody against me, I don't know who was that. * * * He says maybe that war all over, maybe I get that money; that money stay in court, the court and lawyer eat your money, he says; I never been in courthouses before, you know. The lawyer will eat your money, if you want the lawyer, maybe you get half your money, something like that; you loss anyway, if you don't want to settle for $1,000. I received $1,000. I took the $1,000; they scared me. He said that all the money would be gone to the court is why I took this $1,000. I believed what they told me. I never been in court before. He says they said they would put it in the court he said until the war is over, and then I will have to need, he said, a lawyer."

[1] 1. From this evidence it is clear that, however ignorant the plaintiff may have been, he understood that the society refused to pay the full amount of his claim without a suit, giving as a reason that it might be able to prove that he was responsible for the death of the holder of the certificate, or that he was not related to her, that, if he accepted the smaller amount, he took it in satisfaction of his entire claim; and that to induce him to do so it was represented to him that if he brought an action it would involve delay and the expense of employing an attorney.

If the society could have shown that the plaintiff was not a relative of Kata Zebic, or that he had caused her death, it would have been relieved of all liability to him. The fact that it might in that case have been liable for the full amount to some one else does not affect the matter. The defense which it proposed to make was legally sufficient and one it had a right to interpose. The argument that a compromise would avoid delay and expense was legitimate. We do not regard the evidence as making a prima facie case for the avoidance of the settlement. There is nothing to indicate that in disputing the plaintiff's claim the defendant acted in bad faith. No fraud or mistake is shown. No statement made by the society's representative was untrue. A mere showing that the plaintiff was the nephew of the holder of the certificate and that he was not instrumental in her death—in other words, that he had a valid claim for the full amount—is not a ground for setting aside the compromise. Odrowski v. Swift & Co., 99 Kan. 163, 162 Pac. 268; 12 C. J. 324; 5 R. C. L. 893.

"Where a claim is unliquidated or in dispute, payment and acceptance of a less sum than claimed in satisfaction operates as an accord and satisfaction, in the absence of fraud, artifice, mistake, or imposition, as the rule that the receiving of a part of the debt due, under an agreement that the same shall be in full satisfaction, is no bar to an action to recover the balance, does not apply, where plaintiff's claim is disputed or unliquidated. Under these circumstances there is a sufficient consideration for the settlement. The fact that the creditor was not legally bound to make any abatement of his claim, or that the amount accepted was much less than the creditor was entitled to receive and would have recovered had he brought action, or that he was induced to accept a part of his claim by fear that he would lose the whole of it, does not in any way affect the operation of the rule, and it is of no importance which of the parties was right in his contention." 1 C. J. 551–553.

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[2] 2. The defendant urges as a further ground for affirming the rule sustaining the demurrer to the evidence that the plaintiff was required to tender a return of the money he had received in the settlement before he could be heard in an action brought to set it aside as fraudulent. It concedes that to hold this would involve the overruling of Carver v. Fraternal Citizens, 103 Kan. 824, 176 Pac. 634, and asks a re-examination of that case. There, as here, the defendant resisted the payment of the whole amount of the plaintiff's claim solely in reliance upon the compromise. This situation therefore was presented: If the plaintiff prevailed, there could be no occasion for the return of the money, because, the settlement having been set aside, no defense to the payment of the full amount remained; and, if the defendant prevailed, there could be no occasion for its return, because, the settlement having been upheld, it was properly made thereunder. If the defendant had pleaded and relied upon a defense which, if sustained, would have entitled him to a recovery of the money that had been paid, a different question would have been presented. It could then have been argued with some plausibility that, if the compromise should be set aside and it should be adjudged that the defendant owed nothing, the plaintiff might be enabled to retain the benefit of the settlement and at the same time cause it to be annulled.

The judgment is affirmed.

All the Justices concurring.

(105 Kan. 112)

SCHLAUDT v. HARTMAN et al.
(No. 22206.)

(Supreme Court of Kansas. June 7, 1919.)

(Syllabus by the Court.)

APPEAL AND ERROR ⟸1010(1)—FINDING OF TRIAL COURT—REVIEW.

The rule is followed that, where the finding of a trial court is sustained by sufficient evidence, this court is bound by that finding, although, under the same evidence, a different conclusion might have been reached.

Appeal from District Court, Reno County.

Action by A. A. Schlaudt against John Hartman and another. Judgment for defendants, and plaintiff appeals. Affirmed.

E. T. Foote, of Hutchinson, for appellant.

C. M. Williams and D. C. Martindell, both of Hutchinson, for appellees.

MARSHALL, J. The plaintiff appeals from a judgment refusing to confirm a sheriff's sale of real property and setting aside that sale. The sale had been made pursuant to a levy under an execution issued on a judgment rendered in favor of the plaintiff and against the defendants. The defendants claimed, and the court found, that the property was their homestead. The plaintiff contended that the property was not the defendants' homestead, and that contention is now presented to this court. This necessitates an examination of the evidence to see whether there was evidence sufficient to support the finding of the court. The only oral evidence abstracted is that of the defendants. Their evidence showed that John Hartman purchased the property in 1876; that he lived thereon with his family for more than 30 years; that the defendants then left the property in question and went to a farm which Hartman rented in Reno county; that the defendants lived on several rented farms in that county, and afterward moved back to Hutchinson, but did not move onto the premises in controversy until about the time the execution was levied thereon; that when the defendants moved to the country, they went for John Hartman's health; that during all of the time they were absent from the property in controversy they intended to move back onto it; that for that reason they had not sold it; and that they did not acquire a homestead elsewhere. That evidence tended to show that the homestead had not been abandoned. However, there was evidence which did tend to show that the homestead had been abandoned. That evidence showed that John Hartman rented the property to other parties; that he voted in the several townships in the county in which he lived; that he was elected road overseer in one of those townships; that he was a candidate for the office of sheriff in Reno county, and advertised himself as a farmer candidate from the township in which he was then living.

Under the evidence, it was the duty of the trial court to determine whether or not the homestead had been abandoned. There was evidence on which the court could find either way. That compels this court to apply the rule that, where the finding of a trial court is sustained by sufficient evidence, this court is bound by that finding, although, under the same evidence, a different conclusion might have been reached. Safford v. Tibbetts, 104 Kan. 224, 178 Pac. 618. Numerous other cases might be cited.

The judgment is affirmed.

All the Justices concurring.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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(105 Kan. 127)

COX v. CHALFANT. (No. 22225.)

(Supreme Court of Kansas. June 7, 1919.)

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(Syllabus by the Court.)

BROKERS ⊂=94—BROKER'S CONTRACT TO SELL —AUTHORITY.

In answer to an inquiry, the owner of a tract of land wrote a real estate agent: "I will sell the N. E. ¼ * * * for $2,800 net to me. This for immediate acceptance"—and signed his name. *Held* not to constitute authority for such agent to bind the owner by a written contract to sell to a third party.

Appeal from District Court, Elk County.

Action by J. M. Cox against William Chalfant, Jr. Demurrer to petition sustained, and plaintiff appeals. Affirmed.

I. N. Jett, of Elk City, and Thomas E. Wagstaff, of Independence, for appellant.

Wicker & Badger, of Eureka, C. B. Crawley, of Howard, and Chester Stevens, of Independence, for appellee.

WEST, J. In answer to an inquiry the defendant wrote to L. B. Davis:

"T. W. Marshall & Co., Investments.

"West Chester, Pa., April 20, 1918.

"William Chalfant, Jr.

"Mr. L. B. Davis, Elk City, Kansas—Dear Sir: I have your letter of April 17, and note contents. I will sell the N. E. ¼ of 22—31—13, Elk county, Kansas, for $2,800 net to me. This for immediate acceptance.

"Yours truly, William Chalfant, Jr."

The plaintiff, J. M. Cox, alleged that he entered into a written agreement with Davis, agent for Chalfant, for the sale of the property for $2,800, paying $500 cash, with an agreement to furnish abstract of title to the land—

"showing title to be perfect and clear of all incumbrances or liens of any kind or nature. * * *

"It is also agreed to by the second party, upon the delivery of said deed and abstract, to pay over to the said first party, through the First National Bank of Elk City, Kansas, acting as agent for the first and second parties, the remainder, $2,400 balance due.

"L. B. Davis,
"Agent for William Chalfant, Jr.
"J. M. Cox."

Failure of the defendant to comply was alleged. To this petition a demurrer was sustained, and the plaintiff appeals.

It is said that the demurrer was sustained because Davis had no written authority to bind Chalfant, and that the contract, therefore, was within the statute of frauds. While the agent might have claimed his commission for procuring a purchaser, we do not find any authority for him to enter into any contract of sale on behalf of the owner. Assuming that Davis was known to Chalfant to be a real estate agent, the letter amounted to a listing of the property for sale on the terms set forth.

"A real estate broker or agent * * * has no implied authority to bind the principal by signing a contract of sale." Sullivant v. Jahren, 71 Kan. 127, 79 Pac. 1071, Syl. 1.

The terms of the contract, at least as to the abstract, the place of payment, and the mutual agency of the Elk City Bank, were not embraced in the letter. In Greenawalt v. Este, 40 Kan. 418, 19 Pac. 803, it was held that the agent, in the absence of any stipulation, had no authority to make the purchase price payable elsewhere than at the place of the owner's residence.

But, aside from these matters, the authority of the alleged agent was no broader than the quoted letter. The document is a statement of a willingness to sell on the terms specified, but does not attempt or purport to clothe the addressee with any power to make a contract of sale for the writer. Indeed, the contract itself states that it is between Cox and Davis, agent for Wm. Chalfant, or Chalfant's heirs, and is not signed "Chalfant, by Davis, Agent," but "Davis, Agent for Wm. Chalfant, Jr." Hence, neither the letter nor the contract, presumably prepared by Davis, shows authority or expresses an attempt to contract in the name of the defendant. In Helling v. Darby, 71 Kan. 107, 79 Pac. 1073, the owner wrote to the real estate agents:

"I must have $1,600 (sixteen hundred dollars) in cash. You can have all you get over and above that, and I reserve the crop."

It was said (71 Kan. 108, 79 Pac. 1074):

"The letter written by Darby to plaintiffs did not give to the latter an exclusive right to sell the land, nor did it authorize them to enter into a contract of sale in Darby's name which would be binding on him. They were empowered to find a purchaser only."

See, also, Brown v. Gilpin, 75 Kan. 773, 90 Pac. 267, and cases cited; Corley v. Ehlers, 99 Kan. 748, 163 Pac. 140; Schuhmacher v. Lebeck, 103 Kan. 458, 173 Pac. 1072, L. R. A. 1918F, 788; McCarter v. Rogers, 104 Kan. 204, 178 Pac. 621.

In Singleton v. Hill and others, 91 Wis. 51, 64 N. W. 588, 51 Am. St. Rep. 868, relied on by the plaintiff, the owner wrote a letter to his agent, accepting an offer made by a purchaser, and after notification of such acceptance by the agent, who received a payment and put the purchaser in possession, the seller conveyed to another, who had knowledge of the facts. The letter making the offer, with the one accepting it, were

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properly held a sufficient memorandum under the statute of frauds as it then existed in Wisconsin. But the decision is not applicable to the situation presented by the record now before us.

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The demurrer was properly sustained, and the ruling is affirmed.

All the Justices concurring.

(105 Kan. 51)

REISACKER v. REISACKER. (No. 21984.)*

(Supreme Court of Kansas. June 7, 1919.)

(Syllabus by the Court.)

1. DECREE OF DIVORCE—EVIDENCE.

The evidence examined, and *held* to justify the granting of the divorce.

2. DIVORCE ⟸240(1)—AWARD OF ALIMONY—PROPRIETY.

The award of alimony, in view of all the evidence and circumstances shown, *held* proper.

Appeal from District Court, Wyandotte County.

Action for divorce by Peter Reisacker against Sallie E. Reisacker. Decree for plaintiff allowing defendant alimony, and defendant appeals. Affirmed.

Francis E. Howe, of Kansas City, for appellant.

George W. Littick, of Kansas City, for appellee.

WEST, J. The defendant appeals from a decree granting the plaintiff a divorce and giving the defendant $500 alimony, claiming that the evidence did not justify the former, and that the latter was too small a sum in view of what she had contributed to the plaintiff's estate.

[1] Both parties were of mature years, and each had children by a former spouse. After their marriage in 1912 the record shows a most wretched condition of affairs. Whatever might be said of the plaintiff's conduct, there was abundant evidence to justify the granting of the divorce on account of the defendant's cruelty and gross neglect of duty. To state or even quote from this evidence would not tend to edification and is not necessary.

[2] The defendant testified that she had furnished to the plaintiff certain sums of money received for property formerly owned by her, but it is not clear either from the abstract or briefs how much she claimed these sums amounted to, though apparently somewhat in excess of $500. The plaintiff testified that she had not increased his estate, but that she had cost him at least $1,400, and that he owed $1,400 with two years' back taxes. The value of his land was by other witnesses fixed at $2,500. This would leave him an estate of $1,100, and the award of $500 alimony—the plaintiff being required to pay the costs said to amount to $171.45 and a fee of $150 to the defendant's attorney—seems as severe on the plaintiff and as liberal to the defendant as equity and good conscience require.

The decree is affirmed.

All the Justices concurring.

(105 Kan. 99)

BECKER v. KANSAS CASUALTY & SURETY CO. (No. 22196.)*

(Supreme Court of Kansas. June 7, 1919.)

(Syllabus by the Court.)

1. INSURANCE ⟸250(1)—HEALTH AND ACCIDENT POLICY—CONSTRUCTION OF STATUTE.

The statute (Laws 1907, c. 226) which provides in effect that no misrepresentation made in obtaining a policy on the lives of persons shall be deemed material or render the policy void unless the matter misrepresented shall have actually contributed to the contingency on which the policy is to become due applies to a policy issued by a health and accident insurance company giving indemnity for loss of life by accidental means.

2. INSURANCE ⟸253 — HEALTH AND ACCIDENT INSURANCE—APPLICATION—MISREPRESENTATIONS.

The application for insurance contained statements as to existing physical conditions and of things done and that had not been done by the insured, "except as herein stated." No exceptions were stated, but the statements were followed by check marks. It is *held* that the statements so made are to be regarded as positive declarations of fact, and that they constitute a part of the contract of insurance.

3. INSURANCE ⟸300—HEALTH AND ACCIDENT INSURANCE — MISREPRESENTATIONS — MATERIALITY.

False representations by the insured which affect the moral risk, such as that he had not applied for or taken out other insurance of the same kind, or that he had never received indemnity for accident or illness, while they cannot be regarded as having directly contributed to the accidental death of the insured, are not within the scope or purpose of the statute mentioned, and are not rendered immaterial by the statute.

Johnston, C. J., dissenting.

Appeal from District Court, Sedgwick County.

Action by Carrie E. Becker against the Kansas Casualty & Surety Company. Judgment for plaintiff, and defendant appeals.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied July 5, 1919.

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Reversed, with direction to enter judgment for defendant.

Stanley, Stanley & Hegler, and Geo. L. Siefkin, all of Wichita, and William Morheiser, of Chicago, Ill., for appellant.

Wilson, Madalene & Hudson, of Wichita, for appellee.

JOHNSTON, C. J. Carrie E. Becker was the beneficiary in an accident and health insurance policy procured by her husband, Jacob P. Becker, in the Kansas Casualty and Surety Company. He sustained bodily injuries from external, violent, and accidental means, namely, a gunshot wound from which he died, and, the company denying liability, this action was brought. The company answered that the statements made by the insured in the application for the policy which were warranted to be true were in fact false, and therefore the policy was void. The case was submitted to the court upon an agreed statement of facts, and it was decided that statements 7, 9, and 11 in the application were untrue and would have had the effect of avoiding the policy but for the provisions of chapter 226 of the Laws of 1907, which provides, in substance, that misrepresentations made in securing a life insurance policy shall not be deemed material unless the misrepresentations shall contribute to the injury or death of the insured. Gen. Stat. 1915, § 5290. The court held that this statute rendered the misrepresentations immaterial, as their falsity did not in any way contribute to the death of the insured, and hence judgment was given in favor of the plaintiff. Both parties appeal from the decision, the plaintiff contending that the agreed facts did not support the findings as to the falsity of representations made by the insured, and that the findings were not such as to render the policy void, and the defendant contending that the statute cited did not apply to policies of the kind in question, and, even if applicable, did not make the representations immaterial.

[1] The scope of the statute may be first considered. It is contended that in the enactment the Legislature had in mind only strict life insurance contracts based upon medical examinations as well as upon the statements and warranties of the insured. Attention is called to the title of the act which is "An act in relation to life insurance," etc., without mention of health or accident insurance. It will be observed that the act does not purport to be an amendment of the statute relating expressly to old line life insurance. It is an independent act which contains nothing indicating that its provisions are to apply to any particular kind of life insurance. It provides:

"No misrepresentations made in obtaining or securing a policy of insurance on the life or lives of any person or persons, citizens of this state, shall be deemed to be material or render the policy void unless the matters misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable."

The act is not only independent, but it is general in its terms and covers any policy on the lives of persons who are citizens of the state. In express terms the policy provided for "indemnity for loss of life" by accidental means, and the fact that it also provided indemnity for accidental injuries not resulting in death does not take it out of the purview of the act. The defendant agreed to pay insurance on the lives of its policy holders, and the policy is not only within the express terms of the act, but such insurance was manifestly within the contemplation of the Legislature which passed it.

[2, 3] In view of the application of the act to such insurance were the misrepresentations of the insured material and fatal to a recovery by the plaintiff? In the application of the insured he warranted that the statements made were true, and agreed that, if any of those made in the schedule of warranties were untrue, the policy would be void. Item No. 7 of the application was.

"I have no insurance in this company and no other health or accident insurance, nor have I any other application therefor pending except as herein stated. V "

No exception followed this statement, but in the space left for the answer was the check mark indicated. The statement was untrue, in this, that he had applied for insurance in another health and accident company 16 days before the application herein was made. No certificate had been received by him from the other company at the time of the application to the defendant company, but a certificate was issued under the former application 6 days afterwards, and of that application and certificate the defendant had no notice until after the death of the insured.

Item No. 9 was:

"I have never received indemnity for accident or illness except as herein stated. V "

No exception was named, but following the statement was the V-shaped check mark. He had received an indemnity of $25 for a bruised knee about 10 years before that time from another company.

Item No. 11 in the application was:

"I have never been ruptured * * * except as herein stated. V "

Nothing in the nature of an exception was written, but in the space for exception or response was a check mark. It was a fact that he had been ruptured about 30 years before the application to the defendant company was made.

In the agreed facts it was stipulated that the application was filled out by the defend-

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ant company and signed by the insured, and the blank spaces therein were filled out by the defendant company, and were also signed by the insured. It is the contention of the plaintiff that the items or statements mentioned were questions which were not answered, as the check marks cannot be regarded as answers or representations of the insured. These items are not interrogative in form, but are declarations, and, there being no exceptions, they must be taken as the representations and warranties of the insured. The trial court held that the statements were not unanswered questions, but were positive and absolute declarations of fact, and doubtless they were so understood by both parties to the contract when the application was signed.

The representations having been made and being untrue, the question arises are they rendered innocuous by the statute quoted. Under it the misrepresentations are immaterial unless the matter misrepresented actually contributed to the accidental death of the insured. It is the view of the court that false representations as to a physical condition which was in no way related to the death of the insured do come within the exemption of the statute and would not defeat the policy. For instance, an untrue statement that he had never suffered from rheumatism could not be considered as having contributed to accidental death from a gunshot wound. Statement No. 11 is an illustration of that view. The untrue representation that he had never been ruptured was rendered immaterial because the matter of rupture had no relation to the accidental death of the insured and cannot be said to have contributed to it. The court holds that a different rule applies whether the facts misrepresented or fraudulently concealed are such as increase the moral risk, and which, if known by the insurer, would probably have prevented the issuance of the policy. Misrepresentations of this character, although they do not directly contribute to the contingency of death, are deemed not to be within the purpose of the statute. Such misrepresentations never can contribute to the contingency insured against, and therefore it is held that the statute does not apply to or render them harmless.

Statement No. 7 is of the same character. The false representation that he had no accident or health insurance at the time and had no application for such insurance pending is not contributing matter, but does not come within the scope and purpose of the statute. It is a material representation, as the company might well have declined the risk upon one who was bargaining for a great deal of such insurance, and that application was so recent that it must have been a conscious rather than an innocent misrepresentation.

Statement No. 9, to the effect that he had never received indemnity for accident or illness, and which was untrue, falls within the same rule, and is deemed to be one of the matters that in no event could have contributed to the contingency against which the insurance was taken, and is not rendered immaterial by the statute.

It is the view of the court that the misrepresentations defeat a recovery by the plaintiff, and therefore the judgment is reversed, with directions to enter judgment for the defendant.

BURCH, MASON, PORTER, WEST, MARSHALL, and DAWSON, JJ., concurring.

JOHNSTON, C. J. (dissenting). In my view the statute applies to all misrepresentations made in securing a policy of insurance except those which the statute itself specifically takes out of its operation. By its terms no misrepresentation made to obtain a policy is material unless the matters represented have actually contributed to the accidental death of the insured. The misrepresentations in question, it is conceded, could not have contributed to his death, and therefore they have become immaterial. Apart from the statute, I am inclined to the opinion that the misstatements are not of the kind to defeat a recovery. As to statement 7, he had no insurance when the application was made, and, while he had applied for insurance, no response had been made to the application for 16 days, and he therefore had reason to believe that it had been rejected or abandoned. His statement may have been entirely innocent, and good faith in making it is enough. Sharrer v. Insurance Co., 102 Kan. 650, 171 Pac. 622.

In statement No. 9 he said that he had no other indemnity when as a matter of fact he had received $25 for a slight injury to his knee. The injury and amount received was trifling in character, and besides the occurrence was 10 years before the application was made, and may have escaped his memory. Under the circumstances the statement, although untrue, does not appear to me to be necessarily inconsistent with good faith. However, I think the representations are within the statute, and are thereby rendered immaterial.

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(105 Kan. 148)

SMITH et al. v. GOODEAGLE REFINING CO. et al. (No. 22329.)

(Supreme Court of Kansas. June 7, 1919.)

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(Syllabus by the Court.)

APPEAL AND ERROR ⟸87(4) — ORDERS APPEALABLE—CONFIRMING RECEIVER'S SALE—DISCRETION—APPEAL BY RECEIVER.

A contract for the sale of property was made by a receiver under the order and approval of the court appointing him. About eleven-twelfths of the price of the property was paid by the purchaser to the receiver, but the remainder was not paid nor tendered until about a week after it became due. Upon a tender of the balance the purchaser asked the court for an order directing the acceptance of the balance of the purchase price, and to confirm the sale, as well as to require the delivery of possession of the property. The receiver insisted upon a forfeiture as against the purchaser for noncompliance with the sale contract, and also asked for a resale of the property. Orders were made, denying the application for a resale and also confirming the sale made, and directing the receiver to deliver possession of the property sold to the purchaser. The receiver thereupon attempted to appeal from these orders, and it is *held* that he did not have the right of appeal.

Appeal from District Court, Cherokee County.

Action by Charles A. Smith and others against the Goodeagle Refining Company, etc., in which Garland Biffle was appointed receiver. Motion by Leslie J. Lyons, receiver of the People's Oil Company and another, purchasers, that a sale of the property by Garland Biffle, as receiver, be completed and confirmed, and motion by Garland Biffle, as receiver, that the sale be set aside and the property resold, and the motion for a resale was denied, and Garland Biffle, receiver, ordered to accept balance of purchase price and complete contract by delivering property to purchaser, and defendants and Garland Biffle, receiver, appeal. Affirmed.

C. A. McNeill, of Columbus, Krauthoff, McClintock & Quant, of Kansas City, Mo., C. S. Denison and John L. Kirkpatrick, both of Pittsburg, and Joseph Glenn Logan, of Topeka, for appellants.

Stone, McDermott & Caster, of Topeka, for appellees.

JOHNSTON, C. J. A review of the rulings on two motions is sought herein, one of which asked that a sale of property by a receiver be completed and confirmed, and another, by an adverse party, that the sale be set aside and the property resold.

It appears that the district court appointed Garland Biffle as receiver for the property of the Goodeagle Refining Company, and that he sold the refining plant to W. J. Hogue, a promoter of the People's Oil Company, for $57,000, and the contract of sale was approved by the court. Hogue paid $53,000 of the purchase price, but the balance was not paid when due. Leslie J. Lyons was appointed by another court as receiver of the property of the People's Oil Company, and Hogue, and about a week after the time fixed for final payment of the refining plant Lyons tendered $4,300 as final payment on the plant, but it was refused by Biffle, the receiver. Instead of accepting the tender and delivering possession of the property, Biffle applied to the court for an order to resell the property, alleging that the purchaser had made default in the payment of the purchase price, and also that prior to the purchase Hogue had entered into another contract with C. A. Smith, a stockholder of the refining company, who undertook to act for all the stockholders of the company, by which Hogue was to pay Smith $5,000 in cash and $19,500 in the stock of another company, and it was alleged that this contract constituted a part of the sale contract. Biffle further alleged that since the sale of the refinery to Hogue he had learned of other debts of the company, and therefore asked for a resale of the property in order to meet the additional indebtedness. In his averments Biffle contended that the contract of sale had been terminated by the default of Hogue; also that the contract between him and Smith was a part of the sale contract, and, further, that by the failure of Hogue to carry out the provisions of the Smith agreement he had forfeited his rights under the sale contract. On the other hand, Lyons, on behalf of the purchaser, claimed that there had been a substantial compliance with the terms of sale, as $53,000 of the price had been paid in good time, and had already been disbursed by the receiver, and, further, that the balance of $4,300 was tendered only about a week after it became due; and there was the further contention that the Smith contract had never been completed, as it had never been approved by the trial court, and besides that Smith had no authority to contract for the stockholders he assumed to represent. The trial court upon the testimony produced held that the Smith contract could not be considered as a part of the sale contract, that it had never been completed, had never been approved nor even seen by the court, and, further, that since eleven-twelfths of the purchase price had been paid, and that the remaining one-twelfth only became due about a week before it was tendered, it would be inequitable to declare a forfeiture of the $53,000 paid, which had never been returned or offered to be returned, and therefore the receiver, Biffle, was ordered to accept the balance of the purchase price and complete the contract of purchase by transferring and delivering the property to

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the purchaser. The motion of the receiver asking for a resale of the property was therefore denied.

The first question presented is the right of the receiver to prosecute this appeal. The proceeding is only an incident in the case of Charles A. Smith v. Goodeagle Refining Company, in which Biffle was appointed the receiver. The action was not brought by or against the receiver. He had made a sale of property on the order and approval of the court, and is now resisting an order made by the same court, directing him to complete the sale. As the order made did not affect him either as to compensation or expenses of administration, and did not involve any personal interest of his, he had no right to complain of or contest with the court the propriety or validity of its order. He is no more than an officer or arm of the court under whose authority he is acting. Cases are cited in which a receiver having the custody of property was sued by an intervening party charging wrongful action in the administration of the estate by the receiver, thereby making him an adversary party, and hence an appeal was allowed. Felton v. Ackerman, 61 Fed. 225, 9 C. C. A. 457; Bosworth v. Terminal R. Association, 174 U. S. 182, 19 Sup. Ct. 625, 43 L. Ed. 941. In the present case there was no intervention of claimants or outside parties, and the receiver did not stand in the attitude of an adversary party, unless he can be called an adversary of the court under whose authority he was acting. It was his duty not to antagonize but to carry into execution the orders of that court. The general rule is that in the absence of statutory authority a receiver cannot institute a legal proceeding without leave of the court (23 R. C. L. 124), but the holding herein is not rested on the failure of the receiver to apply for leave to appeal. In the Felton and Bosworth Cases cited the actions were brought against the receivers by outside parties and leave to appeal was granted by the courts. In the Bosworth Case it was held that a receiver might appeal when an order was made affecting him personally, or where a claim was made antagonistic to both of the parties to the action, but that he could not appeal from an order or judgment declaring the rights of the respective parties to the suit, nor from any order or decree resting in the discretion of the court appointing him. As between the parties to a litigation the receiver is deemed to be indifferent, and in a contest between them as to the division or disposition of property he has no right to take sides or to prolong the litigation. Matters of this kind are to be determined in accordance with the judgment and discretion of the court. The parties whose rights are affected and who are aggrieved are the ones to appeal if any is to be taken. Knabe v. Johnson, 107 Md. 616, 69 Atl. 420. In Hinckley v. Gilman, etc., R. R. Co., 94 U. S. 467, 24 L. Ed. 166, it was held that an appeal might be allowed from an order fixing the compensation of a receiver and the settlement of his accounts, but that he was not entitled to ask for a review of any order or decree of the court relating to the title of the property or to the possession taken under a sale of the property. In the present case a sale of the property had been made by the receiver under the direction of the court, most of the compensation had been paid to and had already been disbursed by him, and it was not for him to determine whether a forfeiture should be enforced because the purchaser was a few days late in tendering the small balance that remained due. That was a question involving considerable discretion in the court, and was one for the court and not the receiver to determine. He is in much the same attitude as a sheriff who has made a sale of property under a mortgage foreclosure or of a trustee who has made a sale under an order of a court, and where it is claimed that a mistake was made by the court in confirming the sales made. In such a case the sheriff or the trustee is not the one to complain, but it is rather for the parties who may be affected or aggrieved.

In Brown v. Howard, 106 Va. 262, 55 S. E. 682, it was held that a special commissioner appointed to sell land was a mere ministerial officer of the court, and that he could not appeal from an order setting aside a decree of a court to make a sale of property which he was not permitted to do, and he undertook to appeal from that part of the decree relating to the sale, but it was held that he had no such interest as entitled him to appeal. Green v. Harrison, 59 N. C. 253, 82 Am. Dec. 415. It has also been ruled that when a receiver applied for an order authorizing him to sell property to pay debts, which he had contracted in the administration of the estate, and the application was denied, he had no right to complain, as that was a matter resting in the discretion of the court. In re Premier Cycle Mfg. Co., 70 Conn. 473, 39 Atl. 800. See, also, Sutton v. Weber, 100 Ill. App. 360; Polk v. Johnson, 35 Ind. App. 478, 65 N. E. 536; Foreman v. Defrees, Brace & Ritter, 120 Ill. App. 486; Smith v. Warrenfeltz, 116 Md. 116, 81 Atl. 275; 3 C. J. 652.

No reason is seen why the parties affected by the order may not appeal if reason for complaint exists. In an examination of the record it would appear that if the appeal had been presented by one having an appealable interest, we must have held that there was no substantial error in the orders made by the court. The testimony tends to show that the so-called Smith contract was never completed nor approved, and did not become a binding obligation, and, further, that it never constituted a part of the contract of sale, nor does it appear that there was any-

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thing inequitable in the action of the court in refusing to declare a forfeiture because of the default of the purchaser for a few days in the payment of the small balance due after he had paid $53,000 of the purchase money. Especially is this true where it appears that the amount paid had never been restored nor tendered, but, on the other hand, had been disbursed by the receiver. It does not appear that the purchase price was inadequate, nor that any good grounds were shown for a refusal to confirm the sale.

Judgment affirmed.

All the Justices concurring.

(105 Kan. 87)

INDEPENDENT MILLING CO. v. HOWE SCALE CO. OF ILLINOIS. (No. 22188.)*

(Supreme Court of Kansas. June 7, 1919.)

(Syllabus by the Court.)

1. SALES ⟸23(3) — BREACH OF CONTRACT—RESCISSION—DAMAGES.

The correspondence between the parties evidences a contract for the purchase of a track scale with certain specified I-beam and recording beam; first payment to be 30 days after shipment. After the contract had thus been entered into, the plaintiff wrote the seller that there had been some misunderstanding, and it could not accept the seller's proposition. The scale company refused to accept the renunciation, but turned the matter over to its attorney, who requested payment. Later the plaintiff demanded that the scale be shipped which demand was not complied with. *Held*, that both parties having finally treated the contract as in force, the plaintiff could recover damages for its breach.

2. APPEAL AND ERROR ⟸351(2)—TIME FOR TAKING APPEAL—NOTICE.

The appeal was taken in time, and the delay in filing abstract *held* not fatal.

Porter, J., dissenting.

Appeal from District Court, Kingman County.

Suit by the Independent Milling Company against the Howe Scale Company of Illinois. Judgment for plaintiff, and defendant appeals. Affirmed.

T. A. Noftsger, George W. Cox, and W. R. Glass, all of Wichita, for appellant.

John McKenna, of Kingman, for appellee.

WEST, J. The Milling Company sued the Scale Company for damages for failure to deliver a track scale according to contract, and recovered. The Scale Company appeals.

In March the plaintiff was advised by letter that the defendant had a Howe scale, and had referred the plaintiff's inquiry to a representative who would call within a few days. April 6, 1917, the plaintiff wrote:

"Please ship via Santa Fé secondhand 46' track scale new recording beam and steel frame for which we agree to pay $700.00 seven hundred dollars as follows: $350.00 30 days. Balance $100.00 month until paid for, payable at K. C., Mo."

In response a telegram was received:

"Accept seven hundred dollar proposition, scale to include new beam and 15-inch I-beams."

On the same day the defendant wrote that it proposed to furnish a scale to include 15-inch new steel I-beam frame. On the 9th the plaintiff wrote to the agent:

"We have copy of order accepted by Mr. Peak and note that he specified 15" new steel I-beam frame. We wish you would let us know if that is the way you reported the sale to us as we were under the impression that it was an 18" I-beam. We also understood that it was to be a recording type beam."

On April 16th the defendant wrote plaintiff that the matter had been referred to the agent and begged to advise that on a 46' scale it used a 15-inch I-beam frame.

"It is understood that you get new recording beam, which we have had expressed to us from the factory. The scale is practically ready for shipment, and all we need is your signature. Kindly sign, as per agreement, as the scale is packed ready for shipment."

On April 17th the defendant wrote:

"Replying further to your letter of the 16th, beg to advise that we are going to furnish 18" I-beam frame in place of 15". Be sure and sign the contract and send it to us by return mail."

On April 23d the plaintiff wrote the defendant:

"With reference to the scale which we were trying to buy from you will say that there seems to have been considerable misunderstanding regarding this transaction. * * * There was also some misunderstanding between the description Mr. Dennis gave us of this scale and the way you described it, consequently we have made different arrangements and cannot accept your proposition."

Two days later the defendant wrote that it could not accept the cancellation as the scale was ready for shipment, that the steel had been cut and drilled and was also ready for shipment, and that the cancellation could not be accepted unless on payment of the amount of expense.

The president of the Milling Company testified, among other things:

That he understood that the 18-inch I-beam was to be furnished if the scale was bought, and he wanted an 18-inch I-beam. "I did not offer to reimburse the defendant for what they had

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* Rehearing denied July 5, 1919.

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been out on the transaction after the receipt of the latter marked Exhibit I. When we received that letter we thought we had some scales coming to us. They said they would not cancel the order and we thought it would come along. We waited a while, expecting the scales. The next we heard we got the letter from an attorney in Kansas City, Mr. Langley. * * * I did not reply to that letter."

[1] When the written order for the scale, proposing price and terms of payment, was accepted, the contract was complete, except the settlement of the details as to I-beam and recording beam. These details were settled and agreed upon by the correspondence closing April 17th, thus leaving the contract in all respects binding, and one on which the minds of the parties had fully met. The acceptance of the written proposition was already an accomplished fact, and the request to sign and return the form inclosed in the subsequent letters did not operate to change the contract already in existence. When, a few days later, the plaintiff renounced the contract, the defendant had the option to cancel or not, as it saw fit; for, as it takes two to make a bargain, it takes two to unmake one. 3 Elliott on Contracts, §§ 2027–2084. The defendant notified the plaintiff that it would not cancel, and, had the Milling Company said and done nothing further, we would have had a different situation. But, instead of standing upon its renunciation, it, within a short time, demanded performance and made the demand a second time, and, as its president testified, it supposed it had some scales coming, which means that the plaintiff had concluded, along with the defendant, to treat the contract as binding.

The rule is well settled that:

"If the promisee elects not to accept the renunciation and continues to insist on the performance of the promise, as he may do, the contract remains in existence for the benefit and at the risk of both parties. * * * 13 C. J. 655, § 729.

"In case the renunciation of the contract is not accepted by the adverse party, the renunciation may be withdrawn, and the party renouncing after performance on his part may hold the adverse party to performance." Id. 657, § 732; 6 R. C. L. 1024, § 385.

Of the numerous authorities in support of the text, but two will be noticed. Avery v. Bowden, 5 E. & B. 714, 85 E. C. L. 714, 119 Reprint, 647, involved a contract to ship at a certain port within a certain time. On arrival the master demanded a cargo which was refused, but the master continued to demand, and before the running days were out war broke out rendering the performance of the contract legally impossible. In an action for damages for breach of contract, it was held that, as there had been no actual failure of performance before the war broke out, as the running days had not then expired, and as the plaintiff had not accepted the renunciation as a breach, the defendant was entitled to the discharge of the contract which took place on the declaration of war. Note 13 C. J. 655. In Carlisle v. Green, 131 S. W. 1140, it was held by the Texas Court of Civil Appeals that, although one party to a contract for the exchange of lands had notified the other that he would not perform, but was told that he would be held to the contract, he could still call on the adverse party to perform. The court said:

"The appellee, not having treated the declaration of appellant as an end to said contract, appellant had the legal right to repent of his refusal to perform said contract, and to perform the same on any day within the time limited." 131 S. W. 1142.

There are decisions which seem to hold to the contrary, but the weight of authority appears to be in line with those we have cited.

Both parties having finally concluded to treat the contract as a valid and subsisting one, each was bound to the other for its performance. Performance was demanded and refused, and it follows that the plaintiff was entitled to recover.

[2] Complaint is made of the time the notice, proof of service, and journal entry were transmitted, and of delay in filing abstract. The notice of appeal was served in time, and this of itself gives jurisdiction. The delay in the matter of abstracting was not fatal.

The judgment is affirmed.

JOHNSTON, C. J., and BURCH, MASON, MARSHALL, and DAWSON, JJ., concurring.

PORTER, J., dissenting.

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(105 Kan. 1)

McCULLOCH v. GOODRICH. (No. 21329.)

(Supreme Court of Kansas. June 7, 1919.)

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(Syllabus by the Court.)

1. ASSAULT AND BATTERY ⟸27, 43(2)—ADMISSIBILITY OF EVIDENCE—MUTUAL COMBAT—INSTRUCTIONS.

In an action to recover damages for an assault and battery, where the petition alleges that the defendant assaulted the plaintiff, and the answer alleges that the plaintiff assaulted the defendant, and each party introduces evidence to support his contention, competent evidence cannot be properly excluded, although it may tend to prove that the parties engaged in a mutual combat, and, if there is evidence tending to prove that fact, it is proper for the court to instruct the jury concerning the law of mutual combat.

2. ASSAULT AND BATTERY ⟸11 — MUTUAL COMBAT—DAMAGES.

Where persons engage in a mutual combat, each may recover from the other all damages caused by injuries received from the other in the fight.

Appeal from District Court, Sherman County.

Action by Jane McCulloch against Margaret M. Goodrich. Judgment for plaintiff, and defendant appeals. Affirmed.

John Hartzler, of Goodland, for appellant.
E. F. Murphy, of Goodland, for appellee.

MARSHALL, J. The plaintiff sued for damages which resulted from injuries inflicted upon her in an assault by the defendant.

The petition alleged that the defendant assaulted the plaintiff with an umbrella and dangerously wounded her. The answer contained a general denial of the allegations of the petition, and pleaded assault and battery by the plaintiff. The answer also pleaded self-defense, and that, if the defendant did strike the plaintiff with an umbrella, it was unintentional, and only incidental to her lawful defense against the assaults of the plaintiff. Judgment was rendered for the plaintiff, and the defendant appeals.

[1] 1. The defendant contends that the court erred in giving the following instruction:

"The jury is instructed that if parties fight by mutual consent the aggressions are mutual, and the circumstances of who committed the first act of violence is not material in an action to recover damages for the injuries he received in the fight."

"If the conduct of the parties to a mutual combat constitute a breach of the criminal law, the consent of either one to participate in the mêlée does not deprive him of his civil remedy against the other. Each contestant may recover from the other all damages resulting from the injuries he received in the fight."

The defendant argues that by this instruction the court gave the law concerning mutual combat, and that under the pleadings no evidence of mutual combat could be properly introduced. By the pleadings each party alleged that the other committed an assault and battery on the party pleading. Each probably introduced evidence to prove her contention. That evidence may have tended to prove that each was ready to engage in a fight with the other, and that each willingly engaged in the contest. If such a condition existed, that evidence could not be excluded, and the court properly gave the instruction.

This action is closely parallel to McNeil v. Mullin, 70 Kan. 634, 79 Pac. 168, and the rule there declared controls.

[2] 2. Complaint is made of the following instruction:

"The defendant claims in her answer herein that the plaintiff at the time of the alleged controversy was a licensed physician, and as such licensed physician, was maintaining a public office in Goodland, Kan., and that at said time she went to said office on a business errand. You are instructed that one who is a physician and maintains a public office, as such, thereby invites the public to said office for the purpose of consultation and rendering medical services to those who might request it; and if the defendant in a peaceable, quiet, and orderly manner entered said office on a business errand with the plaintiff herein, she had a right so to do, and to remain therein for a reasonable length of time in order to transact such business, providing that during all of said time she was acting in a quiet, peaceable, and orderly manner, but if at any time she became abusive in her language or manner toward the plaintiff or any of the occupants therein, then and in such a case the plaintiff would have a right to request her to depart from said office, and, defendant failing to do so within a reasonable length of time after being so requested, the plaintiff would have a right to use such force as was reasonably necessary in ejecting said defendant from said office; and, if plaintiff did use more force than was reasonably necessary in ejecting defendant from said office at said time, the defendant would have the right to use such force in resisting such excessive force on the part of the plaintiff and protecting herself against harm and injury therefrom as appeared to her at the time, acting in good faith, to be reasonably necessary, and in such a case the defendant would not be liable for injury resulting to plaintiff from the force used by the defendant. However, in such case, if the defendant wantonly, willfully and maliciously used more force than was necessary in resisting such excessive force or assault, she would be liable to plaintiff for damages resulting therefrom."

The defendant argues that there can be no question that if, as the court assumes, the plaintiff used more force than was necessary, she was the aggressor, and, if the defend-

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ant, in defending herself against such aggressions, used more force than was necessary, she cannot be held for damages. The defendant further argues that as the plaintiff was the aggressor, she cannot complain if she was beaten in a combat which she herself began. The defendant's argument is not good. Each party is liable for her own wrongdoing. The defendant assumes that the plaintiff was the aggressor, and argues from that assumption that she cannot complain if she came out second best in the fight. The assumption omits the possibility that the defendant consented to the fight and willingly engaged in it. If she did so consent and did so engage in it, she is liable for the injuries inflicted by her on her opponent. McNeil v. Mullin, supra; 5 C. J. 630.

A careful examination of the instruction does not disclose any error therein of which the defendant can complain.

The judgment is affirmed.

All the Justices concurring.

(105 Kan. 58)

MOFFATT v. FOUTS et al. (No. 21997.)

(Supreme Court of Kansas. June 7, 1919.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⟸732—ASSIGNMENT OF ERROR—GROUNDS FOR NEW TRIAL.

An assignment of error which assumes that the district court granted a new trial on a single ground need not be considered, when the record affirmatively shows that the ruling was also based, and properly based, on other grounds.

2. APPEAL AND ERROR ⟸893(1)—APPELLATE JURISDICTION—TRIAL DE NOVO.

This court's appellate jurisdiction does not include trial de novo of civil cases.

Appeal from District Court, Labette County.

Action by John Moffatt against F. P. Fouts and others. Verdict for plaintiff, motion for new trial granted, and plaintiff appeals. Affirmed.

John Madden and C. E. Cooper, both of Wichita, Mark P. Gillin, of Parsons, and John Madden, Jr., of Wichita, for appellant.

C. E. Pile and L. E. Goodrich, both of Parsons, H. A. Russell, of Scott City, and W. H. Russell, of LaCrosse, for appellees.

BURCH, J. The general nature of this controversy is indicated in the opinion disposing of a former appeal. Moffatt v. Fouts, 99 Kan. 118, 160 Pac. 1137. On the return of the cause to the district court a trial occurred resulting in a verdict for the plaintiff. On motion of the defendants a new trial was granted. From this ruling the plaintiff appeals.

[1] The plaintiff asserts that the new trial was granted on the sole ground of misconduct of counsel, and an extended argument is made in an effort to demonstrate that the court erred in granting a new trial on that ground. The argument need not be considered. The defendants filed separate but similar motions for a new trial, alleging, besides misconduct of counsel, that the verdict was against the preponderance of the evidence, was contrary to the evidence, and was not supported by the evidence. The record discloses that Fouts was granted a new trial "for the reasons and upon the grounds set forth in his said motion for a new trial." Daugherty was granted a new trial "for the reasons presented in his motion for a new trial." The First National Bank of Scott City was granted a new trial "for the reasons and upon the grounds set forth in its said motion for a new trial." It conclusively appears therefore that, aside from an exercise of the court's discretion to grant a new trial when in its opinion the jury has been influenced by improper conduct of counsel, the court was not satisfied with the jury's conception and treatment of the evidence. The right and the duty of the district court to grant new trials under such circumstances has been under discussion so many times that nothing need be added to what has already been said on the subject. It is clear that in this instance the power was not abused.

[2] The plaintiff invites this court to consider the evidence and make a determination of the rights of the parties. The court is without authority to do this. Its power on appeal is limited to correcting errors of the district court. While the Revised Code considerably amplifies the means for reviewing proceedings and reaching a just conclusion on appeal, this court cannot try cases other than those of which it has original jurisdiction.

The judgment of the district court is affirmed.

All the Justices concurring.

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(105 Kan. 23)

BICE v. NELSON. (No. 21847.)

(Supreme Court of Kansas. June 7, 1919.)

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(Syllabus by Editorial Staff.)

EVIDENCE ⟸80(1)—PRESUMPTION—SIMILARITY OF FOREIGN LAW.

Without pleading and proof of the law of Colorado, the court was authorized to assume that it is the same as the law of Kansas.

Appeal from District Court, Phillips County.

On motion for rehearing. Rehearing denied.

For former opinion, see 180 Pac. 206.

BURCH, J. The plaintiff files a petition for rehearing which accepts as correct the statement of the law of Kansas contained in the fourth paragraph of the syllabus of the former opinion. It is said, however, that the sale in controversy was made in Colorado, and that the law of the place where the sale was made governed. The plaintiff is an attorney, and signs the petition as his own counsel. If the law of Colorado clothed him with any special privileges and immunities in respect to false representations, he ought to have pleaded and proved it. Without such pleading and proof, the court was authorized to assume that the law of Colorado is the same as the law of Kansas.

The petition for a rehearing is devoted largely to disputing the court. The plaintiff admits he did not have the record before him when the petition was prepared, but that fact did not deter him from flatly contradicting the court's statements of the evidence. The defendant deemed it necessary to take advantage of rule 5 of this court and file a counter abstract, which was properly certified as a true and correct counter abstract of the record, and which opened with the following statement:

"The abstract of the appellant being inaccurate and incomplete garbling of the records, the appellee submits the following parts of the record, that this court may have an intelligent understanding of the facts that the jury based their verdict upon."

The counter abstract was not challenged; consequently the court quoted from it and relied on it in making general statements concerning the nature of the evidence. The original transcript now lies before the court. With reference to the plaintiff's own testimony showing that Klaes was his agent to sell the truck, the transcript contains the following:

"When Klaes came to you and offered you that proposition to trade your house for this truck, you told him that if he would get you a buyer for the truck you would make the deal? A. Yes; 'but I wouldn't take the truck under any other circumstances. It was an elephant on my hands.

"Q. You told him that if he would get you a buyer for the truck you would make the deal? A. Yes, if he would give me an acceptable amount; yes, if he would get me a cash amount. I would take cash, of course, but he had to give me a satisfactory deal."

The fact that the plaintiff was seller is abundantly shown by other evidence.

With reference to some other material matters the transcript shows the following:

"Q. When you next went to Mr. Bice's office, you went alone? A. Yes, sir.

"Q. And when you went alone what was the conversation? A. Mr. Bice told me he would take my personal note and my chattel mortgage on this truck.

"Q. How much did you offer to give Mr. Bice for the truck, as you claim? A. He wanted $1,400 for the truck. I had offered Mr. Klaes $1,300 for the truck; so Mr. Bice said he couldn't sell the truck for $1,300, but would be willing to take my note at $1,400, and then we got to talking about hauling of coal—

"Q. And you told him you would give him your note and mortgage on the truck for $1,400.00? A. Yes, sir.

"Q. For the truck? A. For the truck; yes, sir.

"Q. Did Mr. Bice in any way guarantee the kind of a truck that you were getting, Mr. Nelson? A. He said to me: 'Mr. Klaes has guaranteed this truck. I think Mr. Klaes is all right.' That is the way he put it. * * *

"Q. Now state to the jury the conversation both times. A. The first time I met Mr. Bice with Mr. Klaes we talked about the truck, and Mr. Klaes said that the truck was in good running condition; that he would guarantee the truck. And as he told Mr. Bice that my time was limited with the coal mine lease, he said it was necessary for me to hurry and get the truck and go and haul coal at once, and they would then talk about consummating the deal, closing it. * * *

"Q. You was ready? What did they say? Tell the jury what they said. A. They said, 'Now the truck, Nelson wants this truck, and I have guaranteed the truck to him; he hasn't got time to examine it, hasn't got a man so as to give it a thorough examination to satisfy himself, but he is willing to take the truck on my say-so.'

"Q. Klaes told Bice that? A. Yes, sir.

"Q. What did Bice say? A. Bice says, 'All right; I will take his note and the mortgage on the truck.' * * *

"Q. What did you say to Bice before you signed the note and mortgage about allowing you a chance to use it? A. I asked Mr. Bice if I could have five days' time in which to try the truck. He said, 'No, we can't do that, because it is out of our county; out of the county you get possession of it,' etc. I don't remember the exact words, but I do remember that part of it. * * *

"Q. You stated in your examination, Mr. Nelson, that you took Mr. Klaes' word for the con-

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dition of the truck and this land condition? A. I did, absolutely.

"Q. That you depended upon his statements? A. Yes, sir.

"Q. And that he guaranteed it to be good, therefore you—that is the reason you bought it? A. Yes, sir; Mr. Bice also said to me at the time he thought Klaes was a reliable fellow, and whatever he said would go with him, as to the condition of the truck; therefore I relied on him.

"Q. He said that he was all right? A. Yes, sir. * * *

"Q. When I asked you, did you not state that you were relying expressly upon the warranties and guaranties of Mr. Klaes? A. Not altogether, as I took Mr. Bice's representations to me that this man Klaes was, he was fully depending upon Mr. Klaes' statement. He says, 'I believe—'

"Q. He told you he was fully depending on his statement? A. Yes, sir; he believed Mr. Klaes was all right; he would guarantee the truck with Mr. Klaes."

In all other respects the transcript fully sustains the verdict and judgment of the district court and the opinion of this court.

A fundamental fallacy of the petition for a rehearing consists in this: The plaintiff relies on the evidence favorable to himself, while the jury accepted and relied on the evidence favorable to the defendant. The law of the case was sufficiently discussed in the former opinion.

The petition for a rehearing is denied.

All the Justices concurring.

(105 Kan. 69)

DAVIS, State Bank Com'r of Arkansas, v. DRURY.

SAME v. MEADE.

(Nos. 22059, 22060.)

(Supreme Court of Kansas. June 7, 1919.)

(Syllabus by the Court.)

1. LIMITATION OF ACTIONS ⟸58(4)—LIABILITY OF STOCKHOLDER—ACCRUAL OF CAUSE OF ACTION.

Where a statute imposes an additional liability upon a stockholder on account of the insolvency of a corporation, in an amount equivalent to that which the stockholder has invested in the corporate stock, such liability is mature, and a cause of action accrues thereon, when the fact of insolvency and the extent of the liability are determined; and the operation of the statute of limitations is not postponed by the unauthorized act of a public official, who gives the stockholders a leniency of 30 days in which to pay their several statutory liabilities.

2. LIMITATION OF ACTIONS ⟸34(1)—ACTION ON STATUTORY LIABILITY.

An action on a liability imposed by statute is barred in three years after such statutory liability has accrued.

Appeal from District Court, Shawnee County.

Separate actions by John M. Davis, as Bank Commissioner of the State of Arkansas, against M. J. Drury and against J. M. Meade. Judgments for defendant in each case, and plaintiff in each case appeals. Affirmed.

Allen & Allen, of Topeka, for appellant.

Clad Hamilton, Clay Hamilton, and J. B. Larimer, all of Topeka, for appellees.

DAWSON, J. In these two cases the bank commissioner of Arkansas seeks to recover from the defendants on their individual liability as stockholders of an insolvent bank. In 1912 the defendant acquired certain shares of stock in the Bank of Huntington, Ark. In 1913 the Legislature of Arkansas enacted a statute (chapter 13, Kirby & Castle's Digest of the Statutes of Arkansas, Edition of 1916) imposing a double liability on stockholders of state banks. In May, 1914, the bank commissioner took charge of the Bank of Huntington because of its actual or impending insolvency. Thereafter the bank commissioner, upon full examination of its financial status, determined that the bank was insolvent, and on August 18, 1914, that officer made an assessment equivalent to 100 per cent.—the full double liability—of the outstanding stock, and notified the defendants to pay the same on September 18, 1914.

These defendants failed or declined to pay, and this action was filed against them on September 5, 1917. In defense, the statute of limitations and certain constitutional objections were successfully interposed in bar of plaintiff's recovery in the trial court, and he appeals.

[1] First, as to the statute of limitations: The Arkansas statute (chapter 13, Kirby & Castle, supra) provides that the stockholders of a bank shall be held individually responsible, equally and ratably, for all the contracts, debts, and engagements of the bank, "to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such stock." Section 537. The statute defines insolvency (section 552), and provides that, when the commissioner has ascertained the fact that the bank is insolvent, he shall require the stockholders to pay a sufficient sum to restore its solvency (section 553), and when he takes possession of such a bank—

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"The commissioner is authorized to collect moneys due it and do such other acts as are necessary to conserve its assets and business and shall proceed to liquidate the affairs thereof as hereinafter provided. The commissioner shall collect all debts due and claims belonging to it * * * and if necessary to enforce the liabilities of its stockholders." Section 554, Id.

In view of these statutory provisions, when did the liability of these defendant stockholders accrue? The statute fixed the liability upon the fact of insolvency; the commissioner ascertained the fact of insolvency when he had completed his investigation of the bank's affairs on August 18, 1914. Whether an earlier date for fixing the stockholders' liability might be logically reasoned out need not be decided. Was the liability complete and absolute on August 18th? We find nothing in the statute giving the commissioner power to defer the maturity of the liability, nothing to suggest that the date when payment upon the liability should be made was dependent upon his grace, courtesy, or forbearance.

It is argued that the Arkansas statute is largely a copy of the federal Bank Act (Act Cong. June 3, 1864, c. 106, 13 Stat. 99); that the duties and powers of the bank commissioner are analogous to those of the federal Comptroller of the Currency; that the federal decisions touching liability of stockholders are that such liability is not due, does not mature, until the necessity to collect it is determined, the amount fixed, and the time of payment prescribed. And, because the Arkansas statute is copied from the federal act, it is argued that the judicial interpretations of the jurisdiction from which the statute was borrowed should control. On some phases of this statute not here pertinent, this rule has been applied by the Supreme Court of Arkansas. Davis, State Bank Com'r, v. Moore, 130 Ark. 128, 197 S. W. 295. This rule is subject to exceptions. Where a statute is not peculiar to the jurisdiction from which it was adopted, and its interpretation by the courts of that jurisdiction is opposed to reason or the weight of authority, the construction given to the statute in the jurisdiction of its origin is not followed. State v. Campbell, 73 Kan. 688, 85 Pac. 784, 9 L. R. A. (N. S.) 533, 9 Ann. Cas. 1208; State v. Chaplain, 101 Kan. 413, 415, 166 Pac. 238. It does not seem reasonable to read into the Arkansas statute a provision that the stockholder's liability is not mature until some date of payment prescribed by the bank commissioner, nor that that date could be advanced or deferred at his discretion. His administrative order requiring the assessment to be paid on September 18, 1914, 30 days after he had determined the necessity for the assessment, and had computed it, was a mere civility to the stockholders, designed, no doubt, to give them a little time to raise and pay their assessments, and to save himself the trouble of commencing possibly needless suits.

In our examination of the decided cases, we note that some of the actions to recover on stockholders' liabilities are based upon their contracts, either express or implied, to pay their assessments on call. In such cases, of course, the "call" date fixes the time when the statute of limitations begins to run. Note and citations in 96 Am. St. Rep. 984. But where the liability is imposed by statute, and the statute is silent as to the date when payment is due, an action on that statute accrues as soon as the fact of liability is ascertained. Bennett v. Thorne, 36 Wash. 253, 78 Pac. 936, 68 L. R. A. 113, and citations. There is nothing peculiar to the Arkansas statute, or to the federal statute, of which it is said to be a copy, about the double liability imposed on stockholders of insolvent banks. It is substantially like our own law. Gen. Stat. 1915, § 523. This court holds that the defendants' liability had fully accrued on August 18, 1914. Cottrell v. Manlove, 58 Kan. 405, 49 Pac. 519; Bank v. King, 60 Kan. 733, 737, and cases cited, 57 Pac. 952; West v. Bank, 66 Kan. 524, 534, 72 Pac. 252, 63 L. R. A. 137, 97 Am. St. Rep. 385; Abernathy v. Loftus, 95 Kan. 87, 93, 147 Pac. 818; McClun v. Lutz, 99 Kan. 775, 162 Pac. 1164; Ramsden v. Knowles, 151 Fed. 721, 81 C. C. A. 105, 10 L. R. A. (N. S.) 897, and note.

[2] In view of the foregoing, it must be held that the present actions to recover on the liabilities imposed on these defendants by the Arkansas statute, which were begun more than three years after the causes of action accrued, were barred by the statute of limitations. Civ. Code, § 17 (Gen. St. 1915, § 6907). This conclusion renders it unnecessary to consider the constitutional questions so ably discussed in the briefs of counsel.

The judgment is affirmed.

All the Justices concurring.

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(105 Kan. 35)

TAFT et al. v. HYATT et al. (No. 21879.)

(Supreme Court of Kansas. June 7, 1919.)

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(Syllabus by Editorial Staff.)

1. APPEAL AND ERROR ⟸843(1)—ARGUMENT—DECISION.

Not every contention made by counsel in their argument must be followed out and decided by the Supreme Court on appeal.

2. ARREST ⟸63(1)—WARRANT—SURRENDER.

An officer authorized to make an arrest with a warrant needs none when the person he takes charge of surrenders himself.

Appeal from District Court, Labette County.

On motion for rehearing. Rehearing denied.

For former opinion, see 180 Pac. 218.

PORTER, J. In a petition for rehearing it is insisted, first, that all that was said in the opinion with reference to an offer of reward by private individuals is outside the case, because it is urged that in this case the offer was a public one. It was signed by the husband of the murdered woman, and also by B. L. Taft, who described himself as "president suborder 62, A. H. T. A.," and by J. W. Elam, who described himself as sheriff of Labette county. There was no suggestion in the record anywhere that the sheriff had authority to make the offer as an official, or to bind the county, and the contention now urged has no merit. There was nothing to show that B. L. Taft had authority to bind the association, of which he was president, but if, in fact, the offer had been made by the association, it would still be a private and not a public offer.

Because we held that Murry, chief of police, is not entitled to the reward on the ground that he acted in the performance of his official duties, it is seriously contended that the decision is unsound, unless the court shall first decide whether the accused would have been guilty of murder if he had resisted arrest, and had killed the chief of police; that, unless Murry would have had the same protection as if armed with a warrant, it was not his duty to make the arrest, and therefore he is entitled to the reward. It is urged that this contention was presented in the brief, and that appellees have the right to insist that it be decided.

[1, 2] We cannot agree with counsel that every contention made in their argument must be followed out and decided. Upon the facts stated with much detail in the opinion, we held that all the chief of police did was done in the discharge of his official duty. He knew that a crime had been committed; he had seen the offer of reward which described Smith as the accused person; he had been requested by Smith's friends to go to the place where Smith was and take charge of him; and he knew that Smith wished to surrender himself for protection from mob violence. In our opinion, it is absurd to argue that Murry, under those circumstances, had no duty to perform as chief of police, or that it was not his duty to take charge of Smith and convey him to a place of safety. If the officer had no duty to perform and no authority to do anything until a warrant issued, the mob might have acted while he was seeking to obtain a warrant. Besides, an officer authorized to make an arrest with a warrant needs none where the person he takes charge of surrenders himself. Whatever the chief of police did in the matter was done as a police official.

Among other matters argued, but which have no proper place in a motion for rehearing, is a complaint of a decision adverse to counsel in another case not even remotely related to the present case.

Rehearing denied.

All the Justices concurring.

(105 Kan. 72)

KELLY v. KELLY. (No. 22121.)*

(Supreme Court of Kansas. June 7, 1919.)

(Syllabus by the Court.)

1. CRUELTY AND NEGLECT—DECREE AND ALIMONY.

The evidence examined, and *held* sufficient to sustain a decree of divorce on the grounds of extreme cruelty and gross neglect of duty, and to justify a small monthly award of alimony and for support of minor children who were given into the custody of the plaintiff.

2. DIVORCE ⟸146—TAKING UNDER ADVISEMENT.

No error arises in a divorce action where the question of alimony is decided offhand, although the matter of the divorce itself is taken under advisement for ten days and then granted.

3. DIVORCE ⟸312—SUPPORT OF MINOR CHILDREN—DISCRETION OF COURT—REVIEW.

In a divorce action, where the welfare of minor children is concerned, the trial court's power in dealing with the property of the parents is necessarily very broad; and, unless that power is obviously abused, the disposition made of that property for the care of the children will not be disturbed on appeal.

4. DIVORCE ⟸261, 311—ALIMONY AND SUPPORT—REDRESS IN TRIAL COURT.

Parties remanded to trial court for enforcement of payment of arrears of alimony and support; attorney's fee, etc., allowed; judgment affirmed.

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* Rehearing denied July 5, 1919.

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Appeal from District Court, Shawnee County.

Action for divorce by Edith L. Kelly against William J. T. Kelly. Judgment for plaintiff awarding a divorce, custody of minor children, alimony and support of children, and the defendant appeals. Affirmed.

J. S. Ensminger, of Topeka, for appellant.
Waters & Waters, Edward Rooney, and J. E. Addington, all of Topeka, for appellee.

DAWSON, J. The district court of Shawnee county granted to the plaintiff a divorce from her husband. She was also awarded the custody of the minor children of the parties, and given $15 per month as alimony and for support of the children, and the title to the homestead, a $400 house and lot, was vested in the plaintiff as trustee for the use and benefit of the minor children; and, subject to application to the court and with its leave first obtained, the plaintiff, as trustee, may sell, mortgage, or rent the property for the use and benefit of the children in such manner as the court may decree; "it being the intent of the court," says the decree, "that the property be held for the benefit of said children only, or, if sold, the proceeds to be held in the same manner and for the same purposes."

[1] It is contended that the testimony did not prove defendant's extreme cruelty and gross neglect of duty. This action was plaintiff's fifth attempt within two or three years to obtain a divorce from defendant. The first three actions were compromised, abandoned, or dismissed. The fourth was tried to a conclusion on March 26, 1918, and plaintiff was defeated. On the evening of the same day, the ill-matched pair returned to their abode, but instead of setting about the re-enshrinement of their lares and penates, reshaping their marital conduct in mutual forbearance, "in honor preferring one another," their angry hostility which had been adjourned in court was immediately renewed at their own fireside. Defendant took special umbrage at part of the testimony which plaintiff had given at the trial, and felt particularly aggrieved about a statement of plaintiff which had been published in a local newspaper. There was no resumption of marital harmony, and a few weeks later this action was begun.

The evidence in this case tended, in part, to show that defendant was a gambler, improvident, quarrelsome, and violent, and neglectful of his wife and children; it was partly shown that he was a thief, and under investigation by the postal authorities, and that he was disposed to inculcate dishonesty in his children. Mayhap the testimony as to defendant's shortcomings was magnified or untrue. As to that, the judgment of the trial court—not ours—must control. On the face of the record, however, it cannot be denied that the findings are supported by the evidence. Putnam v. Putnam, 104 Kan. 47, 56, 177 Pac. 838.

Passing for the moment the trial court's disposition of the property, this court discerns no error in the decree awarding plaintiff the custody of the minor children, nor in the allowance of $15 per month as alimony and for the children's support.

[2] No semblance of error is disclosed in the fact that the trial court decided the question of alimony at one time and took the question of granting a divorce under advisement for about ten days and thereafter granted the divorce.

[3] Fault is found with the trial court's disposition of the property. The house and lot were given to plaintiff as trustee during the minority of the children, and for their use and benefit. It is only for the use and benefit of the children that the property may be sold, mortgaged, or rented, and even in any such case the trial court has reserved to itself full control of the matter. Leave of court must first be had before disposing of the property or in renting it, and the sanction of the court is requisite to dispose of the proceeds or income. Counsel for defendant contend that the court had no power to take his property from him and confer it absolutely upon his children. Very true. The court did not do so. It created a trusteeship during the children's minority and for their benefit. This is authorized by section 672 of the Civil Code (Gen. St. 1915, § 7580). In a divorce case, where the welfare of minor children is involved, the trial court's power in dealing with the property of parents is necessarily very broad, and, unless that power is obviously abused, its exercise will not be disturbed on appeal. As we construe the decree, if the property is not exhausted during the children's minority, with the approval of the court and by its order, the trusteeship will then be terminated, and the title will revert to its status prior to the date of the decree. Smith v. Smith, No. 22051, 180 Pac. 231, decided April, 12, 1919; Emery v. Emery, No. 22088, 180 Pac. 451, decided April 12, 1919.

[4] During the pendency of this appeal, plaintiff filed a motion for an allowance of attorney's fees and for the expenses of preparing her brief and counter abstract, and to require payment of arrears of monthly allowances of alimony and for support of the children. Affidavits of the parties on these matters have been duly considered. It appears that because of nonpayment of the alimony and support allowances and because of her poverty, plaintiff was constrained to place her three smaller children in her mother's care on a farm in Oklahoma. Defendant ignores this apparent necessity and says that this temporary disposition of the

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children frustrates that part of the trial court's decree which gave defendant permission "to visit said children one day each week by leaving said children with him, away from his home." As to the enforcement of the allowances for alimony and for the support of the children, the plaintiff should seek redress in the trial court. An attorney's fee of $50 and $25 for preparing the counter abstract and brief are allowed to plaintiff, and the judgment is affirmed.

All the Justices concurring.

(105 Kan. 193)

AITKEN LUMBER CO. v. KANSAS CASUALTY & SURETY CO. (No. 21967.) *

(Supreme Court of Kansas. June 7, 1919.)

(Syllabus by the Court.)

MECHANICS' LIENS ⇐315—MATERIALMEN—SUIT ON INDEMNITY BOND—AMOUNT DUE.

The contractor in the erection of a building purchased from the plaintiff cement under an agreement that he was to be charged with the sacks on the same terms as for cement, and on receipt of the empty sacks plaintiff was to repurchase them at 10 cents each. In an action on a surety bond given to indemnify persons furnishing the material, *held* that, in order to determine the amount due plaintiff, it was proper to charge the contractor with cash paid for the return of the sacks.

Appeal from District Court, Barton County.

Action by the Aitken Lumber Company against the Kansas Casualty & Surety Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Stanley, Stanley & Hegler and George Siefkin, all of Wichita, for appellant.

Russell & Russell, of Great Bend, for appellee.

PORTER, J. The defendant executed its bond as surety for the use of all persons in whose favor liens might accrue on account of labor or material furnished in the erection of a mill and elevator building. The plaintiff sued to recover a balance claimed to be due for material furnished. The case was tried upon an agreed statement of facts, and judgment was rendered for plaintiff, from which the defendant appeals.

The defendant excepts to three items in plaintiff's account which aggregate $1,148.82, and which were for cash paid by plaintiff to the contractor. The correctness of plaintiff's account otherwise is not disputed. The controversy over the three cash items arises in this way: The plaintiff furnished the contractor cement in sacks under a contract which provided that the purchaser was to pay for sacks on the same terms as for cement, and on receipt of the empty sacks in good condition the plaintiff was to repurchase them at 10 cents each. In order to obtain the discount allowed for cash, the contractor paid the purchase price of the cement when it was delivered, and the discount was figured upon the full amount of the purchase price, which, of course, included the sacks. On three separate occasions he returned sacks after the cement had been used, and the plaintiff paid him in cash the refund agreed upon when the cement was purchased. Because the bond expressly provided that the surety merely guaranteed to pay claims, for which the party furnishing labor or material would otherwise have been entitled to file a lien upon the building, it is contended by the defendant that in fixing the amount of its liability the court erroneously allowed these cash items for which plaintiff would not in any event have been entitled to a lien. There is not the slightest merit in this contention. If no surety bond had been given, the plaintiff would have been entitled to file a lien for the cost of the cement furnished to the contractor, and that is all that is included in the items of which defendant complains. In order to deliver the cement for convenient use, sacks were necessary as containers; these were furnished temporarily by the plaintiff under a contract by which the purchaser was charged with the sacks, and upon their return a fixed price for them was to be refunded to him in cash. The whole question involves a mere matter of accounting. It is obvious that the contractor, having paid for the sacks in the first place, was entitled to receive the cash for them when they were returned, all of which was no concern of the surety company.

The judgment is affirmed.

All the Justices concurring.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

* Rehearing denied 182 Pac. 182.

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(105 Kan. 67)

FLOWERDEW v. LAMBETH. (No. 22036.)

(Supreme Court of Kansas. June 7, 1919.)

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(Syllabus by the Court.)

LANDLORD AND TENANT ⟸331(6)—DELIVERY OF LANDLORD'S SHARE—EVIDENCE.

Upon an issue as to the quantity of corn delivered by a tenant to his landlord, the evidence is *held* to have been sufficient to support the verdict.

Appeal from District Court, Cheyenne County.

Action by Fred Flowerdew against Albert Lambeth. Verdict and judgment for defendant, and plaintiff appeals. Affirmed.

J. L. Finley, of St. Francis, for appellant.
E. E. Kite, of St. Francis, for appellee.

MASON, J. Fred Flowerdew rented a farm to Albert Lambeth, who, among other things, agreed to give him one-third of the grain crop. Flowerdew sued Lambeth, alleging his failure to perform this and other agreements. A jury trial resulted in a verdict for the defendant, on which judgment was rendered, which is now appealed from.

Other issues were involved, but the plaintiff contends that, however they may have been determined, he was entitled to a recovery because the undisputed evidence showed that, while the defendant was required to deliver to him at least 646 bushels of corn, he had in fact received only 475 bushels. The plaintiff pleaded that the corn crop amounted to 3,000 bushels, of which he had received but 500. The defendant pleaded that he had raised only 1,800 or 1,900 bushels, and had delivered 640 to the plaintiff. The plaintiff introduced various estimates of the yield, but relies specifically upon evidence that the defendant had himself used or sold 1,292 bushels of corn raised on the place. This would indicate a total crop of 1,938 bushels, which is not materially in excess of the defendant's figures. Therefore the controversy here does not concern the amount of corn raised, or the amount retained by the defendant, and the only question to be determined is whether the evidence compelled a finding that the defendant failed to deliver one-third of the crop to the plaintiff. The judgment must be affirmed, unless it was conclusively established that the plaintiff received less than 646 bushels.

The corn which the plaintiff received was delivered to him by the defendant by being placed in two cribs on the farm. The defendant testified that a division of the corn was made in the field, and that he did not get more than his share; that 351 bushels was put into one of the plaintiff's cribs, which was made out of boards, and that the other crib, which was made of upright slats wired together, was filled; that this slat crib originally held 500 bushels, but its capacity had been diminished by its being "lapped" to cover places where slats had been broken. This evidence was somewhat indefinite; the extent to which the size of the crib had been reduced not being indicated. But, if the reduction amounted to as much as 200 bushels, the contents of the crib would still be 300 bushels, and this, with the defendant's estimate of 351 bushels in the board crib, would have left him some margin. This estimate was larger than the result of a measurement by one of his own witnesses, but he was not absolutely bound by any testimony but his own.

The plaintiff undertook to account for all the corn in the two cribs by a showing, corroborated by other witnesses, of the contents, totaling 475 bushels, of a number of loads hauled away at different times. Whether these loads actually comprised all the corn that the defendant had placed in the cribs was a matter to be determined by the triers of the facts. This court cannot say that the jury was compelled to give credence to evidence merely because it was not specifically contradicted. Granting that a strong argument is made in behalf of the plaintiff upon the facts, we cannot find in it a basis for a reversal.

The judgment is affirmed.

All the Justices concurring.

(105 Kan. 83)

AMES v. CITIZENS' NAT. BANK OF INDEPENDENCE et al. (No. 22183.)

(Supreme Court of Kansas. June 7, 1919.)

(Syllabus by the Court.)

EXECUTORS AND ADMINISTRATORS ⟸519(1) — ANCILLARY ADMINISTRATOR — ACTION ON CERTIFICATE OF DEPOSIT.

A resident of New Mexico died there, intestate, the owner of certificates of deposit issued by a bank in Kansas. An administrator was duly appointed by the probate court of New Mexico, who brought suit in this state against the bank to recover the indebtedness represented by the certificates. An administrator who had been appointed by the probate court in this state intervened, and claimed the right to recover the debt. *Held*, that the administration here is ancillary to the principal administration at the domicile of the deceased, and that it was error to render judgment in favor of the ancillary administrator.

Appeal from District Court, Montgomery County.

Action by Robert Newton Ames, administrator of the estate of Llewellyn A. Carr, deceased, against the Citizens' National

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Bank of Independence, in which George B. Longan, as Kansas administrator, was permitted to intervene. Judgment for defendants, motion for new trial denied, and plaintiff appeals. Reversed and remanded, with direction to enter judgment in favor of plaintiff and against defendant bank.

Walter L. McVey and Thurman Hill, both of Independence, and M. C. Spicer, of Socorro, N. M., for appellant.

W. N. Banks and O. L. O'Brien, both of Independence, for appellees.

PORTER, J. On the 10th day of January, 1917, Llewellyn A. Carr, a resident of the county of Socorro, and state of New Mexico, died there, intestate. On January 22d the plaintiff, Robert Newton Ames, who was a resident of the same place, was duly appointed administrator of the estate.

At the time of his death Llewellyn A. Carr held in his name three certificates of deposit issued by the Citizens' National Bank of Independence, upon which there was due the sum of $5,720. On July 28, 1917, plaintiff brought this action in the district court of Montgomery county to recover from the bank the amount of the certificates, and attached to his petition duly authenticated copies of the proceedings showing his appointment as administrator and attached copies of the certificates of deposit. He alleged that as such administrator he had demanded from the defendant bank payment of the money, and that the bank refused payment. The answer of the bank admitted the execution of the certificates and that there was due thereon the amount claimed but set up the defense that one George B. Longan a resident of Johnson county had been on the 12th day of February, 1917, by the probate court of Montgomery county, duly appointed administrator of the estate of Llewellyn A. Carr, deceased, and was entitled to have turned over to him as such administrator all the funds belonging to the estate, and that he had made a demand upon the bank for the payment of the funds represented by the certificates. It further alleged that on August 27, 1917, one Juliette Carr Bray, of Kansas City, Mo., brought an action in the United States district court of Kansas against George B. Longan, as administrator, and against the bank in which she claimed to be entitled to the funds represented by the certificates. The answer further alleged that the bank had filed its answer in that proceeding, setting out the same facts, and had at all times been ready and willing to pay to the person entitled the money represented by the certificates, but that the plaintiff failed to take out letters of administration in the state of Kansas. The bank prayed for an order and judgment directing plaintiff to deliver the certificates to the clerk of the court, and for a further judgment directing the bank to pay the judgment into the United States court, and to be released from further liability, and it asked to be allowed attorney's fees and costs.

George B. Longan was permitted to intervene, and filed his answer, setting up the same facts, and alleging his appointment and qualification as administrator; that there are debts against the estate of Llewellyn A. Carr, deceased, unpaid and owing to citizens and residents of this state. The plaintiff filed an answer to the amended petition, denying that at the time of the death of Llewellyn A. Carr he owned any property within this state, expressly denying that there are debts of the estate now due, unpaid, and owing to citizens or residents of Kansas, and alleging that the appointment of Longan as administrator was illegal and void because the court was without jurisdiction to appoint him administrator, and denying that at the time of the appointment of Longan as administrator there were in Kansas any assets of the estate.

The court rendered judgment against the plaintiff, holding that George B. Longan is the duly appointed administrator of the estate, and entitled to take into his possession all money and property belonging to the estate that may be found within the jurisdiction of the court. Longan was given judgment against the bank for the amount due upon the certificates; the bank was directed to pay the money to the clerk of the court; the certificates were ordered delivered to him to be canceled; and he was directed to pay the money to George B. Longan, as administrator. The court denied the plaintiff a new trial, and he appeals.

It appears that the only claim against the estate in favor of a resident of Kansas was one for the sum of $2.50 presented by the publisher of a newspaper at Independence, and this indebtedness was paid and satisfied by Robert Newton Ames as administrator. There is no controversy over the facts.

In the recent case of In re Miller's Estate, 90 Kan. 819, 136 Pac. 255, Syl. 2, L. R. A. 1915D, 856, Ann. Cas. 1915B, 699, it was held that—

"The situs of shares of capital stock in a Kansas corporation owned by one who was a resident of another state at the time of his death, for purposes of administration, is at the domicile of the decedent rather than in the state in which the corporation is organized and has its place of business."

In the opinion it was said:

"Under the common law and as a general rule the situs of personal property is the residence of the owner, and the title to personalty is in the domiciliary executor or administrator." 90

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Kan. 822, 136 Pac. 256, L. R. A. 1915D, 856, Ann. Cas. 1915B, 699.

That case turned, however, upon the peculiar characteristics of corporate stock, and it was held that the probate court was without jurisdiction to make the appointment. In the present case it cannot be said that the probate court of this state was without jurisdiction to appoint an administrator, but the administration here was merely ancillary to the principal administration at the domicile of the intestate.

In reference to the general rule that debts, such as are evidenced by promissory notes, or bills of exchange, are bona notabilia at the domicile of the debtor, it was said in Moore, Adm'x, v. Jordan, 36 Kan. 271, 13 Pac. 337, 59 Am. Rep. 550:

"The courts, however, are not entirely uniform in their holding upon this question. Some of the authorities hold that the title to these evidences of debt is not only in the domiciliary administrator, but that they are assets in his hands instead of at the domicile of the debtor." 36 Kan. 276, 13 Pac. 339, 59 Am. Rep. 550.

The present case, however, turns upon the fact that the plaintiff, who was appointed administrator at the domicile of the deceased, and who had possession of the certificates of deposit, holds a title superior to that of Longan, who is only the ancillary administrator, and who never had in his possession the certificates.

If the ancillary administrator had secured possession of the evidences of debt and had brought suit and recovered the amount due thereon, it would have been his duty, after satisfying any indebtedness against the estate owing to residents here, to remit the balance to the principal administrator, who is the plaintiff.

When the plaintiff demanded from the bank payment of the amount represented by the certificates, the bank had no defense and no ground for refusing payment. No administrator had been appointed in this state. Besides, payment to the administrator appointed in New Mexico was good against any administrator appointed elsewhere. Moore, Adm'x, v Jordan, supra; Wilkins v. Ellett, 9 Wall. 740, 19 L. Ed. 586; Wyman v. Halstead, 109 U. S. 656, 3 Sup. Ct. 417, 27 L. Ed. 1068.

It follows, therefore, that the judgment will be reversed and the cause remanded, with directions to enter judgment in favor of the plaintiff against the bank for the amount of the certificates, interest, and costs.

All the Justices concurring.

(105 Kan. 75)

DAVIS v. HEYNES. (No. 22138.)

(Supreme Court of Kansas. June 7, 1919.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⟸695(1)—SUFFICIENCY OF EVIDENCE—OBJECTION—TRANSCRIPT.

The rule applied that the sufficiency of the evidence to sustain the findings and judgment of a court, and that objections which arise solely upon the evidence and proceedings in the case, cannot be considered upon an appeal, where a transcript of the evidence and proceedings have not been obtained, or have not been otherwise preserved as the Code provides.

2. APPEAL AND ERROR ⟸690(4) — LIMITATION OF ACTIONS ⟸100(13)—CONSTRUCTIVE NOTICE—FRAUD.

In an action for relief on the ground of fraud, constructive notice is sufficient to start the running of the statute of limitations, within the meaning of the Code provision that such an action is deemed to have accrued upon the "discovery of the fraud."

3. LIMITATION OF ACTIONS ⟸197(2) — DISCOVERY OF FRAUD—EVIDENCE.

The facts found by the trial court herein are deemed to be sufficient to sustain the conclusion that the plaintiff had actual notice of the alleged fraud more than two years before the commencement of the action.

Appeal from District Court, Barton County.

Action by L. B. Davis against M. E. Heynes. Judgment for defendant, and plaintiff appeals. Affirmed.

Jamison & Jamison, of Topeka, for appellant.

Osmond & Cole and Russell & Russell, all of Great Bend, for appellee.

JOHNSTON, C. J. The plaintiff sought a recovery from defendant for the alleged fraudulent withdrawal and misappropriation of funds of the plaintiff which had been deposited in a bank of which defendant had been cashier.

[1] Among the defenses alleged was that all of the causes of action set out in plaintiff's petition had been fully litigated in an action between plaintiff and the bank, and that the judgment rendered against plaintiff therein was final. Another defense set up was that the alleged causes of action were based on fraud, and that more than two years had elapsed since the causes of action accrued. The parties stipulated that the question of whether or not the claims of plaintiff were barred by the statute of limitations should be first tried. A trial was then had on that issue, with the result that a finding was made that each of the causes of action relied on by plaintiff was barred by the statute of limitations. Plaintiff appeals, but

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the evidence has not been transcribed nor preserved in the manner necessary to a review of most of the questions discussed by counsel for plaintiff.

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It appears that ineffectual attempts were made to obtain a transcript, and while we recognize the difficulties under which counsel for plaintiff labored, it must be held that we cannot determine that the evidence was insufficient to support the findings, nor any other objection which arises solely upon evidence and proceedings not embraced in the record. Typewriter Co. v. Anderson, 85 Kan. 867, 118 Pac. 879; Davidson v. Timmons, 88 Kan. 553, 129 Pac. 133. The record includes the pleadings, findings, and judgment of the court, and only such questions as arise on this record are open to our consideration.

[2] It is contended that the alleged fraud was not discovered until in 1917, at a time less than two years prior to the commencement of this action. Although the testimony on the subject is not preserved, some of the findings of the court relate to the discovery of the fraud by plaintiff, and these may be examined. It is recited that the plaintiff was a patron of the bank of which defendant was cashier from 1908 until 1910, that he was furnished with a statement of his account about every 30 days, and at the same time there was returned to him the canceled checks, a part of which it was alleged were forged by the defendant. The action against the bank was based on the forgery of the checks and the fraudulent withdrawal of his money from the bank, and was begun on June 8, 1911, and the judgment was entered in that case on April 17, 1912. According to the findings, plaintiff became suspicious of his account with the bank in October, 1910, and was then led to the belief that the defendant, as cashier, had wrongfully imposed on him. He procured an attorney to represent him and look over his accounts with the bank, and for that purpose they were given access to the books of the bank. It appears that after this investigation, which was in January, 1911, he was firmly convinced that he had been defrauded of large sums of money by the defendant, and yet with this belief, and the knowledge gained from the canceled checks and the books, he did not commence this action until February 4, 1918, more than seven years after the alleged fraud was brought to his attention.

While plaintiff had this notice he says he is illiterate, and did not comprehend his legal rights and duties, and he still insists that the preponderance of the evidence was that he did not actually discover the fraud until 1917. He seems to contend that he cannot be held to have discovered the fraud until specific actual notice or knowledge of the fraud is directly brought to his attention. It is enough if the information pointing to the fraud was brought to his notice and he had the means of ascertaining the facts relating to it. 17 R. C. L. 741. Nor is it necessary that there shall be more than constructive notice of the fraud in fixing the time of its discovery under the statutory limitation. In Black v. Black, 64 Kan. 689, 68 Pac. 662, it was held that the phrase "discovery of fraud" does not mean until the party complaining has actual notice of it, but that constructive notice is sufficient, and hence it was ruled that a public record required to be kept, involving the transaction pointing to the fraud, was sufficient notice. A ruling to the same effect is found in Lewis v. Duncan, 66 Kan. 306, 71 Pac. 577. Here the findings indicate that the facts relating to the alleged fraud excited the attention of the plaintiff seven years before the action was brought. In addition to the returned checks alleged to be forged, which he had in his possession, he had investigated the bank account, all of which forced him to the conclusion that he had been defrauded, and yet he allowed his claims to sleep for years beyond the statutory period. He may not have acquired complete information of all the facts at that time, but certainly he had sufficient to put him on inquiry, and that kind of information is deemed to be good notice of all matters to which an inquiry diligently prosecuted would have led. In Woodruff v. Williams, 35 Colo. 28, 85 Pac. 90, 5 L. R. A. (N. S.) 986, it was said:

"The presumption is that, if a party affected by any fraudulent transaction or management might with ordinary care or attention have seasonably detected it, he seasonably had actual knowledge of it. Full possession of the means of detecting fraud is the same as actual knowledge."

In a case where a statute requires actual notice of a fact, it has been held that:

"Actual knowledge of the defect, like any other fact, may be established by circumstantial evidence, that is, it may be shown by a number of minor facts obtained from several witnesses and sources which are so related and linked together as to warrant the inference that the officer had actual knowledge of the defect." Watkins v. Harper County, 95 Kan. 166, 147 Pac. 822.

[3] The circumstances related in the findings afford a fair and reasonable inference that the plaintiff has actual notice of the alleged fraud more than two years before the commencement of the action.

Under the record as it stands, the claims of error cannot be upheld.

Judgment affirmed.

All the Justices concurring.

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(105 Kan. 32)

CALDWELL et al. v. SKINNER et al.*
(No. 21875.)

(Supreme Court of Kansas. June 7, 1919.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⟸671(3) — TRANSCRIPT OF RECORD—REVIEW.

In the absence of a transcript or record of the evidence prepared as the Code provides, questions arising on the evidence and proceedings are not open to review on appeal.

2. APPEAL AND ERROR ⟸701(1)—INSTRUCTIONS—REVIEW—EVIDENCE.

Without evidence bearing on any question in the case upon which an instruction is founded, it cannot be determined that prejudicial error was committed in giving the instruction, although it might under a certain state of facts, or as an abstract proposition, be incorrect.

3. APPEAL AND ERROR ⟸688(2)—RECORD—ADDITIONAL STATEMENT TO JURY—PREJUDICE.

The denial of a request by plaintiffs for permission to make an additional statement of their case to the jury, after an amendment of the answer had been made with the permission of the court, cannot be deemed to be prejudicial error, in the absence of a showing as to the nature and extent of the statement already made.

4. TRIAL ⟸109 — OPENING STATEMENT — DISCRETION OF COURT.

The fullness or brevity of such an opening statement is largely within the discretion and control of the trial court.

Appeal from District Court, Shawnee County.

Action by Sam C. Caldwell and another against C. D. Skinner and J. H. Gayhart, partners, doing business as the Merchants' Transfer & Storage Company. Judgment for defendants, and plaintiffs appeal. Affirmed.

J. M. Stark, of Topeka, for appellants.
D. R. Hite, of Topeka, for appellees.

JOHNSTON, C. J. Property of plaintiffs placed in the custody of defendants as warehousemen was destroyed by fire. On a former appeal a question which arose on the pleadings was determined. Caldwell v. Skinner, 100 Kan. 567, 164 Pac. 1166. Subsequently a trial was had, and after a jury was impaneled counsel for plaintiffs made a statement of their case to the jury, and while counsel for the defendants was stating their defense he was interrupted by an objection, and over the objection of the plaintiffs he was allowed to amend his answer so as to state:

"That in the storage of said goods and in the care thereof the defendants exercised the care that a reasonable man would take of his own property, and that said fire was without fault on the part of these defendants."

Later counsel for plaintiffs asked permission to make an additional statement of his case to the jury, and this was denied. The issue joined between the parties was whether the loss of the goods was caused by the failure of the defendants to exercise such care of the goods stored with them as a reasonably careful owner of the goods would exercise, and upon the evidence submitted a verdict for defendants was given, and it was specially found that there was no such neglect by the defendants, and that no act or neglect of theirs had contributed directly to the loss. A number of other findings were made as to the situation of the warehouse and the conditions under which the goods were accepted for storage, and one of these was that the defendants were not to be liable for loss occasioned by fire.

[1] On this appeal plaintiffs complain of rulings upon evidence, including the refusal of the court to peremptorily instruct the jury that under the law and the evidence they must find for plaintiffs, although a transcript of the evidence was not made. The reason given for the absence of a transcript is that the official stenographer had died before transcribing his notes. To meet such an exigency it is provided in the Code that the court or judge before whom the case was tried may by order provide for the making of a statement of the evidence and proceedings in the case which, when approved and signed by the judge, shall become a part of the record in the case. Civ. Code, § 582 (Gen. St. 1915, § 7486). This was not done. In the absence of such a transcript, record, or agreement of parties, questions arising on the evidence and proceedings are not open for consideration on appeal. Typewriter Co. v. Andreson, 85 Kan. 867, 118 Pac. 879; Readicker v. Denning, 86 Kan. 79, 119 Pac. 533; Davidson v. Timmons, 88 Kan. 553, 129 Pac. 133; Spencer v. McClenney, 104 Kan. 107, 178 Pac. 253.

[2] An attack is made on the instructions of the court, but because of the incomplete condition of the record it cannot be held that prejudicial error was committed in that respect. It has been decided that:

"Without the evidence bearing on any question in the case, it cannot be determined on an appeal that an instruction given, even if erroneous as an abstract statement of the law, was prejudicial error." Giles v. Ternes, 93 Kan. 140, 143 Pac. 491.

Looking at the instructions as presented in the record, they do not appear to be out of line with the law.

[3, 4] There is a contention that there was error in the ruling denying plaintiffs' request for permission to make an additional state-

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

* Rehearing denied July 5, 1919.

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ment of their case to the jury at the opening of the trial. After plaintiffs' statement had been made, the court permitted an amendment of the defendants' answer in one particular, and under some circumstances the allowance of an amendment might justify the making of an additional statement. However, the statement already made may have fully covered the matter included in the amendment, and the fullness or brevity of an opening statement is largely within the discretion and control of the trial court. The record does not disclose the nature or extent of the statements made to the jury by either of the parties, and in the absence of a showing it cannot be held that the denial of an extension of the opening statement operated to the injury of the plaintiffs. Only prejudicial error is ground for reversal, and prejudice has not been shown.

There is nothing substantial in the objections made to the rulings on the evidence, nor in the denial of the motion for a new trial.

Judgment affirmed.

All the Justices concurring.

(105 Kan. 52)

STATE v. GIBBS. (No. 21989.)

(Supreme Court of Kansas. June 7, 1919.)

(Syllabus by the Court.)

1. CRIMINAL LAW ⟸684, 1036(1)—EVIDENCE—REBUTTAL BY STATE.

Ordinarily it is irregular and improper to permit the state, in a criminal prosecution, to introduce, as rebuttal, such evidence as properly pertains to the state's evidence in chief, but reversible error cannot be predicated thereon unless timely objection is made to the introduction of such evidence.

2. CRIMINAL LAW ⟸688, 753(2)—TRIAL—STATE'S EVIDENCE AFTER REFUSAL OF DIRECTED VERDICT.

In a criminal prosecution, where the state fails to establish a prima facie case against the defendant by its evidence in chief, the defendant is entitled to a directed verdict in his behalf; but where that is denied, and the defendant offers evidence in his own behalf, the trial court, for good reason and in furtherance of justice, may permit the state to offer further evidence which properly pertained to the case in chief. Code Cr. Proc. § 227 (Gen. St. 1915, § 8148).

(Additional Syllabus by Editorial Staff.)

3. CRIMINAL LAW ⟸1186(4)—REVERSAL—TECHNICAL GROUNDS.

Where the trial was to be viewed as if the trial court had permitted the state to reopen its case in chief within Code Cr. Proc. § 227 (Gen. St. 1915, § 8148), without defendant's objection under section 219 (section 8140), and where there was no doubt of defendant's guilt, Code Cr. Proc. § 293 (Gen. St. 1915, § 8215), forbidding reversal on technical grounds where substantial justice has been done, controlled.

Appeal from District Court, Cowley County.

T. J. (Jack) Gibbs was convicted of stealing domestic fowls in the nighttime, and he appeals. Affirmed.

H. S. Hines and W. L. Cunningham, both of Arkansas City, for appellant.

Richard J. Hopkins, Atty. Gen., J. K. Rankin, of Topeka, and Ellis Fink, of Winfield, for appellee.

DAWSON, J. The defendant T. J. (Jack) Gibbs was convicted of stealing domestic fowls in the nighttime. Crimes Act, §§ 121, 122 (Gen. St. 1915, §§ 3448, 3449). His main grievance here relates to the overruling of his demurrer and motion for a directed verdict:

"For the reason that the facts proved fail to state any facts as against this defendant that would authorize a judgment for conviction. They don't connect this defendant anywhere with the chicken stealing at all."

[1-3] This demurrer and motion was filed at the conclusion of the introduction of the state's evidence in chief. It may be conceded that up to that point the state had not completely made out a prima facie case against this defendant, and if he had stood on that ruling, and had introduced no evidence in his own defense, the jury would have been bound to acquit him for want of proof (Cr. Code, § 228; Gen. St. 1915, § 8149); otherwise this court would order his discharge. But the defendant did not stand on that ruling; evidence was introduced for the defense; and on rebuttal a codefendant took the witness stand and candidly told of the various thefts of poultry by the defendant and the witness and another person. This evidence made a hopeless predicament for defendant, and his conviction followed as a matter of course.

Defendant cites pertinent precedents to show that the introduction of this evidence on rebuttal was improper, and it certainly was improper. In many jurisdictions it would be fatal to the state's case. State v. Christman, 32 N. D. 105, 110, 111, 155 N. W. 26; Hardesty v. People, 52 Colo. 450, 121 Pac. 1023. Even in this state, such an irregularity would be reversible error if defendant had been denied an opportunity to meet such a situation with further evidence to controvert it. State ex rel. v. Stout, 101 Kan. 600, 168 Pac. 853. But counsel for the state assert that the question of the propriety of such evidence on rebuttal was not questioned in the trial court. That assertion does not appear to be disputed; and upon inquiry we find that no transcript has been provided, so we must accept the state's contention as true. It seems therefore that the matter

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must be viewed as if the trial court had permitted the state to reopen its case in chief (Crim. Code, § 227; Gen. St. 1915, § 8148), and this, too, without defendant's objection (Crim. Code, § 219; Gen. St. 1915, § 8140; Kelly's Criminal Law and Procedure [3d Ed.] § 435); and since no doubt can be entertained of the defendant's guilt, the rule of the Criminal Code forbidding reversal on technical grounds, where substantial justice has been done, must control (Crim. Code, § 293 [Gen. St. 1915, § 8215]).

The judgment is affirmed.

All the Justices concurring.

(105 Kan. 46)

GATES et al. v. LITTLE FAY OIL CO. et al.* (No. 21965.)

(Supreme Court of Kansas. June 7, 1919.)

(Syllabus by the Court.)

1. PLEADING ⟸237(6)—AMENDMENT TO CONFORM TO PROOF—VARIANCE.

A demurrer to evidence was sustained on the ground that although it tended to establish a cause of action it was not consistent with the pleading of the party introducing it, and an application for leave to amend the pleading to conform to the proof was denied. *Held*, that the pleading was not explicitly in conflict with the evidence, but was merely ambiguous and indefinite, and that, in view of circumstances which are regarded as showing that the opposing party was not taken by surprise, the amendment should have been allowed and the demurrer overruled.

2. PARTIES ⟸94(2)—DEFECTS—DEMURRER TO EVIDENCE.

The fact that a company which is described in the pleadings as a corporation, and is made a party as such, and as to the corporate existence of which no issue is raised, turns out to be a firm, not all of the members of which are made parties, is not a ground of demurrer to the evidence.

Appeal from District Court, Allen County.

Action by G. W. Gates and T. S. Breckenridge, partners, etc., against the Little Fay Oil Company and J. E. Crosbie, with answer and cross-petition by defendants, and in which the Independent Torpedo Company was made a party on application of the original defendants. Demurrer to defendants' evidence sustained, judgment for plaintiffs, and defendants appeal. Reversed and remanded, with directions.

F. J. Oyler, of Iola, and F. B. Dillard, of Tulsa, Okl., for appellants.

Ewing, Gard & Gard, and Baxter D. McClain, all of Iola, G. C. Spillers, of Tulsa, Okl., and A. H. Campbell, of Iola, for appellees.

MASON, J. G. W. Gates and T. S. Breckenridge, partners, brought an action against the Little Fay Oil Company and J. E. Crosbie to recover the agreed price for drilling an oil well. It was admitted that the well had been drilled and that the price sued for was that agreed upon. The trial was upon a defense and counterclaim set up in the answer, to the effect that while preparations were being made to shoot the well, an employé of the plaintiffs carelessly or willfully caused a wire to be dropped into it, as a result of which it was rendered entirely useless. The Independent Torpedo Company was made a party on the application of the original defendants, who will be spoken of hereafter simply as the defendants. The allegation against it was that it had been employed to do the shooting, and that its unskillful conduct in attempting to recover the wire contributed to the destruction of the usefulness of the well. A demurrer to the defendants' evidence was sustained, judgment being rendered against them for the price of drilling the well, and they appeal.

The defendants' evidence tended to show these facts: The plaintiffs agreed to drill the well for $1 a foot, the defendants to pay them $25 a day for cleaning it out and what extra work they did after it was drilled, such as shooting, cleaning out, and pumping, if necessary. When the well had been drilled, reaching the oil-bearing sand, the defendants arranged with the Independent Torpedo Company to shoot it. The shooter and the plaintiffs' men began to prepare it for the shot. A shell of nitroglycerine was lowered to the bottom of the well, a wire being attached to it, the purpose being to explode the charge by electricity. A rod some three or four feet long was run through a ring attached to the upper end of the wire to keep it from falling into the well. One of the plaintiffs' men pulled out the rod and the wire dropped into the hole. Efforts were made to recover it, but it broke, and while a part of it was pulled up the rest remained in the well, which had to be abandoned.

In making their own case the plaintiffs had introduced evidence that after the well had been drilled they had nothing more to do with it; that they turned it, together with their rig and men, over to the defendants, who thereafter directed the work; that the agreement was that the plaintiffs were to receive $25 a day for allowing this use of their material and employés. A witness for the defendants testified that there was not a word said about the drilling rig and the plaintiffs' men being turned over to the defendants for the purpose of cleaning out.

[1] The foregoing statement shows that a vital issue in the case was as to who was in control of the work when the accident oc-

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* Rehearing denied 182 Pac. 184.

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curred. The defendants' theory is that the plaintiffs were doing the work under an agreement that they were to receive $25 a day for it. The plaintiffs' theory is that they merely gave the defendants the use of their rig and men for that price. It is clear that some of the evidence introduced tended to support the defendants' theory. Moreover a part of the evidence in behalf of the plaintiffs, which has not been recited, had a similar tendency. The trial court did not sustain the demurrer because of any lack in the evidence itself, but expressly based the ruling upon the ground that the allegations of the answer and cross-petition affirmatively supported the theory of the plaintiffs as to the character of the agreement, and therefore cut off the defense and counterclaim undertaken to be proved. The defendants asked leave to amend their pleading to conform to their proof in this respect, but the request was refused, and they complain of this ruling as well as of that sustaining the demurrer to their evidence. If the original pleading was in fact entirely inconsistent with the defense attempted, the matter of allowing an amendment doubtless rested so much in the discretion of the court as not to be subject to review. But if it was merely ambiguous or indefinite, the defendants may have been entitled to an opportunity to make it more specific. So much of the defendants' answer as need be considered in order to determine its character in this regard reads as follows, the language bearing more directly upon this question being italicized:

"Defendants, for affirmative relief against the plaintiffs and against the Independent Torpedo Company, say that they (defendants) entered into a verbal contract with the plaintiffs to drill and complete a well and *to render such services as were necessary in shooting said well and cleaning the same out;* being one and the same contract, and the well to be drilled upon the land described in plaintiff's petition. The defendants in said contract, agreed to pay to plaintiffs $1 a foot for drilling said well through to oil-bearing sand, *and to pay plaintiffs $25 per day for the use and benefit of their machinery and tools, and all labor necessary in preparing, cleaning, and shooting said well after the same was drilled through the oil-bearing sand.*

"Defendants further show that after the well was drilled by plaintiffs through the oil-bearing sand, to a depth of 901 feet, oil was discovered, and the defendants then contracted with the Independent Torpedo Company to shoot said well and contracted to pay it $100 therefor, if the same was shot; that the plaintiff and the torpedo company *jointly took possession of said well* and began to prepare the same for shooting; and in such preparations and the acts which followed, said plaintiffs and the Independent Torpedo Company were acting jointly."

The allegation that the defendants were to pay the plaintiffs $25 a day "for the use and benefit of their machinery and tools, and all labor necessary in preparing, cleaning, and shooting said well," suggests that this compensation was merely for the use of the rig and workmen, to be employed under the direction of the defendants, but we do not think its language compels that interpretation. The preceding statement that the plaintiffs contracted to drill and complete a well, and "to render such services as were necessary in shooting said well and cleaning the same out," seems to us to have as strong a tendency to the contrary, so that at most the pleading as a whole failed to make it clear that the defendants claimed that the agreement was that the plaintiffs were to control the work in connection with cleaning and shooting the well, and not merely to permit the use of their rig and employés by the defendants. The plaintiffs can hardly have been taken by surprise by the assertion of this claim, for one of them testified that shortly after the wire had been dropped he had a talk with a representative of the defendants in which each asserted that the men were working for the other. The controversy as to who had charge of the work was the foundation of the lawsuit, so far as the counterclaim was concerned, and that was the only matter in dispute. The amendment which the defendants asked leave to make was the substitution, for the second italicized passage in the foregoing quotation, of the words "and to pay plaintiffs $25 a day for cleaning and shooting said well after the same was drilled through the oil-bearing sand." It seems fairly clear that this is, in effect, what the defendants meant from the first, and that their failure to make their intention plain was the result of inadvertence and not of design. We believe that the likelihood of substantial justice being done will be best promoted by a reversal of the judgment, in order that the facts in controversy may be determined upon a trial on the merits. Rulings refusing to allow a pleading to be amended to conform to the evidence have not infrequently been held erroneous, notwithstanding the wide latitude allowed in such matters to the trial court. Wright v. Bacheller, 16 Kan. 259; Wait v. McKibben, 92 Kan. 394, 140 Pac. 860. Here, however, the question is not one of abuse of discretion. The refusal of the amendment was based upon a construction of their answer which was fatal to the defendant's recovery, while this court concludes that such construction can be avoided by making use of that great liberality of interpretation accorded to a pleading which has not been attacked by motion.

[2] 2. In the demurrer to the defendants' evidence filed by the Independent Torpedo Company a defect of parties defendant was assigned as one of the grounds; the reference doubtless being to the fact that while the Little Fay Oil Company was described in the pleadings as a corporation, the evidence tended to show that it was a partnership com-

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posed of four members, the defendant Crosbie being one, and the others not having been made parties. No issue appears to have been raised by the pleadings as to the corporate existence of the company referred to. In the title of the case in all the pleadings, and in the body of the answer of the Torpedo Company, it was described as a corporation, although nowhere was a direct allegation made that it had been incorporated. These considerations render the evidence on this subject immaterial, even if the omission of a necessary party would otherwise be a ground for demurring to the evidence. But any objection in this regard can be avoided by bringing in the additional parties before a trial on the merits.

The judgment is reversed and the cause remanded, with directions to allow the answer to be amended and for further proceedings in accordance herewith.

All the Justices concurring.

(105 Kan. 44)

LEBANON STATE BANK v. GARBER et al.
(No. 21921.)

(Supreme Court of Kansas. June 7, 1919.)

(Syllabus by the Court.)

1. BILLS AND NOTES ⟸395 — LIABILITY — DEMAND.

Demand is not necessary to fix the liability of a person primarily liable on a note payable on demand.

2. PARTNERSHIP ⟸48 — TRIAL ⟸251(1) —ACTION ON NOTE—INSTRUCTIONS—EVIDENCE.

Various assignments of error considered, and *held* to be without substantial merit.

Appeal from District Court, Jewell County.

Action by the Lebanon State Bank against C. A. Garber and others. Judgment for plaintiff, and defendant Garber appeals. Affirmed.

W. R. Mitchell, of Mankato, for appellant.
R. W. Turner and D. F. Stanley, both of Mankato, for appellee.

BURCH, J. The action was one to recover on a promissory note, given by the firm of Sullivan & Co., which it was alleged was composed of C. A. Garber, S. C. Flood, and others. The plaintiff recovered, and Garber appeals.

The note was dated October 7, 1912, and was payable generally on demand. The action was commenced on September 14, 1917, and the petition alleged that demand for payment had been made. A motion was filed to require the petition to be made more definite and certain by stating when and on whom demand had been made. The motion was properly denied.

[1] The defendant who appeals cites a half dozen decisions to the effect that when a note is payable on demand, demand for payment must be made within a reasonable time. The decisions all relate to demand as a step in fixing liability of persons secondarily liable. The Negotiable Instruments Act expressly provides that presentment for payment is not necessary to charge a person primarily liable (Gen. Stat. 1915, § 6597), and no demand is necessary to charge the maker of a demand note (8 C. J. 527). In such a case the only function of demand is to fix maturity of the paper, but commencement of action is of itself demand (8 C. J. 530), and the maker of a demand note may be sued immediately after delivery of the executed instrument. In this instance suit was commenced within the period of the statute of limitations, computed from the date of the note, and the question when and on whom demand had previously been made was not material.

Other grounds of the motion to make the petition more definite and certain were not well taken, and a demurrer to the petition was properly overruled.

[2] The answers of Garber and Flood consisted of verified general denials of the allegations of the petition, Flood stating affirmatively, in addition to his denial, that he was not a member of the partnership, and did not execute the note or authorize its execution. Witnesses for the plaintiff testified to the formation of the partnership and execution of the note to obtain funds to carry on the partnership business. The money thus obtained was left on deposit with the plaintiff, and was paid out on checks signed, "Sullivan & Co., C. A. Garber," and "Sullivan & Co., by S. C. Flood." The checks were introduced in evidence, and tended to sustain the allegations of the petition because they showed use of the firm name by Garber and by Flood in the appropriation of firm funds. The defendants offered in evidence two bundles of Garber's individual checks on his individual account, signed by himself, or signed "Chas. Garber, by S. C. Flood." The offer was properly refused.

It is said the offered checks would have explained why Garber and Flood happened to write checks against the account of Sullivan & Co., and would have shown they were given for the price of stock shipped by Garber and Flood with Sullivan & Co. The checks are not reproduced in the abstract, and it is not claimed they made any reference to Sullivan & Co. or its account or business, or contained

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any notations indicating the transactions to which they related; consequently the checks themselves would have explained nothing, and would not have shown the purpose for which they were drawn. The distinction between the probative force of these checks and the checks introduced in evidence by the plaintiff is obvious. It is further said the aggregate amount of the checks would have tended to corroborate some testimony given by Garber and Flood. It was not necessary to incumber the record with the checks themselves to show how much they all amounted to. Giving of the checks was not disputed, the sum of their amounts was determinable by simple addition and was not disputed, and what the checks really meant in relation to the issues in the case depended entirely on the truthfulness and relevancy of explanations which Garber and Flood in fact gave.

The court gave the jury the following instruction:

"Statements of one alleged partner, made in the absence of another person, would not be competent evidence tending to prove that such other person was a partner, but you may take such statement into consideration in determining whether or not there was any partnership of which the person making the statements was a partner."

The first part of the instruction responded to a request of the defendants. Complaint is made of the latter part. Of course a declarant's statements may be considered against himself. Certain instructions requested by the defendants relating to demand were properly refused, for reasons already given. A request for an instruction concerning the right of the bank to charge the note to the account of the makers did not relate to any issue in the case. The verdict was amply sustained by the evidence.

The judgment of the district court is affirmed.

All the Justices concurring.

(105 Kan. 91)

McCLURE v. CO-OPERATIVE ELEVATOR & SUPPLY CO. (No. 22189.) *

(Supreme Court of Kansas. June 7, 1919.)

(Syllabus by the Court.)

AGRICULTURE ⟹6—FARMERS' CO-OPERATIVE CORPORATION — DIVISION OF NET PROFITS — RECOVERY BY STOCKHOLDER.

A co-operative corporation was organized by farmers under section 2306 of the General Statutes of 1915. The basis for the division of net profits was ascertained by adding, to the total amount paid for products sold by stockholders to the corporation, the total amount paid by stockholders for merchandise purchased from the corporation. After paying expenses, and after paying a fixed dividend to all stockholders, net profits were realized. One of the stockholders, in addition to being a farmer, conducted a grain, brokerage, and commission business. He purchased a large amount of grain from the defendant at the market price, and sued to recover his proportionate share of the net profits. If he recovers, the result will be that he purchased his grain for less than the market price at the expense of the other stockholders. *Held*, that he cannot recover.

Appeal from District Court, Meade County.

Action by J. B. McClure against the Co-operative Elevator & Supply Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Frank S. Sullivan and A. T. Bodle, both of Meade, for appellant.

H. Llewellyn Jones, of Meade, and W. G. Fairchild and H. S. Lewis, both of Hutchinson, for appellee.

MARSHALL, J. The plaintiff, as a stockholder, seeks to recover pro rata shares of the net earnings of a co-operative corporation, organized under section 2306 of the General Statutes of 1915. All the stockholders were farmers. Judgment was rendered in favor of the defendant, and the plaintiff appeals.

Section 2306 reads:

"Any number of persons, not less than twenty who are citizens of the state of Kansas, may associate themselves together as a co-operative corporation for the purpose of conducting any agricultural, dairy, mercantile, mining, manufacturing, or mechanical business on the co-operative plan. The title of such corporation shall begin with 'the' and end with 'association,' 'company,' 'corporation,' 'exchange,' 'society,' or 'union.' For the purpose of this act the 'co-operative plan' shall be construed to mean a business concern that distributes the net profits of its business by: First, the payment of a fixed dividend upon its stock; second, the remainder of its profits are prorated to its several stockholders upon their purchases from or sales to said concern or both such purchases and sales."

The plaintiff was not only a farmer and a stockholder in the defendant corporation, but he also conducted a grain business, and purchased large quantities of grain from the defendant. During the period covered by the transactions involved in this action, the defendants' net profits amounted to $8,115.44. The plaintiff alleged that during that period, he purchased from the defendant 27,937 bushels of wheat, for which he paid $27,113, and that his share of the net profits was $1,084.42, 4 per cent. of the total business. The

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basis for the division of net profits was ascertained by adding, to the total amount paid for products sold by stockholders to the corporation, the total amount paid by such stockholders for merchandise purchased from the corporation, and each stockholder was then paid his proportionate share of the net profits based on the amount of business he furnished. The plaintiff claims that he is entitled to a proportionate share of the net profits based on the amount that he paid the defendant for wheat.

The plaintiff's contention seems plausible, but it is not tenable. The profits realized by the defendant were derived from its stockholders, who sold to it products at less than the amount received by the defendant for those products, and from stockholders who purchased from the defendant merchandise at a price greater than that paid therefor by the defendant. The purpose of the corporation was to enable such stockholders to have those profits returned after a 5 per cent. fixed dividend and all the expenses of handling the business had been paid. The defendant did not realize any profit on the transactions with the plaintiff. The profit on those transactions was realized by purchasing from the stockholders at reduced prices, and by selling on the market at the market price. In those transactions the plaintiff represented the market. Presumably he paid the full market price for the wheat purchased by him. Honesty compelled him to pay that price. If he was buying the wheat at less than the market price, he was getting a dishonest advantage, one which the law will not favor.

By this action, the plaintiff seeks to recover an amount equal to 4 per cent. of what he paid to the defendant for wheat purchased by him. According to the allegations of his petition, he paid practically $1 a bushel for wheat. He now wants returned to him an amount that will make his wheat cost him 96 cents a bushel. If the plaintiff is correct in his contention, and if the wheat raisers, who were stockholders, had sold to the defendant 100,000 bushels of wheat for $90,000, out of which there had resulted, after paying expenses and fixed dividends, a profit of $4,000, and the defendant had purchased all that wheat, for which he had paid $100,000, the market price, he would be entitled to have returned to him his pro rata share of the $4,000 net profit. That would result in his paying less than the market price for the wheat purchased by him, and would result in the producer receiving less than that market price. The law does not contemplate such a result, and the courts will not compel it.

The judgment is affirmed.

All the Justices concurring.

(105 Kan. 129)

SILVER LAKE STATE BANK v. GEORGE et al. (No. 22232.)*

(Supreme Court of Kansas. June 7, 1919.)

(Syllabus by the Court.)

1. CHATTEL MORTGAGES ⟸170(2) — SALE — RIGHTS OF MORTGAGEE.

Where a sheriff sold chattels under an execution, and a third party had a mortgage on some of the property sold, and that party, before the sale, commenced an action in replevin to recover possession of the mortgaged property, the fact that the sheriff sold property not covered by the mortgage will not defeat the mortgagee's right to recover the value of the mortgaged property.

2. BILLS AND NOTES ⟸430—CHATTEL MORTGAGES ⟸235½—PAYMENT—NEW NOTE.

A new note is not payment of an old one where each is evidence of the same debt, and the old note is retained by the payee thereof as security for the new one; and a chattel mortgage given to secure the payment of the debt evidenced by the old note remains as security for the payment of that debt.

3. FRAUDULENT CONVEYANCES ⟸299(2) — RIGHTS OF EXECUTION CREDITORS—FRAUD—EVIDENCE.

After an examination of the evidence abstracted, this court is unable to say that the trial court committed any error in finding that there was no fraud shown.

4. INTEREST ⟸38(1) — SALE OF MORTGAGED PROPERTY—CONVERSION.

Under the circumstances described in the first paragraph of this syllabus, where it appears that the mortgaged property sold by the sheriff was of greater value than the amount of the mortgagee's claim, with the interest thereon, and that the property cannot be returned, judgment should be rendered for the full amount of the mortgagee's claim, with the agreed rate of interest; but the judgment itself should bear interest at the rate of 6 per cent. per annum.

Appeal from District Court, Shawnee County.

Action by the Silver Lake State Bank against W. F. George, Hugh Larimer, Sheriff, and others. From a judgment against him for the wrongful conversion of personal property under an execution levied thereon by him, defendant Hugh Larimer, Sheriff, appeals. Modified and affirmed.

James A. Troutman and J. J. Schenck, both of Topeka, for appellant.

Clad Hamilton and Clay Hamilton, both of Topeka, for appellee.

MARSHALL, J. Hugh Larimer, sheriff of Shawnee county, appeals from a judgment against him for the wrongful conversion of

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personal property under an execution levied thereon by him. The plaintiff claimed the right to the possession of the property under a chattel mortgage given to it by defendant, W. F. George, to secure the payment of an indebtedness of $1,375 evidenced by a promissory note for that amount. Execution had been issued out of the district court of Shawnee county on a judgment against W. F. George in favor of the Independent Harvester Company, and the execution had been levied on the property claimed by the plaintiff under its chattel mortgage. The plaintiff replevied that property. The sheriff gave a redelivery bond, sold the property, and the proceeds of the sale remain in his hands. On the trial, it was admitted that the value of the property in controversy was more than the amount of the plaintiff's claim of $1,375, with interest thereon from April 1, 1917, at 8 per cent. per annum.

George was one of the plaintiff's customers, and in December, 1916, was indebted to the bank on two notes, one for $1,600, dated December 1, 1916, and the other for $575, dated December 5, 1916. The notes were secured by a chattel mortgage given on December 5, 1916. On March 26, 1917, George paid $800 on these notes, took up the $575 one, and obtained credit for $225 on the $1,600 one. That left $1,375, with interest, owing on the $1,600 note. At that time a new note for $1,375 was given, but it was dated April 1, 1917. When the $1,375 note was given, the $1,600 note was not delivered to George; but it was pinned to the $1,375 note as collateral security. The chattel mortgage was not released nor canceled.

Proceedings in aid of execution were instituted by the Independent Harvester Company against George, who was, on Thursday night, June 28th, notified to appear before the district court on June 30th to answer questions concerning his property. On the same day, the cashier of the plaintiff bank was commanded to appear at the same time and place, to have there the books of the bank showing its transactions with George for the preceding three years, and to answer questions concerning his property and business affairs. On June 29th George went to the bank and gave to it the chattel mortgage on which the plaintiff claims. At that time George had $120 on deposit in the bank. He drew that money from the bank and took it away. The sheriff's abstract shows that:

"The court found that the special interest of the bank in the property described in the petition was $1,375, with interest at 8 per cent. from the 1st day of April, 1917, that the personal property levied upon had been sold, and could not be returned, and rendered judgment for the amount claimed, with interest at 8 per cent., amounting in all to $1,546.78."

[1] 1. The sheriff claims that some of the property sold by him was not included in the chattel mortgage, nor identified as the property mortgaged. It does not appear how this can avail the sheriff. He agreed that the value of the property in controversy was more than the amount of the plaintiff's claim. Only the property described in the plaintiff's petition was in controversy, and the finding of the court must be construed as referring to that property.

[2] 2. The sheriff questions the consideration for the $1,375 note, and questions the validity of the mortgage given to secure the $1,600 and the $575 notes. He argues that the $1,600 note was paid by the $1,375 note, and that, therefore, the mortgage securing the $1,600 note ceased to be of any force. This argument cannot be sustained.

"A new bill or note is not a payment of the original instrument, in the absence of an understanding or agreement to that effect, but when given and received in satisfaction of the earlier paper such paper is thereby discharged." 7 Cyc. 1011.

The same principle is declared in 8 C. J. 569, where a large number of decisions are cited to support the rule.

In Bank v. Livermore, 90 Kan. 395, 133 Pac. 734, 47 L. R. A. (N. S.) 274, this court said:

"Where a new note, payable at a future date, is taken for the same debt evidenced by a past-due note, which is not surrendered, the parties are presumed to intend that action on the old note shall be suspended until the maturity of the new one, in the absence of anything to indicate a contrary intention."

See, also, Hutchins v. Stanley, 88 Kan. 739, 129 Pac. 1180.

After the new note was given, the $1,375 debt remained a valid obligation, and the old mortgage continued as security therefor. Howard v. National Bank, 44 Kan. 549, 24 Pac. 983, 10 L. R. A. 537; Cornwell v. Moss, 95 Kan. 229, 147 Pac. 824.

[3] 3. The sheriff argues that George acted fraudulently throughout the transaction, and that the $1,375 note and mortgage to secure it were given in fraud of the plaintiff's rights. The court found "that no fraud was shown in relation to the execution of the note and mortgage given by the defendant, George, to the plaintiff upon which plaintiff asked judgment." Under the evidence, there was no question about a bona fide indebtedness from George to the bank in the sum of $1,375. The bank had a perfect right to obtain security for the payment of that debt, even if in so doing it would defeat the harvester company in collecting its judgment. Miller v. Krueger, 36 Kan. 344, 13 Pac. 641; National Bank v. Ridenour, 46 Kan. 707, 27 Pac. 150, 26 Am. St. Rep. 167; Davis v. McCarthy, 52 Kan. 116, 34 Pac. 399; Hadley v. Adsit, 3 Kan. App. 122, 42 Pac. 836. From the evidence

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abstracted, this court is unable to say that the trial court committed any error in finding that there was no fraud shown, although the chattel mortgage was taken after the bank had notice that the harvester company was attempting to collect its judgment.

[4] 4. Complaint is made that the court rendered judgment against the sheriff for the full amount of the note and all the interest that was due at the time. The sheriff says:

"In computing the amount of the judgment, the court figured interest at 8 per cent. from the date of the note. The note drew interest at 8 per cent. This action, however, was not founded upon the note, but upon the alleged wrongful conversion of the property."

He cites Johnson v. Oil Well Supply Co., 85 Kan. 507, 117 Pac. 1022. There this court said:

"The holder of a note and chattel mortgage made to secure the same sued for the wrongful conversion of the mortgaged property and rightfully recovered a judgment for the amount of the note up to the day of trial, including the rate of interest specified in such note, 10 per cent. *Held*, that such judgment can under sections 4347 and 4348 of the General Statutes of 1909 bear only 6 per cent. interest."

"Section 4348 (Laws 1889, c. 164, § 5) provides that any judgment rendered on a contract shall bear the same rate of interest mentioned in such contract. But here the judgment was not rendered upon the note but upon the wrongful action of the defendants in converting the property covered by the chattel mortgage executed to secure the note. The amount due at the time the judgment was rendered was properly computed at 10 per cent. but the judgment itself by force of the statute referred to, not being on contract but upon tort, can bear only 6 per cent. interest." 85 Kan. 512, 117 Pac. 1024.

Judgment was rendered for $1,546.73, with interest thereon at the rate of 8 per cent. per annum from the date thereof, and for costs of the action. Under Johnson v. Supply Co., supra, judgment was properly rendered for the amount named, but the judgment should not bear more than 6 per cent. interest.

The trial court is directed to modify the judgment, so as to make it draw interest at the rate of 6 per cent. interest per annum from its date. With that modification, the judgment is affirmed.

All the Justices concurring.

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(20 Ariz. 485)

BRYAN et al. v. INSPIRATION CONSOL. COPPER CO. (No. 1568.)

(Supreme Court of Arizona. June 18, 1919.)

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1. DEATH ⟸41—ACTIONS—EMPLOYERS' LIABILITY ACT—PARTIES.

Under the Employers' Liability Act (Civ. Code 1913, par. 3158), declaring that, where death ensues, the employer shall be liable to personal representatives of the deceased for the benefit of the widow or husband and children, and, if none, then to such employé's parents, the administrator of a deceased employé cannot sue for the benefit of deceased's parents on the theory that he is trustee of an express trust within paragraph 400, but suit must be in the name of the parents as the real parties in interest.

2. DEATH ⟸44—ACTIONS—PARTIES—SUBSTITUTION—DEPARTURE.

Where the administrator of a deceased servant sued under Employers' Liability Act (Civ. Code 1913, par. 3158) for the benefit of the surviving parents, on the theory that he was trustee of an express trust within paragraph 400, the substitution of the parents as the real parties in interest was a departure, and therefore properly denied.

Appeal from Superior Court, Gila County; G. W. Shute, Judge.

Action by Riley Bryan, administrator of the estate of Allen Bryan, deceased, on behalf of E. R. Bryan and Julia Bryan, parents of the deceased, against the Inspiration Consolidated Copper Company. Verdict for plaintiff was vacated, and judgment entered for defendant, and plaintiff appeals. Affirmed.

An action under the Employers' Liability Law (Civ. Code 1913, tit. 14, c. 6) by the administrator of the estate of Allen Bryan, deceased, to recover compensation for loss occasioned by an accident resulting in the death of said Allen Bryan. The cause was tried to a jury. The jury rendered a verdict for plaintiff. The defendant moved to vacate the verdict and moved for a judgment for defendant notwithstanding the verdict. Defendant's motions were granted. The plaintiff appeals from the judgment dismissing the action.

Baker & Baker, of Phœnix, and A. C. McKillop, of Globe, for appellant.

Edward W. Rice, of Globe, for appellee.

CUNNINGHAM, C. J. The appellant's assignments of error are as follows:

"(1) The court erred in rendering judgment for the appellee, because the action was properly brought in the name of Riley Bryan, administrator of the estate of said deceased.

"(2) The court erred in denying the application of the appellant, Riley Bryan, administrator of the estate of the said deceased, to file amended complaint, substituting E. R. Bryan and Julia Bryan, parents of said deceased, as plaintiffs in the place of Riley Bryan, administrator of the estate of said deceased."

The complaint, after stating the facts, alleges:

"(6) That by reason of the death of the plaintiff's said intestate, Allen Bryan, the estate of said Allen Bryan, deceased, and the plaintiff as administrator thereof, has sustained damages in the sum of $35,000; that the said intestate, Allen Bryan, was unmarried, and left surviving his father and mother, the parents of said Allen Bryan, and that this action is brought by the plaintiff as administrator for the benefit of said surviving parents."

[1] The appellant contends that the action was properly brought by the administrator of the estate of Allen Bryan, deceased, for the benefit of the parents of deceased. If appellant's contention is correct, then the court committed no error by rejecting the plaintiff's offer to substitute the beneficiaries for the trustee, the administrator.

"Every action shall be prosecuted in the name of the real party in interest: Provided, an executor or administrator, or a trustee of an express trust or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is brought." Paragraph 400, C. C. Ariz. 1913.

The complaint shows on its face that the action is brought by the administrator for the use and benefit of the parents of the deceased; consequently, under the proviso of said paragraph 400, the cause could properly be prosecuted by the administrator without joining the beneficiaries. It naturally follows that the court was wholly within the law when it rejected the motion of the administrator to substitute the beneficiaries for the administrator as the party plaintiffs, unless paragraph 3158, C. C. 1913, Employers' Liability Law, changes the rule prescribed by paragraph 400, supra.

The portion of said paragraph 3158 applicable to the question here presented is as follows:

"* * * Personal injury or death by any accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, is caused to or suffered by any workman engaged therein, in all cases in which such injury or death of such employé shall not have been caused by the negligence of the employé killed or injured, then the employer of such employé shall be liable in damages to the employé injured, or, in case death ensues, to the personal representative of the deceased for the benefit of the surviving widow or husband and children of such employé; and, if none, then to such employé's parents; and, if none, then to the next of kin dependent upon such employé; and, if none, then to his personal representative, for the benefit of the estate of the deceased."

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The defendant, appellee, contends for a construction to be placed on the statute to the effect that the personal representative of the deceased can maintain an action only for the benefit of the surviving husband or wife and children of the deceased, and also for the benefit of the estate of the deceased; that whenever, as in this case, the liability of the statute accrues to the parents of the deceased, such parties are the real parties in interest, and the personal representative of the deceased is given no authority to represent such parents and maintain the action to recover such liability. The trial court so construed the statute, and we think that construction is the correct meaning to be given the languge used. The Legislature had the power to authorize the personal representative of the deceased to act as the trustee for the surviving parents of deceased, and, in that event, to commence and prosecute an action to recover for the loss of their son; but the Legislature has not done so, but has treated the parents as capable of enforcing the right given by statute, if any. If they recover, they recover that which the law permits, and thereafter account to no one. If the administrator should sue and recover for the benefit of the parents, he recovers only that which the parents are entitled, in their own right, to recover, and no more. The administrator cannot recover for his expenditure in such case from the defendant. Nor could he claim anything from the beneficiaries on any theory other than an implied contract to pay for the reasonable value of his services. It is clear in reason and plain language that the administrator of the estate of Allen Bryan, deceased, is not a proper party to sue for and recover the rights given Allen Bryan's parents arising from said Employers' Liability Law.

Appellant's first assignment of error, on the ground that the court erred in rendering judgment for appellee because the action was properly brought in the name of Riley Bryan, administrator of the estate of said deceased, must be denied.

[2] The second assignment of error, the order refusing an amendment to the complaint "substituting E. R. Bryan and Julia Bryan, the parents of said deceased, as plaintiffs in the place of Riley Bryan, administrator of the estate of deceased," must be denied also. The said substitution of parties is a clear departure in the proceedings, and will not ordinarily be permitted. Clearly the action was commenced by one party, and, if another is substituted, the action would therefore become an action prosecuted by the real parties in interest, while the action, as commenced, was one prosecuted by a trustee of an express trust—by a trustee for the use and benefit of others. The parties substituted would not continue to prosecute the action in a representative capacity as the action was commenced, but they would prosecute the action from the time they became parties in their own right, as an original action. The substitution of parties would clearly change the action in material matters, and in effect would amount to the commencement of a new and materially different action. The trial court correctly denied the motion to substitute the parties.

There being no error in the record, the judgment will stand affirmed.

ROSS and PATTEE, JJ., concur.

NOTE.—Judge BAKER having announced his disqualification to participate in the decision in this case, SAMUEL L. PATTEE, Judge of the Superior Court of Pima County, Ariz., was requested to and did sit with the other Judges in the disposition of this cause.

(20 Ariz. 476)

HAGAN v. DUTTON et al. (No. 1693.)

(Supreme Court of Arizona. June 14, 1919.)

1. MINES AND MINERALS ⟸17(1)—LOCATION—DISCOVERY OF MINERALS.

The discovery of mineral within the limits of the mining claim located is a necessary prerequisite to a complete and valid mining location.

2. MINES AND MINERALS ⟸17(1), 26—LOCATION—DISCOVERY OF MINERALS — RELOCATION.

Locator need not be the first or original discoverer of mineral on the mining claim located, but may appropriate an abandoned or forfeited discovery by locating the claim as a relocation; it being sufficient if he knew at the time of making his location that there had been a discovery of mineral on the location.

3. MINES AND MINERALS ⟸17(1), 38(17) — DISCOVERY OF MINERALS—EVIDENCE.

When controversy is between two mineral claimants, the rule respecting the sufficiency of a discovery of mineral is more liberal than when it is between mineral claimant and one seeking an agricultural entry, since where land is to be taken out of category of agricultural lands, the evidence of its mineral character should be reasonably clear.

4. MINES AND MINERALS ⟸38(22)—DISCOVERY OF MINERALS — FACT QUESTION FOR TRIAL COURT.

Whether there had been a discovery of minerals on mining claim was a question of fact for trial court under the evidence.

5. MINES AND MINERALS ⟸38(17)—DISCOVERY OF MINERALS — SUFFICIENCY OF EVIDENCE.

Evidence *held* to warrant finding that there had been a sufficient discovery of minerals upon mining claim to satisfy statutory requirement.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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6. MINES AND MINERALS ⟸38(24)—DISCOVERY OF MINERALS—FINDING.

In suit to quiet title to mining claims, involving conflicting claims of mineral claimants, finding of failure of evidence to disclose minerals in place *held* to have reference to disclosing mineral in place in the discovery shaft required to be sunk within 90 days after location, under Civ. Code 1913, par. 4030, subd. 2, and not to discovery of minerals upon the claim.

7. MINES AND MINERALS ⟸38(24)—QUIETING TITLE TO MINERAL CLAIMS—MATERIALITY OF FINDING.

In action to quiet title to mining claims, where defense was invalidity of location by plaintiff's predecessors in interest because land had previously been located by defendant's predecessors, finding as to whether defendant's predecessors had complied with statute as to disclosing mineral in place in discovery shaft was immaterial, since cross-complaint had been dismissed and judgment did not determine defendant's title to land.

8. MINES AND MINERALS ⟸26—RELOCATION—MONUMENTS—ADOPTION.

Monuments placed upon land by relocator the day before the claim became open to location, where no objection thereto was made by locator then upon land, could be legally adopted by relocator upon relocating upon land the following day when it became open to location.

9. MINES AND MINERALS ⟸26—MONUMENTS—ADOPTION BY RELOCATOR.

Monuments existing on the ground at the time of the location may be adopted by a relocator.

10. MINES AND MINERALS ⟸19(1) — LOCATION—NOTICES.

Some precaution must be taken by prospector to protect his location notice from destruction.

11. MINES AND MINERALS ⟸38(19)—LOCATION—NOTICE—SUFFICIENCY OF EVIDENCE.

Evidence *held* to show substantial compliance with Civ. Code 1913, par. 4028, requiring posting of location notice upon conspicuous monument of stones, or upon securely fixed upright post, at least four feet out of ground.

12. MINES AND MINERALS ⟸27(1) — PRIOR LOCATION.

Attempted location upon land withdrawn from the public domain by a prior, valid, and subsisting location is wholly void for purpose of founding any right or claim to the land.

Appeal from Superior Court, Greenlee County; Samuel L. Pattee, Judge.

Action by J. A. Hagan against W. W. Dutton and others. From judgment rendered, and from order denying motion for new trial, plaintiff appeals. Affirmed.

L. Kearney, of Clifton, for appellant.
H. A. Elliott, of Clifton, for appellees.

BAKER, J. The appellant, as plaintiff in the court below, brought suit in the superior court of Greenlee county, against the appellees, as defendants in the court below, to quiet title to certain mining claims situated in the Copper Mountain mining district, in Greenlee county, Ariz., known as the Olive group of mining claims. The complaint alleges that the plaintiff was the owner and in possession, and entitled to the possession, of the said mining claims by virtue of valid mining locations made on the 18th day of January, 1917. The defendants Richard T. O'Donnell, J. L. Awalt, and Morenci Consolidated Mines Company, a corporation, each filed a disclaimer of any right or title in and to said mining claims adverse to the plaintiff. The defendant C. C. Dorsey made no appearance and filed no answer. The defendant W. W. Dutton appeared and answered, denying the validity of the Olive group of mining claims, and alleged that he was the owner and entitled to the possession of the Red Metal group of mining claims (said claims being the identical ground covered by the "Olive" group of mining claims) by virtue of valid mining locations made on the 1st day of January, 1917. Dutton also filed a cross-complaint, seeking to quiet title to the said Red Metal group of mining claims as against the plaintiff. This cross-complaint, on Dutton's motion, was dismissed by the court, which action narrowed the issues in the case to the sole question of the validity of the plaintiff's location of the Olive group. The lower court found the facts to be: That J. L. Awalt, the predecessor in interest of the defendant Dutton, initiated valid locations of the Red Metal mining claims on January 1, 1917, and subsequently transferred his interest in the claims, by good and sufficient deed, to the defendant Dutton; and that at the time of the location of the Olive group of mining claims by the plaintiff's predecessor in interest, the ground was segregated from the public domain and not open to location. Upon these findings, the court entered judgment, and decreed that the plaintiff had no right, title, or interest in and to the mining claims in question. The judgment carried costs for the defendant Dutton, but made no determination of his rights or title to the ground. The plaintiff appeals from the judgment and the order denying a new trial.

The ground in controversy was first located by R. T. O'Donnell, one of the defendants, in the year 1915, known as the O'Donnell group of claims. O'Donnell failed to do the annual work upon the claims, required by law, for the year 1916, and it was stipulated and agreed by the parties that on the 1st day of January, 1917, the ground in controversy was open, unappropriated mineral land of the United States, and subject to be located as mineral ground under the mining laws of the

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United States and the statutes of the state of Arizona. The Olive and Red Metal locations covered the same identical ground, and was formerly comprised in the said O'Donnell group of claims.

The defendant Awalt, acting on behalf of the defendant Dutton, entered upon the ground embraced in what was then known as the O'Donnell claims on December 31, 1916, and erected discovery monuments in anticipation of the claims coming open to location on the following day. The evidence is fairly conclusive that on the following day location notices, which had been previously prepared were posted or placed in each of the several discovery monuments that had been erected the day before (the notices denominating the claims as Red Metal), and the evidence is undisputed that Awalt transferred whatever interest he had acquired by virtue of these acts to the defendant Dutton, who thereafter attempted to complete the location work upon the claims within the 90 days allowed by law.

It is admitted that on January 18, 1917, one Olive, acting on behalf of the plaintiff, went upon the ground in controversy and erected discovery monuments and posted location notices thereon (designated as the Olive group of claims) and thereafter, within the time and manner as required by law, performed all acts required by the statute to perfect the locations of the Olive claims, and that he subsequently conveyed said Olive group of claims to the plaintiff.

The decisive question in the case is: Was the property vacant and unoccupied mineral land of the government and subject to location on the 18th day of January, 1917, when the plaintiff's predecessor in interest entered and located the ground? If it was, the judgment should be reversed; if it was not, the judgment should be affirmed.

The plaintiff first contends that there was no evidence tending to prove that a discovery of mineral was made by either Dutton, or his predecessor in interest Awalt, before the monuments of the Red Metal group were put up, or at any time afterwards.

[1] That discovery of mineral within the limits of the mining claim located is a necessary prerequisite to a complete and valid mining location is thoroughly settled by a long line of decisions. The rule is well known to any one at all familiar with mining law. 2 Lindley on Mines (3d Ed.) par. 335, and cases cited in note.

[2] But a locator need not be the first or original discoverer of mineral on the mining claim located. He may appropriate an abandoned or forfeited discovery by locating the claim as a relocation, and it is sufficient if he knew at the time of making his location that there had been a discovery of mineral on the location. 2 Lindley on Mines (3d Ed.) par. 335, and cases cited in note.

[3] It is to be observed that both of the parties in this case are in the position of prospectors or explorers upon the public domain, both claiming to have made valid mineral locations.

"* * * When the controversy is between two mineral claimants, the rule respecting the sufficiency of a discovery of mineral is more liberal than when it is between a mineral claimant and one seeking * * * an agricultural entry, for the reason that where land is sought to be taken out of the category of agricultural lands the evidence of its mineral character should be reasonably clear, while in respect to mineral lands, in a controversy between claimants, the question is simply which is entitled to priority." Chrisman v. Miller, 197 U. S. 313, 25 Sup. Ct. 468, 49 L. Ed. 770; 2 Lindley on Mines (3d Ed.) par. 336.

[4, 5] The testimony in behalf of the defendant Dutton, in respect to the discovery of mineral on the Red Metal claims, is slight, and not as strong and convincing as might be desired, yet we think it is sufficient to bring the case within the rule announced in the authorities just cited. The location of the Red Metal group of claims was a relocation of the O'Donnell claims. Any mineral disclosed by the work done on the claims by O'Donnell, and known to Awalt, was a sufficient discovery of mineral upon which Awalt could base a location. Awalt, in behalf of the defendant Dutton, testified that there was a great deal of mineralized porphyry in all the country where the contested claims were located; that the ground covered by the "Red Metal" claims was mineralized porphyry heavily iron stained, and seamed with iron; that the district was what is termed a "Porphyry District" where big bodies of ore were found in the porphyry; and that miners locating the porphyry expected to find mineral when they dug down. Arhelger, another witness testifying in behalf of the defendant, stated that the ground covered by the contested claims was mineralized porphyry. Bingham, a witness testifying on behalf of the plaintiff, stated that the porphyry where the contested claims were located is of a character in which copper deposits are found. Hagan, the plaintiff, himself testified, substantially, that porphyry covers the entire district; and that there were some copper stains in the "Red Metal" locations. Whether or not the discovery of mineral had been made on the Red Metal claims was a question of fact for the trial court to determine under the evidence. It is true there is some conflict in the testimony on that point, but we cannot say that the court was without authority in finding that there was a sufficient discovery of mineral to satisfy the statutory requirement in that particular.

The plaintiff, however, insists that the

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findings of fact show that there was no discovery of mineral on any of the Red Metal claims. This contention is evidently based upon an equivocal finding of the trial court, in the following language:

"The court has great doubt whether the testimony shows disclosure of mineral in place in any of the defendant's claims (Red Metal claims) to comply with the statute in that respect, and does not find that such discovery was made."

[6, 7] Evidently the court by this finding referred to the necessity of disclosing mineral in place in the discovery shaft, which the statute (subdivision 2, par. 4030, Civil Code) requires to be sunk within 90 days after the location. The issue as to whether the defendant Dutton had disclosed mineral in place in the discovery shaft, or whether he had performed location work sufficient to measure up to the statutory requirements, could only bear upon the rights of the defendant Dutton to permanent relief under his cross-complaint. This cross-complaint had been dismissed, and the judgment in no wise determined the title or rights of the defendant Dutton to the ground, and hence the finding in question was immaterial.

[8] The plaintiff contends in the second place that no discovery monuments were erected on the Red Metal claims by the defendant Dutton, or his predecessor in interest Awalt. No question is raised as to the facts that Awalt built discovery monuments on the claims on December 31, 1916, or as to the sufficiency of these monuments in dimensions. But it is claimed that these monuments were built at a time when the ground was not open to location. We see no force in this objection. O'Donnell, who was present upon the ground and had knowledge of the erection of the monuments and the preparation of the location notices which were placed therein, made no objection.

[9] It is settled that discovery monuments existing on the ground at the time of the location may be adopted by a relocator; that either rebuilding partially existing monuments or availing himself of existing monuments by using them is a compliance with the law, and the use of such monuments for the purpose of marking the boundaries of a claim is a sufficient compliance with the statute, and sufficient to create a valid location, other requirements of the law having been performed. Bergquist v. West Virginia-Wyoming Copper Co., 18 Wyo. 234, 106 Pac. 673; Riverside Cement & Sand Mfg. Co., v. Hardwick, 16 N. M. 479, 120 Pac. 323.

Applying the logic of the cases that permit the adoption of a monument, we can see no just reason why the relocator of the Red Metal claims could not legally adopt and use the monuments on the 1st day of January, 1917, which he had erected on December 31, 1916.

The plaintiff's third contention consists of an attack upon the finding of the court that legal and sufficient location notices of the Red Metal claims were posted in the discovery monuments. No objection is made to the form or the contents of the notices of location. The contention is that the notices were concealed or hidden. The evidence on behalf of the plaintiff is to the effect that the notices were found in the monuments under the ground; that it appeared as if the monuments had been built first and the notices stuck in the crevices between the rocks, where they come together; some of these (notices) had fallen and dropped on the ground; others were on the rocks; they were loose, and dirt and gravel had been thrown over them, hiding them from view, so they could not be seen, and to get at the notices the monuments had to be partly torn down, or one had to get a stick and scratch the dirt out and reach in to pull the notices out. Some of the witnesses said that when some one who had knowledge of where the location notices were called their attention to the fact that they had looked in the wrong portions of the monuments to discover the notices, they returned to the monuments, and without any apparent difficulty discovered the notices inside of the monuments. Awalt testified for the defendant that he stuck the notices in the cracks of the monuments and plugged it up with rocks that fitted in the cracks, and then raked up some gravel and threw it on top of the notices to keep the rats from pulling them out of the monuments, as he did with all of his location notices.

[10] It is manifest that some precaution must be taken by a prospector to protect his location notice from destruction. 2 Lindley on Mines (3d Ed.) par. 356.

The authorities strongly tend towards sustaining the sufficiency of posting location notices, wherever possible. Bergquist v. West Virginia-Wyoming Copper Co., supra; Donahue v. Meister, 88 Cal. 121, 25 Pac. 1096, 22 Am. St. Rep. 283.

Courts are not inclined to defeat the claim of him who has in good faith attempted to comply with the law. Gold Creek Antimony Mines & Smelter Co. v. Perry, 94 Wash. 624, 162 Pac. 996; Gird v. California Oil Co. (C. C.) 60 Fed. 531; Bergquist v. West Virginia-Wyoming Copper Co., supra.

[11] The statutes of some of the states require that notices shall be conspicuously posted on the claim. Our statute does not go this far. It demands a conspicuous monument of stones, or an upright post securely fixed, projecting at least four feet above the ground, in which monument of stones, or on which post, there shall be posted a location

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notice, etc. Civil Code, par. 4028. We find no indication in the evidence that there was any intentional concealment of the notices, and it fairly appears that there was a substantial compliance with the statute in posting the notices, and we shall not disturb the finding of the court that sufficient and legal notices of location had been posted on the Red Metal claims.

The plaintiff makes a fourth contention that it was error in the court to find that there was no collusion between O'Donnell, the original locator of the ground and Awalt and the defendant Dutton, to the effect that O'Donnell should fail to do the annual work on the O'Donnell group of mines for the year 1916, with the understanding that Awalt and Dutton should relocate the ground as the Red Metal claims for the use and benefit of the said O'Donnell. The plaintiff offers us no argument in support of this contention, and we are satisfied from an examination of the record that the finding of the court was fully sustained by the evidence.

[12] Finally, the lower court having determined that Awalt, on January 1, 1917, initiated a valid mining location on all the claims known as the Red Metal group, and the findings of the court in that behalf being fully sustained by the evidence, it follows, as a matter of law, that the attempted location of the same ground by the plaintiff, on the 13th day of January, 1917, as the Olive group of claims, was wholly void for the purpose of founding any right or claim to the ground.

At the time of the plaintiff's location of the Olive group of claims, the ground in controversy had been withdrawn from the public domain by the prior, valid, and subsisting location of the Red Metal claims.

In Swanson v. Sears, 224 U. S. 180, 32 Sup. Ct. 455, 56 L. Ed. 721, the United States Supreme Court said:

"A location and discovery on land withdrawn quoad hoc from the public domain by a valid and subsisting mining claim is absolutely void for the purpose of founding a contradictory right. Belk v. Meagher, 104 U. S. 279 [26 L. Ed. 735]; Gwillim v. Donnellan, 115 U. S. 45 [5 Sup. Ct. 1110, 29 L. Ed. 348]."

See, also: Omar v. Soper, 11 Colo. 380, 18 Pac. 443, 7 Am. St. Rep. 246; Sierra Blanca M. Co. v. Winchell, 35 Colo. 13, 83 Pac. 628; 2 Lindley on Mines (3d Ed.) pars. 339, 645a, and cases cited in notes.

There is no error in the record, and the judgment and order of the superior court are affirmed.

CUNNINGHAM, C. J., and ROSS, J., concur.

(25 N. M. 273)

ABO LAND CO. v. DUNLAVY et al.
(No. 2185.)

(Supreme Court of New Mexico. May 19, 1919. Rehearing Denied June 7, 1919.)

EVIDENCE ⟸157(3), 178(3) — PAROL EVIDENCE—AUTHORITY OF OFFICERS OF CORPORATION.

Where the authority of the officers of a corporation to execute certain deeds is questioned, and it appears that no record of the directors' meetings has been made, or that the minute book containing such records has been lost, it is error to refuse to allow oral testimony to show such authorization.

Appeal from District Court, Torrance County; Mediler, Judge.

Suit to quiet title by the Abo Land Company against James P. Dunlavy and Porter H. Hower. Disclaimer by defendant Dunlavy, and judgment for plaintiff against defendant Hower, and he appeals. Reversed, and new trial granted.

Harry S. Bowman, of Santa Fé, for appellant.

Rodey & Rodey, of Albuquerque, for appellee.

RAYNOLDS, J. This is a suit to quiet title in the plaintiff for certain real estate located at Mountainair, N. M. The complaint alleges title in the plaintiff, and states that defendants claim some title or interest therein adverse to the plaintiff. The defendant Dunlavy entered a disclaimer as to any right, title, or interest in the land in question, and defendant Hower denied the allegations of the complaint and set up title in himself by virtue of two deeds from the plaintiff corporation to him.

Plaintiff in its reply denies:

That the deeds in question "are in truth or in fact the genuine deed or deeds of the plaintiff. * * * And if the signatures and seals on or to such alleged deeds, or either of them, are in truth and in fact the genuine signatures and the seal of the officers and this plaintiff, then the plaintiff alleges that the same were, through conspiracy, wrongfully and fraudulently obtained without any consideration by the defendant from some one or more of the then officers, or supposed officers, of the plaintiff, and with full knowledge of such facts and fraud on the part of the defendant."

The case went to trial on this state of the pleadings, and the court found:

"That the plaintiff was the owner in fee of the property; that defendant had no right or title to the property; that the two alleged deeds held by the defendant Hower are null and void and are not in truth or in fact the deeds of the plaintiff corporation, and should be given up for cancellation."

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The court decreed and quieted title in the plaintiff, and ordered the deeds delivered up to be canceled.

The defendant requested the court to make findings of fact as follows:

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"That the defendant Hower was a bona fide purchaser for value; that the deeds were regular and legal in form, execution, description and delivered for a good, legal, and valid consideration; that no fraud or collusion has been proven against the grantee, Hower; that the plaintiff had permitted the same officers who executed the deeds in question to execute all their deeds for land which they were selling, and that their business was selling town lots."

The court failed to rule upon this request for findings, and no exception was saved to its action in this respect. No specific findings, except those found in the judgment, were made or asked for by the plaintiff. The trial judge at the close of the case, when giving judgment for the plaintiff, stated that there was nothing to show that the officers had any power to execute the first deed, and that they were not officers of the company at all at the time of the execution of the second deed.

The appellant assigns 23 errors, most of which are directed to the admission of evidence, or the refusal of the trial court of offers made by the defendant. We do not deem it necessary to pass upon all these assignments, as it is apparent from the judgment of the court that the evidence objected to and admitted or offered, and the offer denied, were not considered by the court, except as hereinafter stated.

The decision of the court as shown by the judgment and the remarks of the judge in deciding the case was based upon the proposition that the officers in question were not authorized or empowered to execute the deeds, and that therefore these deeds were null and void as far as the plaintiff corporation was concerned. This action of the court is assigned as error, and we think the point well taken. As shown by the record and exhibits at the time the deeds in question were made, James P. Dunlavy was president, and William M. McCoy was secretary. The second deed was dated August 26, 1915, and the successors of these two officers were not elected until October 16, 1915, as shown by the minutes of the meetings introduced in evidence. By statute they were officers until others had been chosen and qualified in their stead. Code 1915, § 896. The first deed was dated December 23, 1913, and it appears throughout the testimony, and is uncontradicted, that at that time the same officers were acting as president and secretary of the plaintiff corporation. The by-laws of the corporation, sections 3 and 5, offered in evidence, provide the president shall sign all deeds and the secretary shall countersign them.

The appellant offered to prove by the witness Dunlavy that the board of directors had authorized the president and secretary to make said deeds, stating at the same time that the minutes of the directors' meetings had been lost. The court refused to allow the testimony offered to be given, which refusal is assigned as error.

"A corporation may enter into a written contract under seal without a formal vote or written entry of the vote by the directors. Where the directors are present and all assent to the execution of the contract, this is sufficient proof of corporate resolutions or votes, and the votes of the directors are made by producing the original minutes or record books of the corporation. * * * Where the record book is lost, or no record was ever made, secondary evidence may be resorted to." Cook on Corporations (7th Ed.) vol. 3, par. 714, pp. 2471, 2472, and cases cited.

The court therefore erred in refusing the offer made by the defendant to prove the authority of the president and secretary to make the deeds in question, and the case should be reversed and a new trial granted upon that ground.

There are other errors assigned which we think were well taken, but they need not be considered.

For the reasons above stated the case is reversed, and a new trial granted; and it is so ordered.

PARKER, C. J., and ROBERTS, J., concur.

(25 N. M. 299)

MIERA v. MIERA. (No. 2227.)

(Supreme Court of New Mexico. April 7, 1919. On Motion for Rehearing, June 13, 1919.)

(Syllabus by the Court.)

1. HUSBAND AND WIFE ⟸131(3)—WIFE'S SEPARATE PROPERTY—PRESUMPTION—STATUTE.

Under section 2764, Code 1915, where real estate is conveyed to a married woman, the presumption is that title is thereby vested in her as her separate property.

2. POWER OF ATTORNEY—ACKNOWLEDGMENT AND RECORD.

Section 4774, Code 1915, requires all powers of attorney, or other writings containing authority to convey real estate as agent or attorney for the owner of the same, etc., to be acknowledged, certified, filed, and recorded as other writings conveying or affecting real estate are required to be acknowledged.

3. FRAUDS, STATUTE OF ⟸116(5)—POWER OF ATTORNEY TO CONVEY—VALIDITY—STATUTE.

In order to give validity to a conveyance of lands under power of attorney, the power to

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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convey must possess the same requisites and observe the same solemnities as are necessary in the deed directly conveying the land, and the only recognized exception to the rule is where the execution by the agent or attorney is in the presence and by the direction of the principal.

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On Motion for Rehearing.

4. HUSBAND AND WIFE ⟸267(7)—COMMUNITY PROPERTY—TRANSFER BY HUSBAND OR WIFE—VALIDITY.

Under chapter 84, Laws 1915, a transfer or conveyance attempted to be made of the real property of the community by either husband or wife alone is void and of no effect.

Appeal from District Court, Sandoval County; Raynolds, Judge.

Action to quiet title by Merejilda G. de Miera against V. S. Miera. Judgment for plaintiff, directing cancellation of deed to defendant, and he appeals. Affirmed.

E. W. Dobson, of Albuquerque, for appellant.

Barth & Mabry, of Albuquerque, for appellee.

ROBERTS, J. In her complaint filed in the lower court appellee alleged that she was the owner in fee simple and in possession of the real estate involved in this litigation, describing the same; that appellant claimed a title or interest in said premises by and through a certain deed alleged to have been executed by appellee and her husband, E. A. Miera, now deceased; that said deed was invalid for the reason that appellee did not execute said deed, nor did she authorize any one else to execute the same for her; and there was a further allegation upon information and belief to the effect that E. A. Miera, the deceased husband of appellee, had not signed the deed and that it was a forgery; that said purported deed attempted to convey the real estate in question to appellant and had been placed of record in the county clerk's office of Sandoval county; that appellant had no right, title, interest, or claim whatever in or to the real estate in question.

The relief prayed for was that the appellant be required to set forth the nature of his claim, and that all his adverse rights might be determined by decree of the court; further, that it be adjudged that appellant had no estate or interest in or to said land or premises, and that the appellant be required to give up said deed to be canceled, and that the same be canceled under the direction of the court; and for such other relief as the court should deem mete and proper.

Appellant answered the complaint, denying that the appellee was the owner in fee simple and in possession of the land described in the complaint; alleged that E. A. Miera, the husband of appellee, executed the deed in his lifetime; that he had signed it; and further alleged that:

"At the time he executed said deed in his own behalf he signed the name of the plaintiff, his wife, and claimed that he had a right to sign her signature as his wife to said deed, as he had done on previous occasions in transferring real estate. Affiant, further answering said paragraph 111, denies that the signature of E. A. Miera was forged upon said deed, and denies that it was not his signature. Further answering said paragraph, the defendant admits that the plaintiff was not present when said deed was signed by the said E. A. Miera, and did not acknowledge the same, but the said E. A. Miera did acknowledge the same before the notary whose signature is attached to the said deed referred to in said paragraph."

Appellant further stated that he had no knowledge or information as to whether Miera had power of attorney from his wife, and proceeds:

"But alleges that of his own knowledge the said E. A. Miera had executed similar documents under the same circumstances on behalf of his wife."

No demurrer or reply was filed to the answer, and the court heard the evidence offered by the parties.

Appellee put in evidence the patent from the United States, dated October 26, 1911, granting the real estate in question to appellee; also a certified copy of the official plats in the office of the surveyor general at Santa Fe, N. M., of the sections in which the land was located. Appellee did not testify as a witness in the case; the evidence showing that she was a confirmed invalid. Various motions were interposed from time to time by appellant for judgment on account of the claimed failure on the part of appellee to make certain proof which appellant claimed was necessary. Appellant did not testify in the case on his own behalf.

The court made findings of fact in which he refused to find that the signature of E. A. Miera to the deed was in fact a forgery, but did find that the appellee did not sign the deed and did not authorize her said husband or any one else to sign it for her, and that appellee had not conveyed said property nor authorized it to be conveyed, nor did she acknowledge said deed before any officer authorized to take acknowledgments under the laws of the state of New Mexico. Judgment was rendered quieting appellee's title as against the claims of the appellant and directing the clerk of the court to cancel the deed in question to V. S. Miera.

This appeal is prosecuted by the appellant to review such judgment. He has assigned sixteen grounds of error, which he discusses under five propositions. The first point

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made is that the suit in question was not a suit to quiet title, but to remove a cloud on the title. The second proposition is that appellee, having brought a suit to remove a cloud on her title, must stand or fall by the allegations of the complaint. The third and fourth are directed against the form of the decree, and the fifth is that, the deed in question having been introduced in evidence by appellant without objection, it was prima facie presumptive evidence of the following facts: (1) Competent and proper parties; (2) a proper subject-matter; (3) a good and sufficient consideration; (4) a written or printed form; (5) sufficient and legal words; (6) reading, if desired, before the execution; (7) execution, signing, sealing, and attestation; (8) delivery.

[1-3] All these objections, however, may be put aside without discussion, for the judgment of the court is sustainable if the correctness of each proposition be admitted. By his answer appellant admitted that appellee did not sign the deed, and that she was not present when the acknowledgment to the same was taken by the notary public. He does not claim any future acknowledgment or set forth any facts by way of estoppel. He does not contend that E. A. Miera, the husband of appellee, had a power of attorney executed by appellee authorizing him to make the deed; his sole contention being that Miera had theretofore in a similar manner signed and acknowledged deeds to real estate for his wife. The property in question was conveyed to appellee by the government of the United States while she was a married woman, and the presumption is that title was thereby vested in her as her separate property. Section 2764, Code 1915. The answer does not deny that the property in question was the separate property of the wife, and there was no proof introduced tending to show that it was the property of the husband or community property. Section 4774, Code 1915, requires all powers of attorney or other writings containing authority to convey real estate as agent or attorney for the owner of the same, etc., to be acknowledged, certified, filed, and recorded as other writings conveying or affecting real estate are required to be acknowledged. That there was no such power of attorney authorizing Miera to execute the deed in question is not controverted by appellant. He relies solely upon the fact that Miera had theretofore signed and acknowledged similar deeds for his wife. That his purported acknowledgment of the signature of his wife or his act in signing her name to the deed did not divest her of her title to the real estate or operate to convey the same is well settled. In Devlin on Real Estate, § 356, the author says:

"The law requires that a power of attorney to execute a deed should be in writing and of the same solemnity as the deed itself. 'No man shall be divested of his interest in real estate, but by his own acts and operation of the law; if any authority by parol may be shown, a man may be made to convey all his estate, and the conveyance rest entirely in parol.'"

It is a well-recognized principle at common law that, in order to give validity to a conveyance of lands under power of attorney, the power to convey must possess the same requisites and observe the same solemnities as were necessary in the deed directly conveying the land. Clark v. Graham, 6 Wheat. 577, 5 L. Ed. 334; Johnson v. Dodge, 17 Ill. 433. And the only recognized exception to the rule is where the execution by the agent or attorney is in the presence and by direction of the principal; and the exception arises from the doctrine that what is done in the presence and by the direction of another is the act of the latter as much as if done by himself in person. The cases on the proposition will be found cited in the note to the case of Davenport v. Parsons, 10 Mich. 42, 81 Am. Dec. 772. Many other cases to the same effect will be found in the note to section 356 in Devlin on Deeds.

It would indeed be a remarkable procedure in American jurisprudence if the owner of real estate could be stripped of title thereto by the act of a party in signing and acknowledging the deed in the name of the owner upon the assumption that he had the power to do so because he had theretofore made similar conveyances, and this without the presence, consent, or authority of the owner. The judgment of the court directing the cancellation of the deed was entirely proper, and would probably have been entered upon the pleadings had a motion therefor been timely made.

For the reasons stated, the judgment of the district court will be affirmed; and it is so ordered.

PARKER, C. J., concurs.

RAYNOLDS, J., did not participate, having heard the case below.

On Motion for Rehearing.

ROBERTS, J. On rehearing appellant complains because the court did not determine the question as to whether or not the suit in the court below was an action to remove a cloud on title or a suit to quiet title. We did not pass upon this question because in our judgment it was unnecessary. If it be conceded that the action, as he contends, was one to remove a cloud on title, the decree would nevertheless be sustainable.

[4] He further argues that in the former opinion this court held that the property in question was the separate estate of the appellee, and that we were in error in this in that the proof did not show whether it was

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the separate estate or community property. If community property, however, the result would be the same; for, under chapter 84, Laws of 1915, it is provided that any transfer or conveyance attempted to be made of the real property of the community by either husband or wife alone shall be void and of no effect. The answer admits that appellee did not sign the deed, and the proof in the lower court all was to the effect that she had not signed the deed, or authorized her husband to sign it for her. This being true, and the deed having been executed subsequent to the enactment of said chapter 84, it was void and conferred no title upon appellant.

For these reasons, the motion for rehearing will be denied, and the former opinion adhered to.

PARKER, C. J., concurs.

(43 Nev. 95)

STATE ex rel. JONES et ux. v. BONNER, Justice of the Peace. (No. 2358.)

(Supreme Court of Nevada. June 20, 1919.)

JUSTICES OF THE PEACE ⟸208(3)—CERTIORARI — REVIEW — JURISDICTION — RECORD —PRESUMPTIONS.

Judgment of a justice of the peace against defendants will be held void on certiorari, record or files of the case not affirmatively showing summons was served or that defendants appeared, nothing being presumed in favor of jurisdiction of courts of limited jurisdiction, and it not being permissible to consider affidavits that summons was in fact served.

Original proceedings in certiorari by the State, on the relation of R. H. Jones and another, against William Bonner, Justice of the Peace. Judgment set aside.

Robert L. Waggoner, of Yerington, for petitioners.

H. Pilkington, of Yerington, for respondent.

COLEMAN, C. J. This is an original proceeding in certiorari to inquire into the jurisdiction of the justice of the peace of Spragg township, Lyon county, to render a certain judgment in favor of Mrs. J. Bean and against R. H. Jones and Jane Doe Jones, his wife. The record of the justice of the peace relative to the case, as certified to this court, is as follows:

"Complaint filed; summons issued; affidavit for attachment filed; undertaking for attachment filed; writ of attachment issued; affidavit for arrest filed; undertaking for arrest filed; order of arrest indorsed in summons; docketing case; judgment entered in the above-entitled case for plaintiff for amount prayed for in the sum of $30 and attorney fee of $15, and costs of this action taxed to defendant. E. A. Blanchard, Acting Judge."

Section 5732, Revised Laws 1912, as amended (Stats. 1913, p. 360), provides how and by whom a summons may be served, and also makes provision for the return showing service thereof. It will be seen from a perusal of the record of the justice of the peace that, so far as appears therefrom, no service of summons had been made upon either of the defendants at the time the judgment was rendered, nor is there in the files sent up by the justice of the peace the original summons showing service thereof; nor does the record show that the defendants appeared in the action. It is an ancient rule that nothing is presumed in favor of the jurisdiction of courts of limited jurisdiction. That such a court has jurisdiction must affirmatively appear; and, unless it does so appear, judgment by such a court is void for want of jurisdiction. This is not a new question in this state. It was before the court in 1866, and the court then held that such a judgment as is here involved was void, as the court was without jurisdiction. McDonald v. Prescott & Clark, 2 Nev. 109, 90 Am. Dec. 517. It would be a waste of time to enlarge upon this point. See, also, 16 R. C. L. 367; 24 Cyc. 497.

We may say that there are different affidavits on file in this court to the effect that the summons was in fact served. These we cannot consider. This case shows the importance of attorneys giving their personal attention to the preparing of and superintending the making of returns in suits in justices' courts. In this proceeding counsel for petitioners admit the indebtedness. It may be that the officer who made the service of the summons—if in fact any was made—can now make his return showing service of summons, thereby giving the justice of the peace jurisdiction to proceed. But as to this we express no opinion.

It not appearing from the record and files of the case mentioned that the justice of the peace had jurisdiction to consider the same, it is ordered that the judgment rendered in said justice's court in favor of Mrs. J. Bean and against R. H. Jones and Jane Doe Jones, his wife, be, and the same is hereby, declared null and void, and is hereby set aside, and that relators have and recover their costs.

SANDERS and DUCKER, JJ., concur.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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(54 Utah, 428)

DAVIS v. HEINER. (No. 3315.)

(Supreme Court of Utah. May 3, 1919. Rehearing Denied June 16, 1919.)

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1. APPEAL AND ERROR ⟸1052(5) — HARMLESS ERROR—EVIDENCE.

In action on contract to purchase cattle, any error in admitting testimony concerning transactions of parties prior to date of bill of sale *held* not prejudicial in view of subsequent acts of parties and findings of jury.

2. APPEAL AND ERROR ⟸1170(1) — HARMLESS ERROR—STATUTE.

Under direct provisions of Comp. Laws 1917, §§ 6622 and 6968, Supreme Court will not reverse judgment except for prejudicial error.[1]

3. TRIAL ⟸296(2)—INSTRUCTIONS.

Refusing requested instruction to find for defendant if he tendered plaintiff a check in satisfaction of all demands and plaintiff accepted it and cashed check, etc., *held* not erroneous in view of instruction given on that issue.

4. APPEAL AND ERROR ⟸1062(1) — HARMLESS ERROR—INSTRUCTIONS.

Where defendant claimed he had settled a controversy by payment to plaintiff, any error in submitting to jury question whether a bona fide dispute existed is not prejudicial to defendant, since jury, by verdict for plaintiff, must have found that money was not in full payment.

5. ALTERATION OF INSTRUMENTS ⟸29—EVIDENCE—SUFFICIENCY.

Alteration of a written bill of sale need not be established beyond a reasonable doubt.[2]

6. TRIAL ⟸233(2) — INSTRUCTIONS — SUFFICIENCY.

Trial court should concisely state issues to jury, and not merely read the pleadings verbatim.

7. APPEAL AND ERROR ⟸1064(1) — HARMLESS ERROR—INSTRUCTIONS.

Trial court's error in simply reading pleadings to jury, and not concisely stating issues in his own language, *held* not prejudicial, where issues were simple, and substantially all allegations in both complaint and answer were controverted.[3]

Appeal from District Court, Utah County; A. B. Morgan, Judge.

Action by William W. Davis against George A. Heiner. Judgment for plaintiff, and defendant appeals. Affirmed.

George Halverson, of Odgen, for appellant.

Elias Hansen, of Spanish Fork, for respondent.

GIDEON, J. Three causes of action are stated in the complaint. During the trial the third cause was dismissed, and that will not be further considered. The only dispute respecting the second cause of action is that defendant pleads payment. The whole controversy is therefore concerned with the first cause of action.

Plaintiff alleges an oral contract between himself and the defendant made on or about the 15th day of January, 1917, by which the plaintiff undertook to purchase certain cattle for the defendant and to hold the same until about the 20th day of February that year at which time they were to be delivered to defendant at Spanish Fork, Utah; that within the limits fixed by that agreement the defendant undertook to pay the plaintiff the amount paid for the cattle and $1 additional per head for plaintiff's services; that immediately upon the making of the agreement the plaintiff entered upon the performance of the contract, and bought for the defendant prior to the 20th day of February approximately 380 head of cattle. There are some other allegations respecting arrangements for cars in which to ship the cattle between the 20th and 28th of February. It is further alleged that on or about the 28th day of February the defendant informed the plaintiff that he would be unable to take the cattle at that date, countermanded the order for the cars, and requested plaintiff to feed the cattle for an additional ten days and that defendant would pay for the feed required and also the labor necessary in feeding and caring for the same; that at the request of defendant such arrangements continued until about the 10th day of April, when a new contract or an amendment of the preceding contract was made between the parties; that by the new contract the defendant agreed to pay the plaintiff a definite and fixed sum for certain of the cattle therein specified, being an amount greater than the limit agreed upon in the arrangements made in January; that defendant further contracted to pay the plaintiff the cost of the hay fed to the cattle in the meantime and the reasonable value of the labor for such feeding; that the cattle agreed upon were delivered and accepted by defendant on the 9th and 10th of April, and that plaintiff's claim for such cattle, feed, and labor has not been fully paid.

The answer denied the allegations of the complaint, except as admitted by the affirmative statements. As an additional defense it is alleged that a written contract was made between the plaintiff and defendant on the 12th day of March, 1917, in which defendant agreed to purchase and the plaintiff agreed to sell to defendant certain cattle therein described, which were to be delivered about April 1st of that year; that it was

[1] Moore v. Railroad Co., 174 Pac. 873.

[2] Dovich v. Chief Con. M. Co., 174 Pac. 627.

[3] Smith v. Columbus Buggy Co., 40 Utah, 597, 123 Pac. 580.

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stipulated in that agreement that the defendant would pay a feed bill of 9 cents per head per day; that at the date of the contract certain payments were made to plaintiff; that the stock was delivered on the 10th day of April and an additional payment was made at that date; that at the time of delivery and final settlement a dispute arose as to the number and character of the cattle delivered, "the amount due for feed, and the amount due under the terms of the contract, upon account of said cattle and upon account of the dealings of the plaintiff and defendant over said cattle and said feed bill"; that plaintiff and defendant thereupon stated their accounts to each other and it was found that the defendant was indebted to plaintiff at that time in the sum of $1,666, which defendant paid the plaintiff by check, and which the plaintiff accepted in full of all demands against defendant, and that thereafter plaintiff received the amount of said check from the bank upon which it was drawn.

By reply plaintiff admitted the payment of the sums mentioned in the answer, but denied all of the other allegations.

Trial was had to the court and a jury, and resulted in a verdict in favor of plaintiff on the first and second causes of action. From that judgment defendant appeals.

Numerous assignments of error are made respecting the introduction of testimony, refusal of the court to sustain the defendant's motion for a nonsuit, and certain instructions given and others refused.

It appears from the record that both plaintiff and defendant are and have been for a number of years engaged in buying and selling live stock; that prior to the transaction in question the plaintiff purchased cattle for defendant and for a firm known as Heiner Bros., of Salt Lake City, of which firm the defendant was a member. In addition to the particular cattle involved in this action, it is in evidence that during the same period two or three other bunches of cattle were purchased by the plaintiff as the agent or on behalf of the defendant. Respecting these particular cattle the testimony shows that the defendant was present and went with the plaintiff to examine them at the time the purchase was made. They are not involved here, and they are only material as it appears that at the final delivery of the cattle on April 9th and 10th some of these outside cattle were resold or retained by the plaintiff under a new agreement or arrangement made at that date. It also appears that on or about March 12, 1917, the defendant was at the home of the plaintiff in Spanish Fork, and while the cattle involved in this action were then in possession of the plaintiff the following written bill of sale or memorandum was signed by the plaintiff. It is referred to in the record as Defendant's Exhibit 1:

"Bill of Sale for Cattle. Duplicate.

* * * * * * * * *

"This is to certify that W. W. Davis, of Spanish Fork, has this day, March 12, 1917, bargained and sold to Geo. A. Heiner, of Ogden, the following described live stock, and does hereby guarantee the title thereto, viz.:

No. Head.	Description.	Brands.	Location of Brands.	Price per Head.
	"About 150 head of cows			at $46 per head.
	"About 125 head of 2 year olds			at $42 per head.
	"About 60 head of 1 year olds			at $32 per head, to be delivered April 1, 1917, feed bill excepted, at 9 cents a day per head.

"Received in part payment for above-mentioned stock $5,000. Wm. W. Davis."

It is admitted that the stock mentioned in this memorandum or bill of sale includes at least part of the cattle delivered to defendant on April 10th. It is the contention of appellant that this written agreement was the consummation of all prior oral agreements had between the parties. It is also his contention (and defendant so testified at the trial) that no subsequent change or amendment was made to that agreement; that the cattle inspected and received by him were delivered pursuant to the same; that payments were made upon the basis provided therein; and that he had fully paid the plaintiff all amounts due for the stock so delivered and accepted. On the other hand, it is the contention of respondent, and the case was apparently tried upon that theory, that at most this writing contained only a partial statement of the arrangements between the parties; that it was a mere memorandum or receipt given at that time for the payment of the amount mentioned therein which was to be applied on the cattle already purchased by the plaintiff as the agent, or at the request of, the defendant; that, in addition, the stock were not delivered at the time specified, to wit, April 1st; that a subsequent arrangement or agreement was had on April 9th and 10th by which new obligations were undertaken by both parties; that to all intents and purposes this so-called bill of sale was rendered ineffective; and that the final deal was not completed under the provisions of that contract, but was completed and carried out under arrangements made at the dates of delivery.

Practically all objections to the introduction of testimony on the part of the defendant were based upon the contention that this agreement of March 12th was a merger of all previous dealings respecting the cattle in question, and for that reason any oral testimony concerning the conversations had between the parties was immaterial and incompetent as tending to vary or contradict the terms of a written agreement. Defendant invokes the elementary rule that, when

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parties reduce an agreement or contract to writing, all prior negotiations respecting the matter contained within the writing become merged therein, and the writing, in the absence of uncertainty or ambiguity in the language, or fraud on the part of either party, is binding, and oral testimony will not be heard to explain, vary, or contradict the terms of such writing.

In this case the allegations of the complaint are, and the plaintiff's testimony supports the allegations, that a contract was made between the parties in January whereby the plaintiff undertook to buy for defendant certain cattle at not to exceed the price stated, and was to receive as compensation for his services $1 per head for the cattle purchased. The bill of sale or writing in question is a sale or an agreement to sell the cattle actually bought by plaintiff under the contract claimed by him to have been made in January. We have no way of determining just what was in the minds of the parties when the contract was made in March, except the writing itself. That writing appears to be a complete contract. It is just what it purports to be—a bill of sale—but why it was made or what negotiations or new arrangements led up to its execution does not appear in the record. That some agreement or arrangement concerning the purchase of these cattle existed prior to March 12th is abundantly shown by defendant's own testimony. Moreover, there is in the record ample proof to support the findings of the jury that, whether or not a contract was made in January, as claimed by the plaintiff, or whatever the purpose of the writing of March 12th may have been, the final sale or delivery of the stock was not consummated under the terms of either of such agreements. The plaintiff testified, and in that he was corroborated by other witnesses, and the jury must have so found, that when defendant came to accept the cattle on the 9th day of April, some of the stock gotten together by plaintiff were not such as defendant had specified or such as he could handle, and at that time arrangements were made by which plaintiff retained some of the cattle. Respecting that arrangement defendant was asked: "What, if anything, was said about any rebate to be given Davis as an inducement to take any of those cattle?" Defendant replied: "There was a little—I have just forgotten—I think it was a couple of dollars a head, maybe it was $3 a head, but there was a little I was to give him for taking these cattle that I did not want; yes."

Apparently there is no dispute as to the number of cattle actually delivered and accepted by defendant, to wit, 61 cows, 73 two year olds and 83 yearlings, a total of 217 head. The number specified to be delivered under the so-called bill of sale was a total of 335 head. There is no dispute but that plaintiff had gathered together, or, as he claims, purchased, something like 380 head, and had that number on hand at the time Exhibit 1 was executed.

[1, 2] Conceding that appellant's contention is right, that all negotiations between the parties prior to March 12th are immaterial as having been merged in the written agreement, but also conceding that the jury must have found that the final arrangements for the sale and delivery of the cattle actually received by the defendant were made on the 9th and 10th of April, in what way is the defendant injured by the introduction of the testimony objected to? At most, it would only explain the relationship existing between the parties and would have no bearing either way as to what the actual agreement was as made by the parties at the time of the final delivery of the stock. While it may have been error on the part of the court, after the plaintiff admitted the execution of the bill of sale on the date it bears, to admit testimony concerning any arrangements prior to that time, still we are unable to see from the subsequent arrangements or acts of the parties and the findings of the jury how that testimony was prejudicial to the interests of defendant. That this court is not authorized and will not reverse a judgment unless the error complained of is prejudicial is a part of the statute law of this state and is supported by numerous decisions of this court. Comp. Laws Utah 1917, §§ 6622 and 6968; Moore v. Railroad Co., 174 Pac. 873.

It appears that some days after the stock had been shipped from Spanish Fork plaintiff and defendant met in Salt Lake City, and, after some hours spent in attempting to arrive at an adjustment concerning the matters involved, the defendant gave plaintiff a check for $1,666 which he insists was delivered by him with the understanding and conditioned that the same was to be in full settlement of all demands or claims upon the part of plaintiff. On the other hand, it is insisted by plaintiff that the check was delivered, not in full settlement, but with the understanding and agreement between the parties that the question of whether there was any additional amount due plaintiff, and, if so, how much, should be left to arbitration, or, as stated, to three disinterested persons.

[3, 4] Complaint is made by appellant of the refusal of the court to give to the jury the following instruction respecting that issue:

"I charge you that under the evidence in this case there was a bona fide dispute between the plaintiff and the defendant, and if you find from the evidence that the defendant (Heiner) offered to pay, and tendered to the plaintiff (Davis) his check for $1,666 in full satisfaction of the demands of the plaintiff against the defendant, and that the plaintiff retained and cashed said check, then I charge you that the plaintiff ac-

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cepted the check subject to the conditions imposed by the defendant, and the plaintiff cannot recover in this action, and your verdict should be for the defendant: No cause of action."

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The court did, however, instruct the jury covering this particular issue as follows:

"If you find from the evidence in this case that at the time the plaintiff and the defendant met at the Cullen Hotel in Salt Lake City, Utah, in the month of April, 1917, after the cattle mentioned in the evidence had been shipped from Spanish Fork, that there was a bona fide dispute between the plaintiff and the defendant, and if you further find from the evidence that the defendant then and there offered to pay and tendered to the plaintiff the check for $1,666, which is in evidence in this case as Defendant's Exhibit No. 9, conditioned that the said check was so tendered only as a full and complete satisfaction of all plaintiff's claims against the defendant by reason of the transaction set forth in plaintiff's complaint, and if you further find that the plaintiff, fully understanding that said check was so tendered and conditioned on defendant's part, accepted said check, with or without protest, and retained said check, and afterwards cashed the same, then I charge you that the plaintiff accepted said check subject to the conditions imposed by the defendant, and the plaintiff cannot recover in this action, and your verdict should be for the defendant: No cause of action."

We are unable to see what serious ground of complaint appellant has for the failure of the court to give the instruction requested in view of the instruction given. That there was a dispute between the parties respecting the amount due the plaintiff was testified to by both plaintiff and defendant. That they spent some hours in an attempt to come to some agreement as to the correct amount was also testified to by both parties. That at the conclusion of that meeting the defendant gave to the plaintiff a check for $1,666 is admitted, as is also the fact that the plaintiff afterwards received the amount of that check. The controlling or vital question for determination by the jury was whether the check given by defendant was in full payment and so understood by plaintiff at that time. That question was fairly submitted to the jury by the instruction. Conceding that the proof showed conclusively that a bona fide dispute existed between the parties, we fail to see how or in what way the leaving of that question to the jury was prejudicial to the defendant, inasmuch as the jury, in view of their verdict, must have found that the check was not given in full payment. It is true the court, after instructing that, if they found the check given was in full payment, further stated to the jury that it was necessary to further find "that the plaintiff, fully understanding that said check was so tendered and conditioned on defendant's part, accepted said check," before they could find against plaintiff. The instruction requested by appellant necessarily implies that the plaintiff must have accepted the check with the knowledge that it was intended to be in full payment; otherwise the effect of what appellant is contending for would be that one party could make a contract without the knowledge or consent of the other party. If there is any new or additional element in the instruction as given that was not included in the one requested by counsel for defendant, it is to the effect that the jury must find that the plaintiff accepted the check "with the full understanding that the check was tendered and conditioned to be in full payment," but the distinction between *understanding* and *fully understanding* is somewhat difficult to draw and one not likely to mislead the jury.

[5] Plaintiff testified that the writing of March 12th had been altered after its execution by adding the words "Feed bill excepted, at 9 cents a day per head." Defendant requested the court to instruct the jury that the burden of proving such addition or alteration was upon the plaintiff, and that they should not find that such alteration had been made unless clearly established to the satisfaction of the jury beyond a reasonable doubt. The court refused to so charge. This is assigned as error. The requested instruction calls for a greater weight of evidence than is required to establish a fact in civil cases. Dovich v. Chief Con. M. Co., 174 Pac. 627; 17 Cyc. 755 et seq.

Objection is further made that the court in its instructions failed to state the issues to be determined by the jury. That, in our judgment, is the most serious question presented on this appeal.

The court apparently did not attempt in any way to state the issues in any general language, and in fact did not in general or definite terms state to the jury what the issues were. The court began its instructions as follows: "The plaintiff brings this action against the defendant, and for cause of action alleges." It then set out the complaint, the answer, and the reply hæc verba. The court then instructed the jury that the third cause of action had been dismissed and was not to be further considered. No further reference is made to the issues.

Appellant contends that it was the duty of the court to construe the pleadings and to charge the jury respecting the issues of fact to be determined, and relies upon the opinion of this court in the case of Pulos v. Railroad, 37 Utah, 258, 107 Pac. 241, Ann. Cas. 1912C, 218. In that case the court charged the jury that the amended complaint set forth what the plaintiff claimed and the amended answer set forth the defendant's version, and that both the amended complaint and answer were made part of the instructions, and the jury was referred to such pleadings for the particular statements

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as to what each party alleged in reference to the controversy. Following that, it appears, a statement was made "in general terms" giving the substance of the material allegations of the complaint and the denials and averments contained in the answer. In that case this court held that the charge involved two erroneous statements. One was that the jury had a right to take the pleadings with them to the jury room, and the other that it was their duty to consult the pleadings and determine for themselves the issues. The judgment was reversed upon that and other errors.

In the instructions under consideration no reference was made to the pleadings as such, and the jury was not instructed to examine the pleadings and from them determine the issues. However, the court made no attempt to instruct the jury respecting the issues further than to copy into the instructions the pleadings in the case. Of necessity the jury, in order to determine the issues, were required to examine the pleadings.

Plaintiff relies upon the holding of this court in Smith v. Columbus Buggy Co., 40 Utah, 597, 123 Pac. 580. While it is true that it was there held not to be error for a trial court, under all circumstances, to state the issues in the language of the pleadings, yet, proceeding to discuss and apply the instructions to the facts in that case, it was said:

"Of course, many things may be stated in a complaint that may be admitted or not disputed in an answer; and the same may be true with regard to the answer and the reply thereto. Under such circumstances, it may be misleading to the jury to copy the whole pleadings in stating the issues, because all of the matters of fact that are admitted in a pleading or not denied no longer present any issue to be tried by the jury. In this case, however, all the facts relating to the respondent's right of recovery were denied, and the court only copied such portions of the answer as raised some issue in the case."

It is not the desire or intention, under like facts, to overrule or modify the holding in that case. In the case at bar three distinct causes of action are stated in the complaint. Allegations are made respecting at least two distinct agreements between the parties. The answer denies those allegations and alleges a new contract as an affirmative defense. By the reply the existence of that contract is put in issue. Moreover, it developed at the trial, from the plaintiff's evidence, and also from the defendant's evidence, that the contract made in January was not in any way controlling, and was to all intents and purposes out of the case. Either the deal was completed and the cattle delivered under the written bill of sale of March 12th or under the verbal contract made at the time of delivery of the cattle in April. That was the first and vital question to be determined by the jury. Another important question to be determined was whether the check for $1,666 given to the plaintiff was given and accepted in full settlement. It was the duty of the court to instruct the jury and define to them the issues of fact they were required to determine. Merely handing the pleadings to the jury with no statement, either general or specific, does not, in the judgment of the writer, meet the requirements stated by this court in Pulos v. Railroad, supra, as follows:

"The court in the written charge itself should clearly define the particular issue or issues submitted to the jury, and should specifically state to them the material facts alleged, denied, and admitted in respect of such issues."

See, also, Baltimore & O. R. Co. v. Lockwood, 72 Ohio St. 586, 74 N. E. 1071; K. C., F. S. & M. Ry. v. Dalton, 66 Kan. 799, 72 Pac. 209.

[6, 7] We are all agreed that it was the duty of the trial court to construe the pleadings and advise the jury as to the issues of fact to be determined by them. The defendant was entitled to have such issues defined and properly submitted to the jury. In the writer's opinion that was not done, and the failure of the trial court to so define and advise the jury as to the issues of fact was prejudicial to the defendant and ought to work a reversal of the judgment. However, my Associates, while not dissenting from the proposition that it was the duty of the court to construe the pleadings and define the issues, are of the opinion that in this case the failure to do so was not prejudicial, at least not sufficiently so to warrant a reversal. The reasons for that conclusion are stated in the concurring opinion written by Mr. Justice THURMAN and appended hereto.

The order therefore is that the judgment of the court below be, and the same is hereby, affirmed, with costs.

THURMAN, J. I concur with Mr. Justice GIDEON in the order affirming the judgment and in all of his conclusions except that relating to the manner of stating the issues to the jury. As to that I also concur upon the proposition that merely reading to the jury a verbatim statement of the complaint, answer, and reply is not such a statement of the issues as the law contemplates and may be misleading and prejudicial. The better practice in all cases is for the trial court to make a plain and concise statement in its own language of the issues to be determined by the jury, carefully omitting any and all issues that may have been eliminated by the parties themselves or the court during or before the trial. But it does not necessarily follow that the losing party has been prejudiced simply because the trial court copied in his instructions and read to the jury the pleadings in the case instead of a statement

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of the issues in the language of the court. Reading the pleadings to the jury as a statement of the issues may or may not be prejudicial. The burden is on the appellant in the particular case to point out and show to this court wherein he may have been prejudiced by the matter of which he complains. Nowhere in the exceptions taken, the error assigned, the argument or brief of counsel, or even in the opinion of Mr. Justice GIDEON, is there any attempt to point out or suggest wherein or in what manner the appellant has been prejudiced in the instant case by reason of the form of statement adopted by the court. The whole tendency of his opinion, as I read it, is to cast upon the party disclaiming prejudice the burden of disproving it rather than upon the opposing party the burden of proving it.

In the opinion of the writer this involves an erroneous conception of the rule by which this court is bound. It gives sanction and recognition to the old rule that prejudice is presumed from error, and that the burden of showing that the error was without prejudice falls upon the party that disclaims it.

Compiled Laws Utah 1917, §§ 6622 and 6968, invoked by Mr. Justice GIDEON in disposing of another assignment of error, read as follows:

"6622. The court must in every stage of an action disregard any error or defect in the pleadings or proceedings, which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect."

"6968. No exception shall be regarded unless the decision excepted to is material and prejudicial to the substantial rights of the party excepting."

These sections lay down the rule that harmless errors must be disregarded. This, supplemented by the ordinary presumption in favor of judgments in cases of appeal, undoubtedly casts the burden of establishing prejudice on the party affirming it.

The allegations of the complaint were denied by the answer, and in addition thereto the answer alleged an affirmative defense. This was denied by the plaintiff. The issues were simple. They were not involved. There was nothing to confuse or mislead the jury. The plaintiff relied on the transaction as he alleged it, and the defendant relied on the transaction as he alleged it. Substantially every allegation in both the complaint and answer was controverted by the opposing party.

I am of the opinion that this question comes within the principle declared in Smith v. Columbus Buggy Co., a decision by this court referred to by Mr. Justice GIDEON. In that case the trial court incorporated into the instructions to the jury a verbatim copy of the complaint and such portions of the answer as presented the material issues. This was excepted to by appellant and assigned as error on appeal. In disposing of the exception the court, speaking through Mr. Justice Frick, then Chief Justice, said:

"While it is desirable in all cases that the jury, who are laymen and unfamiliar with the rules of pleading, or construction, should, as clearly and as briefly as possible, be told the precise issues that are to be determined by them, yet, where the issues are stated in the language of the pleadings, and it is not made to appear that the jury were either misled or confused by the method pursued, the judgment cannot be reversed for the sole reason that the court stated the issues in the language of the pleadings. We can discover nothing in the record before us from which it is made to appear that the appellant was in any way or to any extent prejudiced by the statement of the issues in the manner in which it was done. This assignment must therefore fail."

The court, while not approving of that manner of stating the issues to the jury, nevertheless refused to reverse the judgment on that ground alone. There being no reversible error, the judgment was affirmed.

In the case of Pulos v. Railroad, also referred to by Mr. Justice GIDEON, the trial court permitted the jury to take the pleadings with them when the cause was submitted, and also instructed them to refer to the pleadings for a particular statement of the issues involved. This court on appeal held that this method of stating the issues was error. The court, however, before reaching this question, in the course of its opinion, had already sustained an exception of appellant upon another question for which the judgment would have been reversed. Just what the judgment of the court would have been if it had been called upon to reverse the judgment solely on account of the manner in which the issues were stated is not necessary to determine. In that event, however, it would have been the duty of the court to consider the question as to whether or not the error appeared to be prejudicial. If not, the judgment must have been affirmed notwithstanding the error complained of.

An examination of the instructions given to the jury discloses the fact that the plaintiff was required to establish every fact alleged in his complaint by a preponderance of the evidence. No such burden was imposed upon the defendant notwithstanding he alleged and relied on certain affirmative defenses. For this reason it seems to me that appellant has less cause for complaint than respondent would have had if he had been the losing party.

The judgment of the trial court should be affirmed.

CORFMAN, C. J., and FRICK and WEBER, JJ., concur.

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(54 Utah, 459)

WOOTON v. DRAGON CONSOL. MINING CO. (No. 3284.)

(Supreme Court of Utah. May 16, 1919.)

1. MASTER AND SERVANT ⟸286(24) — INJURIES TO SERVANT—NONSUIT—INSPECTION OF MINE.

In action for injuries to mucker in mine by rock falling from side or roof of hole in which he was working, evidence of inspection by master as shown by plaintiff's testimony *held* insufficient to authorize nonsuit at close of plaintiff's evidence.

2. APPEAL AND ERROR ⟸996—REVIEW—VERDICT.

It is not within province of an appellate court to disturb verdict of jury in case where state of evidence is such that reasonable men might differ as to the side on which it preponderates.

3. APPEAL AND ERROR ⟸999(3)—REVIEW—NEGLIGENCE.

Court on appeal can pass on negligence only in clear cases.[1]

4. TRIAL ⟸142—PROVINCE OF JURY—INFERENCES FROM EVIDENCE.

It is solely the function of the jury to weigh the evidential effect of facts before it and to deduce such legitimate inference as those facts afford.[2]

5. MASTER AND SERVANT ⟸205(2)—ASSUMPTION OF RISK—NEGLIGENCE OF MASTER.

Mucker in mine injured by rock falling from side or roof of hole in which he was working *held* not to have assumed risk of injury when his only protection from danger lay in care and precaution of master in inspecting and scaling loose rock.[3]

6. APPEAL AND ERROR ⟸1170(10)—LAW OF THE CASE — UNCHALLENGED INSTRUCTION—STATUTE.

In an action for injuries to mucker in a mine, an erroneous instruction that lessee of mine was an independent contractor ignored by the verdict will not become the law of the case so as to cause a reversal in view of Comp. Laws 1917, §§ 6622, 6968, relating to disregard of errors not affecting substantial rights of parties.

7. MASTER AND SERVANT ⟸88(3) — INDEPENDENT CONTRACTOR — LESSEE OF MINE—CONTROL BY MASTER.

Under contract with owner of mine to mine ore at stated sum per ton under owner's "direction and supervision," owner to furnish tools and air and lessee to furnish labor and supplies, and in view of the subsequent performance whereby only one lessee was left working, and he was put on pay roll of owner at daily wage, and was put under direction of mine superintendent who directed when and where to mine the ore, *held* that lessee was not an independent contractor.

8. MASTER AND SERVANT ⟸88(3) — "INDEPENDENT CONTRACTOR."

An independent contractor is one who exercises independent control over the mode and method by which he produces the result demanded by the contract.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Independent Contractor.]

9. EVIDENCE ⟸538 — EXPERT TESTIMONY—KNOWLEDGE—CARE—MINES.

A witness to be competent as an expert to testify as to care which should be used in sounding and scaling loose rock in side or roof of a hole in a mine after blasting, in absence of local peculiarity, need not be acquainted with the condition of the particular hole in question.

10. EVIDENCE ⟸505 — EXPERT TESTIMONY—QUESTION—CONCLUSION.

In action for injuries to mucker in a mine from fall of rock from side or roof of hole in which he was working, question to expert witness, could he determine whether rock was loose or not by sounding and by picking and making the tests usually made, *held* not objectionable as calling for a conclusion.

Appeal from District Court, Juab County; D. H. Morris, Judge.

This is an action brought by A. Wooton, plaintiff, against the Dragon Consolidated Mining Company, a corporation, defendant, to recover damages for personal injuries. Verdict for plaintiff. Defendant appeals. Affirmed.

In speaking of the parties as actors in the case and in the court below, we shall refer to them as plaintiff and defendant. As actors in this court, they will be called appellant and respondent.

Plaintiff, in his complaint, in substance alleges that at all times in question the defendant owned and operated the mine in question, and that plaintiff was employed by defendant to work therein as a "mucker"; that defendant negligently failed to make proper inspection of the roof and walls of the place where plaintiff worked, negligently failed to scale off or remove or timber up loose rock and earth, and negligently failed to warn plaintiff of the condition of said place, and that plaintiff had no knowledge or notice of said dangerous condition; that on August 3, 1916, while plaintiff was working in said mine in the employ of defendant, a rock fell from the "side or roof of said hole in which plaintiff was then working" and inflicted upon him the injuries upon which he bases this action.

[1] Davis v. D. & R. G. R. R. Co., 45 Utah, 1, 142 Pac. 705.

[2] Arrascada v. Silver King Coalition Mines Co., 181 Pac. 159; Johnson v. Silver King Con. Min. Co., 179 Pac. 61; Miller v. Utah Con. Min. Co., 178 Pac. 771.

[3] Miller v. Utah Con. Min. Co., 178 Pac. 771; Urich v. Min. Co., 169 Pac. 263; Andrews v. Free, 45 Utah, 505, 146 Pac. 555.

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Defendant denies each and every one of the above allegations.

Defendant alleges that at the time mentioned in the complaint the said mine was in the possession of, and under the control of, lessees of defendant, and denies that plaintiff was employed by defendant or worked in said mine for or under the control of defendant.

Further answering, defendant alleges that plaintiff's injury, if any, was proximately caused by his own negligence in going into his place of work prematurely, and without being required so to do, immediately after the firing of blasts in the raise above his place of work, and in failing to take any precaution to ascertain whether earth and rocks above him had been loosened by said blasts.

There is further answer, alleging that plaintiff assumed the risk, and that any injuries he received were caused by a fellow servant.

The evidence, of course, develops the facts of the matter in greater detail. It is not disputed that on or about May, 1916, plaintiff was employed by defendant to work in the Dragon mine, which mine was then owned and operated by defendant. Plaintiff worked in this mine largely, if not entirely, in the capacity of mucker from that time until he was injured. On August 3, 1916, while working in the mine as a mucker, he was injured by being struck by a piece of rock that fell from a place above him.

At the time of the accident the plaintiff was working in a large subterranean excavation called the "Gloria Hole." This "Gloria Hole" was an underground room as large as the "Nephi courthouse." It was approached from the outside by means of a tunnel. In the "Gloria Hole," in the face of a cliff therein and some 20 feet or so above the floor, was the mouth or entrance of an incline "raise" or drift extending upward into the mountain on an angle of about 22 degrees. Ore was being mined in this "raise" or drift. As the ore was blasted or broken down it would fall from the mouth of the raise to the floor of the "Gloria Hole" directly beneath the mouth of the raise, and there make a pile of ore from which muckers loaded the cars that hauled the ore to the bins.

On the night of the accident plaintiff was working on and around this pile of ore engaged in loading cars. A rock fell from the raise above and struck the pile of ore, where it broke into several pieces. One of the pieces of the rock struck plaintiff on the ankle.

Concerning the alleged negligence of the master, there is evidence to the effect that the rock in question came from the raise; that plaintiff was not working in the raise, but was working on the floor of the "Gloria Hole" below the mouth of the raise, and that his only protection from falling rock was the master's precaution in inspecting the raise and making it safe by scaling off or bracing up the loose rock therein. There is further evidence to the effect that a proper inspection of the raise would have disclosed the instability of a mass of rock as large as that which fell. There is evidence that the raise was inspected and sounded at 6 o'clock by a competent miner. The accident occurred after 6 o'clock. The evidence is conflicting as to whether another shot was fired in the raise after this inspection and before plaintiff was injured. So, also, the evidence is uncertain, if not conflicting, as to the exact time when plaintiff was injured. The jury found the issue as to negligence in favor of plaintiff.

Defendant contends that at the time of the accident plaintiff was not employed by or working for defendant, but was employed by and working for Ben Long. In support of this contention defendant offers a contract evidencing a lease of the right to mine ore given by defendant to Sutherland and Long. There is much evidence concerning this lease, proceedings thereunder, and modifications thereof. Many of the 48 errors assigned pertain to, or involve the effect of, this lease. Other facts will be stated in the opinion. The errors assigned will, in our discussion, be grouped according to principle invoked.

Cheney, Jensen & Holman, of Salt Lake City, for appellant.

Parker & Robinson, of Provo, and Willard Hanson, of Salt Lake City, for respondent.

BRAMEL, District Judge (after stating the facts as above). [1] At the trial defendant, at the close of plaintiff's evidence, made a motion for a nonsuit. At the close of all the evidence defendant made motion for a directed verdict of no cause of action. In each of these motions, and in a motion for a new trial, defendant raises the points, among others, that no evidence was given of negligence on the part of the employer, and that the evidence shows that plaintiff assumed the risk.

It is argued that the rock came from the raise; that the raise had been inspected at 6 o'clock; that the accident occurred after the inspection; that the master fulfilled his duty, and that there is no liability. At the time the motion for a nonsuit was made only plaintiff's evidence was before the court, and it appeared therefrom that the miner, before the accident, went into the raise to inspect, and that he came down again after he had been up there 20 or 30 minutes. There is no direct evidence in this of any particular kind of an inspection. Nor, in the light of other evidence then in the record as to what actually happened, may the court presume or hold

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this to be evidence that a proper inspection, or any particular inspection, had been made. Felton v. Bullard, 94 Fed. 781, 37 C. C. A. 1; Gibson v. Ry. Co., 61 Wash. 639, 112 Pac. 919; Cunningham v. Ry. Co., 4 Utah, 206, 7 Pac. 795.

[2, 3] At the close of all the evidence there there was evidence in the record that Waters, the miner, did make an inspection of the ordinary and usual kind, and scaled off the walls and roof of the raise at about 6 o'clock. But this same Waters, who made this inspection, says that, after this inspection and before plaintiff was hurt, another blast was fired in the raise. The answer of defendant alleges, and the evidence of defendant is to the effect, that plaintiff met with injury by going to his place of work prematurely and immediately after the firing of blasts in the raise. The evidence of Waters tends to make the inspection which he said he made at 6 o'clock an immaterial fact, because, according to his account, subsequent blasts in the raise altered conditions before the accident. The evidence upon the question of negligence is conflicting. It is not within the province of this court to disturb the verdict of the jury in a case where the state of the evidence upon the given issue is such that reasonable men might differ as to the side upon which it preponderates. This court can pass upon the question of negligence only in clear cases. Davis v. D. & R. G. R. R. Co., 45 Utah, 1, 142 Pac. 705.

[4] It is solely the function of the jury to weigh the evidential effect of the facts before it, and to deduce therefrom such legitimate inferences as those facts afford. Arrascada v. Silver King Coalition Mines Co., 181 Pac. 159 (decided this term); Johnson v. Silver King Con. Mining Co., 179 Pac. 61 (decided this term); Miller v. Utah Con. Min. Co., 178 Pac. 771 (decided this term).

[5] The evidence in this case makes it plain that plaintiff from his place of work could not inspect the raise, and that his only protection from rock falling therefrom lay in the care and precaution exercised by the master. In this fact this case is similar to the case of Miller v. Utah Con. Min. Co., supra. Also see Urich v. Min. Co., 169 Pac. 263; Andrews v. Free, 45 Utah, 505, 146 Pac. 555. Those cases dispose of the idea of assumed risk in this case.

So far as concerns the above-mentioned points, the contention of the appellant is without merit.

[6] The trial court instructed the jury that the lease or contract between the defendant on the one part and Sutherland and Long on the other part made and constituted Ben Long an independent contractor. No error is assigned by either party to this instruction, and it is not in question here for the purpose of direct review. But appellant contends that the rule announced or status declared in this instruction is the "law of the case" in this court, and that in reviewing the errors assigned this court must work upon the hypothesis that Ben Long was an independent contractor. Most of the errors assigned by appellant are based upon the theory that Ben Long was an independent contractor, and depend upon that theory for their merit.

The cases are in conflict as to the existence of any rule that compels an appellate court in considering an appeal to follow as law of the case the unchallenged rulings of the lower court in that same case. If there is such a rule, it was born of dicta and tradition rather than of rigorous logic. Armstrong's Adm'r v. Keith, 3 J. J. Marsh. (Ky.) 153, 20 Am. Dec. 131, and note.

It has been held by many courts that it is the duty of the jury to obey the instructions of the court regardless of whether such instructions are right or wrong, and that a proper verdict found contrary to an erroneous instruction will be set aside on appeal. Lynch v. Snead Ironworks, 132 Ky. 241, 116 S. W. 693, 21 L. R. A. (N. S.) 852, and notes. California formerly so held, but the earlier decisions have been overruled and that state is now committed to a contrary doctrine. Mining Co. v. Mining Co., 114 Cal. 100, 45 Pac. 1047; O'Neill v. Thomas Day Co., 152 Cal. 357, 92 Pac. 856, 14 Ann. Cas. 970.

The Supreme Court of the United States refuses to allow any "law of the case" that may exist in the matter before it, by reason of any decision of an inferior court therein, to control or influence its decision. In fact, the Supreme Court of the United States has virtually declared itself exempt from any "law of the case" in this narrow sense. Messinger v. Anderson, 225 U. S. 436, 32 Sup. Ct. 739, 56 L. Ed. 1152; United States v. D. & R. G. R. R. Co., 191 U. S. 84, 24 Sup. Ct. 33, 48 L. Ed. 106. This court, in the case of Schuyler v Railroad Co., 37 Utah, 581, 109 Pac. 458, in the opinion on the first hearing, strongly announced that it is the duty of the jury to follow an instruction of the court regardless of whether that instruction is right or wrong. Two rehearings were granted in that case. The first opinion and the order reversing the judgment made therein were set aside, and a verdict found contrary to an erroneous instruction was allowed to stand. The three opinions are contained in 37 Utah, 581–616, 109 Pac. 458, 1025.

It is held by many courts that, where the jury returns a verdict that is proper in all respects under the evidence and upon the record, such verdict will not be set aside on appeal on the ground that the jury disregarded an erroneous instruction in finding such verdict. 4 C. J. 1042–1043, notes and

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cases cited; 13 Standard Ency. of Procedure, p. 983, and notes.

In cases like this, it is said by the supporters of the "law of the case" doctrine that the idea that the judge is to declare the law and the jury is to pass upon the facts is the corner stone of our judicial system, and that any rule or practice that tends to rob the judge of any of the fullness of his authority to declare the law to the jury, tends to destroy the court. So long as the judge declares law—the true law—the argument may be valid. When the judge erroneously instructs the jury, it is fitting and just that such error be corrected. How corrected? That is a form—a matter of procedure. If the matter comes to an appellate tribunal with the error of the judge already corrected by a verdict of the jury, should the appellate court, for the sake of preserving a form, confer upon the judicial error the garb of sanctity or the boon of immortality?

The highest end for which an appellate tribunal exists is to correct the errors of lower courts, not to perpetuate them. This court would not be holding in high esteem the purpose for which it was created were it to accede to any rule that would permit errors of inferior tribunals to lessen its authority, or to burden litigants with unnecessary delay and expense.

A principle incompatible with appellant's contention is in broad and strong terms established by the statutes of this state. Section 6622, Comp. Laws 1917, provides that the court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and that no judgment shall be reversed or affected by reason of such error or defect. Section 6968 provides that no exception shall be regarded unless the decision excepted to is material and prejudicial to the substantial rights of the party excepting. In accordance with the word and spirit of these statutes, this court has held in at least half a hundred cases that it will not reverse a judgment because of irrelevant performances or irregularities or errors that do not result in wrongful judgment or in depriving the complaining party of a substantial right which, had it been properly exercised, might have secured a different decision. By substantial right is meant a right that is a part of or a factor in the justice of the case as distinguished from a matter of unessential form or an immaterial matter.

In this particular case, let it be conceded that it was the duty of the jury to follow the instruction of the court, be that instruction right or wrong. Let it be assumed that the court gave to the jury an erroneous instruction, and that the jury disregarded the same and, contrary thereto, returned a verdict which according to the case presented is, in the justice of the matter, a just and proper verdict. Does not this come fairly within the statute? More than this, is not this a typical instance of an error, or two errors, that did not prejudice substantial rights? We are of the opinion that it is.

The contract or lease is a part of the evidence presented to this court in this appeal. We are of the opinion that we are free to examine the same and reach such conclusions as to the legal effect thereof as our deliberations may justify.

[7] The contract in question is dated April 21, 1916, and is between Alex Sutherland and Ben Long, parties of the first part, and Dragon Consolidated Mining Company, party of the second part. It recites that the party of the second part is owner of the mine and desires to have ore mined. By the express terms of the contract Sutherland and Long agree to mine ore under the "direction and supervision" of the second party at such places, at such times, and in such quantities, as the second party shall direct, and place said ore in the company's bin. Sutherland and Long agree to furnish their own powder, fuse, caps, supplies, and labor. The second party is to furnish tools and air. The contract provides that the work shall be done in such manner only as is usual and customary in skillful and proper mining operations of a similar character, and "according to approval of second party." Sutherland and Long agree not to injure the mine, and to hold second party harmless from all suits, claims, and demands. Second party may terminate the contract at any time on notice. Sutherland and Long are to receive 65 cents per ton for ore mined.

On the face of the writing, it is manifest that a typical case of an independent contractor is not presented. The control reserved to the owner covers all details of the work, including "direction and supervision" as to times, places, and quantities, and "approval" of methods employed. The owner may enforce its will, wish, or opinion by terminating the contract. The owner reserves another hold on Sutherland and Long. It may call upon them for protection against claims and demands arising against the owner or its property. Upon the fact of the contract, it would be as easy to show that Sutherland and Long were working for the second party at a wage of 65 cents per ton as to show that they were masters of the means, method, or manner by which the work was to be accomplished.

Some additional light may be thrown upon the relationship existing between the company and Long by examining the performances that took place under, and collateral to, this contract.

After some work had been done under the contract, Sutherland quit and left Ben Long

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to work alone. In getting out the ore Long was under the direction or control of the superintendent of the mine, who gave orders as to where ore should be mined and how much should be produced. The superintendent and, to a certain degree, the shift boss "saw to it" that the work was done according to correct methods of mining. The superintendent approved the work and saw that it was done "carefully and right."

Some time before the accident, Long became discouraged and was about to quit, and the company made a new arrangement with him to the effect that he should be guaranteed a minimum of four dollars per day for his wage or profit, and that if he did not make enough beside to pay his men the company would pay the difference. After this new arrangement was made, Long's name was put upon the pay roll of the company and he was given a number, as were other employés, and his pay was for the time he worked. However, there was a book account of some nature kept of the "iron contract," and the men in the "Gloria Hole," including plaintiff, seem to have worked for the company and on the "iron contract" in turns for some time prior to the accident. For instance, the shift boss says that he "borrowed" plaintiff from Long two days in August.

[8] According to all the books and authorities, an independent contractor is one who exercises independent control over the mode and method by which he produces the result demanded by the contract. Analyze the contract in question. The result or final product called for by the contract is mined ore in the bin of the company. By the terms of the contract Ben Long was under the control of defendant at every step of the work. It is difficult, if not impossible, to see or even to imagine one substantial detail of the actual work of getting out ore in which Long was independent or free from supervision or control. The contract itself stipulates that this work shall be done in such manner only as is usual and customary in skillful and proper mining and according to the approval of the defendant. This wide provision confers upon the defendant large powers in the way of directing the details of the mode and manner in which the work shall be done, and it deprives Ben Long of any voice in the matter. Linnehan v. Rollins, 137 Mass. 123, 50 Am. Rep. 287; Railway Co. v. Hanning, 15 Wall. (U. S.) 649, 21 L. Ed. 220. The authorities are practically unanimous to the effect that one is not an independent contractor unless he is vested by the contract with the right to control the mode and manner of doing the work. 1 Thom. Neg. §§ 621–622; 1 Shearman & Red. Neg. (6th Ed.) 164–167; 1 Labatt M. & S. § 64; 2 Mechem, Agency (2d Ed.) 1870, 1871; 24 Cyc. pp. 1546–1551; 14 R. C. L. pp. 67–77; Bishop, Non-Contract Law, § 602.

We are of the opinion that Ben Long was not an independent contractor.

All errors assigned to instructions given rest upon the theory that Ben Long was an independent contractor and that plaintiff was working for Long. These exceptions are disposed of in what has been said concerning the status of Long. The same statement applies to the exception to the ruling of the court permitting plaintiff to answer the question, "How long did you continue in the employ of the defendant company?"

[9] Another error is assigned to a ruling of the court permitting a witness to answer a question over the objection of defendant. This assignment deserves some consideration. Baxter, a witness for plaintiff, and a miner of 30 years' experience in the Tintic country, in which the Dragon mine is situated, and who had worked in the Dragon mine for a period of 15 months, covering a time at or shortly prior to the time of the accident, and who was familiar with the formation and rock in the "Gloria Hole," after having given evidence to the effect that ordinarily the miner and not the mucker makes the inspection, and that the inspection consists of picking down loose material and sounding the place to see if it is solid, and that such inspection would disclose loose rock, was asked the following question by counsel for plaintiff:

"Q. What would you say as to whether or not an experienced, competent miner could determine by sounding or picking in a formation such as this 'Gloria Hole' was, and is, as to whether or not a quantity of approximately 200 pounds was loose or not—what I mean is, could he determine whether or not that was loose or not by sounding and by picking, and making the tests that usually the ordinary miner would make?"

Objection was made on the ground that the question is incompetent and immaterial and calls for a conclusion, and that no proper foundation for it had been laid.

The evidence of Wooton then in the record was that the rock fell from the incline, that it weighed 200 or 300 pounds, and that it broke when it struck the pile of ore.

It is insisted that Baxter was not qualified to answer the question, because it was not shown that he was familiar with the formation in the incline itself. Throughout the whole trial the name "Gloria Hole" seems to have been used in referring to the general place in question. The incline was in the "Gloria Hole." Baxter said he was acquainted with the formation in the "Gloria Hole." We think he was qualified to answer the question. And here we suggest that we do not think that the qualification of the witness, in the absence of some suggestion of local peculiarities, depends upon his knowl-

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edge of the particular raise in question. If so, logic demands that we proceed one step farther and require knowledge of the particular spot from which the rock fell, or of the rock itself at the time it fell. He was testifying as to the efficacy of a general method of finding loose rock in a mine. There is no suggestion in the evidence, or in the argument, that the rock in the Dragon mine was of a kind peculiar to that mine, or that it differed in sounding quality from rock in general.

Opinion evidence is admitted in some cases, if not in all cases, as a matter of necessity. It is in such cases the best evidence the nature of the subject-matter affords. Chamberlayne, Ev. § 1982; 17 Cyc. 40–45. The question of fact at issue in this particular case was whether or not there was any method by which the looseness of a rock hanging in a mine could be discovered. The jury could not pass upon that question without the aid of evidence of some kind. The best evidence might be a view of the rock at the instant prior to its fall or immediately after the blast, or sounding it in the presence of the jury; but such evidence never was obtainable. The best evidence of whether a person was or was not permanently injured by an accident would be an examination made some years after the accident; but the court cannot wait. As a matter of necessity, it admits opinion evidence to show the permanence of the injury. In this case, per necessity, the best evidence of the fact as to whether or not the looseness of the rock could have been discovered before the rock fell was an opinion from an expert as to what sounding would discover.

[10] The question put to Baxter may lack perfection of form, but in substance it asks for his opinion as to whether or not sounding, picking, and the usual tests would disclose the looseness of a 200-pound rock. The words "usual tests" may be disregarded as repetition or surplusage. Baxter had testified that rock is sounded to see if it is solid, and that the loose rock is picked down. That seems to be all the test there is. The miner Waters later testified that he inspected the place by picking down loose rock and then sounding. Coal Co. v. Berberich, 94 Fed. 329, 36 C. C. A. 364; Roraback v. Pennsylvania Co., 58 Conn. 292, 20 Atl. 465, 2 Jones, Com. on Evidence, § 375; 3 Wigmore, § 1976, and note. The question proposed was one which called for an answer based upon the knowledge of the witness as an expert —upon his own knowledge of the efficacy of sounding rock—and it did not call upon him to make or state any conclusions drawn from any comparisons of disputed facts, nor did it usurp any function of the jury. McCarthy v. Duck Co., 165 Mass. 165, 42 N. E. 568. Here the difference between the principle announced in the case of Allen v. Railroad Co., 7 Utah, 239, 26 Pac. 297, and the principle applicable to this case becomes apparent. The question put to the witness in the Allen Case was: "State whether or not, in your opinion, * * * if the car had been thoroughly examined, * * * the defect in the round which gave way would have been discovered?" As the court in that case points out, the words "thoroughly examined" in the relation in which they are placed contain much food for thought, leave much room for speculation, and afford a wide margin for uncertainty, and in the end leave the witness free to imagine any kind of an undisclosed inspection he prefers and say yea or nay. But suppose the evidence in the Allen Case had shown that one method of testing for loose rungs was by tapping them, and that the question put to the witness had asked if tapping would disclose looseness. This would have called for proper opinion evidence. Faulkner v. Min. Co., 23 Utah, 437, 66 Pac. 799; 3 Wigmore, § 1976, and note; Lawson, Expert, Evidence, 75–122; 17 Cyc. 64 et seq. We see no merit in this exception.

Judgment affirmed. Costs to be taxed against appellant.

FRICK, WEBER, GIDEON, and THURMAN, JJ., concur.

(26 Wyo. 212)

MORGAN v. STATE.

(Supreme Court of Wyoming. June 16, 1919.)

1. CRIMINAL LAW ⟸1092(9)—BILL OF EXCEPTIONS—EXTENSION ORDER.

Under Laws 1917, c. 70, § 1, authorizing trial court within 60 days from its decision to extend time for filing bills of exception, an extension order made after the 60-day period is void.

2. CRIMINAL LAW ⟸1090(16) — APPEAL—NEW TRIAL—BILL OF EXCEPTIONS.

Alleged error in overruling a new trial motion can be reviewed only when the motion is included in the bill of exceptions.

Error to District Court, Crook County; E. C. Raymond, Judge.

Proceeding between the State of Wyoming and James R. Morgan. From an adverse judgment, Morgan brings error. Proceedings in error dismissed.

Metz & Sackett, of Sheridan, for plaintiff in error.

D. A. Preston, former Atty. Gen., W. L. Walls, Atty. Gen., and T. Paul Wilcox, Deputy Atty. Gen., for the State.

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PER CURIAM. In this case a motion of the defendant in error to strike the bill of exceptions from the record and to dismiss the proceedings in error has been submitted. The ground of the motion is that the bill of exceptions was not presented to the court or judge for allowance or allowed within the time required by law. The judgment was rendered October 8, 1917, the motion for a new trial was denied November 20, 1917, and the bill of exceptions was presented for allowance and allowed February 27, 1918. On February 15, 1918, an order was filed giving the plaintiff in error (defendant below) until February 28, 1918, to present the bill for allowance. No other order was made granting an extension of time for the presentation of the bill. Section 4595, Comp. Stat. 1910, as amended and re-enacted by section 1, chapter 70, Session Laws 1917, provides as follows:

"The party objecting to the decision must except at the time the decision is made, and shall have sixty days from and after the date of the judgment, decree, or final order in the case within which to reduce the exception to writing and present the same to the court or judge for allowance. If within said sixty days the party excepting shall make it satisfactorily to appear to the court or judge authorized to allow the bill of exceptions that the party will be unavoidably prevented from presenting the bill within said time, the court or judge by written order may extend said time, but not to exceed sixty additional days."

[1, 2] In this case the bill of exceptions was not presented for allowance until 99 days after the motion for a new trial was denied. No order for an extension of time for the presentation of the bill was procured until 87 days after the denial of the motion for a new trial. By the statute the party excepting has 60 days after the date of the final order, which in this case was the date of the denial of the motion for a new trial, within which to present his bill of exceptions. He has that time as a matter of right, and without any order of the court or judge. The court or judge is authorized to grant further time, not exceeding 60 additional days, by written order made within the 60 days allowed by the statute in all cases, upon a satisfactory showing that the party will be unavoidably prevented from presenting the bill within 60 days from the date of the final order. In the case at bar the order giving further time for the presentation of the bill was not made until 87 days after the ruling on the motion for a new trial, and was ineffectual to extend the time. The bill of exceptions, not having been presented for allowance within the time required by the statute, must be stricken from the record; and, as the only error assigned in the petition in error is the overruling of the motion for a new trial, which motion must be included in the bill of exceptions and cannot otherwise be presented to this court for review, and the bill being stricken from the record, nothing remains for this court to consider.

It follows that the proceedings in error must be dismissed; and it is so ordered.

Dismissed.

(105 Kan. 106)

VILLALOBOS v. CUDAHY PACKING CO.
(No. 22204.)

(Supreme Court of Kansas. June 7, 1919.)

(Syllabus by the Court.)

1. MASTER AND SERVANT ⟸419 — WORKMEN'S COMPENSATION ACT—AWARD OF EMPLOYER'S COMPENSATION COMMITTEE — REVIEW.

A workman for a packing company was injured in the course of his employment. The compensation committee organized by the company proceeded to award compensation to the workman, who, although notified, did not attend, and refused to accept the award. Within a few weeks he brought an action to review and cancel the award and have his compensation fixed, alleging, among other things, that the award was grossly inadequate, and that his incapacity to work had increased since the award was made. It is *held* that under Gen. St. 1915, § 5923, as amended by section 16 of chapter 226 of the Laws of 1917, the court had jurisdiction and authority to review the award and to consider all competent evidence touching the inadequacy of compensation and increased disability.

2. MASTER AND SERVANT ⟸419 — WORKMEN'S COMPENSATION LAW — AWARD BY COMMITTEE OF EMPLOYING COMPANY—REVIEW—EVIDENCE.

The court determined that the committee had acted in good faith, but that the award was grossly inadequate, and rendered judgment for a lump sum to cover total and partial incapacity. The evidence examined, and *held* to support the judgment.

3. MASTER AND SERVANT ⟸405(6)—WORKMEN'S COMPENSATION LAW — ALLOWANCE FOR MEDICAL EXPENSES—EVIDENCE.

The sum allowed for doctors' bills and hospital and medicine bills was supported by the evidence.

4. ALLOWANCE OF COMPENSATION TO INJURED EMPLOYÉ—CREDITS.

From the record, including the transcript, nothing appears which requires the allowance made by the court to be credited with any part of the award made by the committee.

Appeal from District Court, Sedgwick County.

Action by Preciliano Villalobos against the Cudahy Packing Company. Judgment for plaintiff, and defendant appeals. Affirmed.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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Houston & Brooks, of Wichita, for appellant.

Dempster O. Potts and W. P. Campbell, both of Wichita, for appellee.

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WEST, J. This was an action to review and cancel an award made under the Workmen's Compensation Act (Gen. St. 1915, §§ 5896–5942), and to recover compensation. The plaintiff prevailed, and the defendant appeals.

The plaintiff was injured by falling so that his side struck the edge of a barrel. Being a Mexican, his interpreter took up the matter of adjustment with the counsel for the employer, but owing to latter's other engagements, no definite meeting was had. In the meantime, the compensation committee, organized by the defendant company, took up the matter, and, having notified the plaintiff, who did not appear, adjourned the hearing to a subsequent date, and made an award, the plaintiff not appearing. Within a few weeks the plaintiff brought this action, asking for a review of the award, that it be canceled and held for naught, and that the court determine the issue and fix the compensation. He denied the authority of the committee, and alleged that he had been at all times ready and willing to settle by agreement; that he had a verbal agreement with defendant's counsel which was not carried out; that the committee acted under the influence of the defendant, and that the compensation was grossly inadequate; and that his incapacity to work had increased since the award was made and filed.

On hearing the entire matter, the court found that the compensation committee acted in good faith, but that the plaintiff had been totally disabled for five months, and that it would require three months more to recover, and for this, and nine months' partial disability, allowed him $772.80, and found that the award of the committee was legal and valid in all respects, but grossly inadequate.

[1, 2] The defendant urges two grounds for reversal: First, that the plaintiff could not ignore the arbitration proceedings and then set aside the award as grossly inadequate; and, second, that there was no evidence to sustain the judgment. As to the latter, several doctors testified and differed. One thought there was an enlarged spleen, another, that there was a broken rib. There was evidence of swelling and great soreness and it seems that the plaintiff was in bed for some time. Some deemed him neurasthenic. It is impossible to read the descriptions of his condition without regarding it as far from one of health. The court expressed the conviction that there was traumatism which had developed the plaintiff into a malingerer, a neurasthenic, and rendered judgment for a lump sum.

The original section (section 5923, Gen. Stat. 1915; Laws 1911, c. 218, § 29) reads:

"At any time within one year after an agreement or award has been so filed, a judge of a district court having jurisdiction may, upon the application of either party, cancel such agreement or award, upon such terms as may be just, if it be shown to his satisfaction that the workman has returned to work and is earning approximately the same or higher wages as or than he did before the accident, or that the agreement or award has been obtained by fraud or undue influence, or that the committee or arbitrator making the award acted without authority or was guilty of serious misconduct, or that the award is grossly inadequate or grossly excessive, or if the employé absents himself so that a reasonable examination of his condition cannot be made, or has departed beyond the boundaries of the United States or Canada."

This was amended by section 16, chapter 226, of the Laws of 1917, so as to read as follows:

"At any time before the final payment has been made under or pursuant to any award or modification thereof agreed upon by the parties, it may be reviewed by the judge of the district court having jurisdiction, upon the application of either party, and in connection with such review the court may appoint a physician or surgeon or two physicians or surgeons to examine the workman and report to the court, and the court shall hear all competent evidence offered, and if the court shall find that the award has been obtained by fraud or undue influence or that the committee or arbitrator making the award acted without authority or was guilty of serious misconduct or that the award is grossly excessive or grossly inadequate, or that the incapacity or disability of the workman has increased or diminished, the court may modify such award, upon such terms as may be just, by increasing or diminishing the compensation, subject to the limitations hereinbefore provided in this act; and, if the court shall find that the workman has returned to work for the same employer in whose employ he was injured or for another employer and is earning the same or higher wages than he did at the time of the accident or injury, or is gaining an income from any trade or employment which is equal to or greater than the wages he was earning at the time of the accident or injury, or shall find that the workman has absented himself and continues to absent himself so that a reasonable examination cannot be made of him by a physician or surgeon selected by the employer, or has departed beyond the boundaries of the United States or Dominion of Canada, the court may cancel the award and end the compensation; provided, that the provisions of this section shall not apply to awards of compensation provided for in the schedule of specific injuries in section 8 of this act."

Section 32 of the Act of 1911 (Gen. Stat. 1915, § 5926) has not been amended, and provides that an agreement or award may be modified at any time by a subsequent agreement.

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"Or, at any time after one year from the date of filing; it may be reviewed, upon the application of either party on the ground that the incapacity of the workman has subsequently increased or diminished. Such application shall be made to the said district court; and, unless the parties consent to arbitration, the court may appoint a medical practitioner to examine the workman and report to it; and upon his report and after hearing the evidence of the parties, the court may modify such agreement or award, as may be just, by ending, increasing or diminishing the compensation, subject to the limitations hereinbefore provided."

These things then may be considered by the court in reviewing an award: Fraud, undue influence, lack of authority, serious misconduct on the part of the committee or arbitrator, gross excess in amount, gross inadequacy, increase of disability, decrease of disability, subsequent receipt of wages equal to or exceeding those received when injured, absence of the workman so that a physical examination cannot be made. It is argued that gross inadequacy is to be judged by the evidence which was before the committee, and must be such as to imply bad faith when made. But certainly this cannot be true in case of increased or diminished disability, for such increase or decrease is what may render the award grossly excessive or grossly inadequate. There is no direction that competent evidence be received with reference to some of the points already suggested and not as to others, and the natural meaning of the language is that competent evidence touching any of such points is to be received. There seems to be very little uniformity in the workman's compensation statutes touching the matter of review and cancellations of awards. From a note, 6 N. C. C. A. 548, it appears that California provides for certiorari or review and the certification of the record in the case to the court on which record alone the cause shall be heard. Laws 1913, c. 176, § 84. Maryland (Laws 1914, c. 800, § 55) provides for a review in the nature of an appeal, and if the court shall determine that the commission has acted within its power granted by the act, this decision shall be confirmed, otherwise reversed or modified. By motion of either party questions of facts involved in such case may be submitted to a jury. Oregon has a similar provision. Laws 1913, c. 112, § 32. West Virginia provides for an appeal to the Supreme Court. Laws 1913, c. 10, § 43.

The committee in this case made no findings of fact, and there seems to be no requirement that any be made. Hence all the court could act on was the award and such evidence as might be produced. Boyd's Workman's Compensation, § 569, quotes from Radcliff v. Pacific Steam Nav. Co., 3 B. W. C. C. 185:

"The doctrine of res judicata does not apply to a decision as to the amount of weekly payment to the injured workman when it is made the subject of an application to review, although it may apply to some of the facts proper to be considered on the occasion of such a review. The issue on such a review is the same issue as if it were an original award made at the date of the review, and the amount to be awarded is a payment which, in case of partial incapacity, must not exceed the difference between the amount of the average weekly earnings of a workman before the accident and the average weekly amount which he is earning, or able to earn, in some suitable employment or business at the date of the review, but is to bear such relation to the amount of such difference as may under the circumstances of the case appear proper."

See, also, note L. R. A. 1916A, 266.

When, as in this case, no findings are made and no evidence returned with the award, how can the court "find that * * * the award is grossly excessive or grossly inadequate, or that the disability of the workman has increased or diminished" save after hearing evidence on which to base such finding or findings? Counsel say:

"If no consideration or weight whatever is attached to an arbitration, if the findings and awards of arbitrators are to be wholly disregarded, neither employer nor employé will avail themselves of the arbitration provisions of the statute. In order to give efficacy and value to the arbitration provisions of the statute, the awards of arbitrators are entitled to the same weight as are awards in common-law arbitrations."

But the only effect to be given is such as indicated by the language used by the Legislature in expressing its intention, and, as we have seen, a modification is contemplated in any of several contingencies, and, under certain circumstances, an actual cancellation. Whether the effect be desirable or not it is equally open to both parties and equally liable on the application of either to be accomplished. And this object seems equally obtainable after a full submission of all the evidence to the committee or after a hearing in the absence of one of the parties duly notified, as in this case. It is true, as counsel forcibly suggests, that by a mere written objection the plaintiff might have ended the committee's authority to hear the matter. But in spite of his failure to object and his failure to attend, he appears to have afterwards proceeded in the way marked out by the statute, and this puts the matter beyond our power to change.

[3] It is complained that the court allowed $150 for doctors' bills and hospital and medicine bills. The only thing in the abstract to support this is the statement that evidence was offered to show that the hospital and medicine bills amounted to $87. But the transcript has been procured, and it shows that one physician testified that charges for his services would probably run between $50

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and $75. This with the other evidence furnished a fair basis for the allowance of $150.

[4] It is also asserted that no credit was given for money which was paid the plaintiff after the injury. The compensation committee found that the defendant had paid him $34.50 since the injury, and allowed additional compensation for ten additional days in March, 1918, of $10.80, being 60 per cent. of his average weekly earnings, for those days. After hearing the evidence touching the award of the committee, the court said, among other things:

"The fact remains that he did not appear before the committee and the fact remains that he did not accept any money. He did not take any money."

The plaintiff testified that on the Saturday after his injury on February 8th, he received pay for work done up to that time; that he stayed at the packing house from the 10th up to the 16th of February, and received $19.95. A representative of the defendant testified that after the injury he tendered the plaintiff the $18 allowed by the committee, and paid him $31.90 for work he had done, but this had nothing to do with "this compensation." From this confusion of evidence nothing appears which requires a modification of the allowance made by the court.

The judgment is affirmed.

All the Justices concurring.

(105 Kan. 114)

CARDWELL v. BENNETT et al. (No. 22214.)

(Supreme Court of Kansas. June 7, 1919.)

(Syllabus by the Court.)

MONEY RECEIVED ⟸6(5)—OVERPAYMENT—RECOVERY.

The facts touching the sale of a carload of wheat and the details concerning the payment therefor, considered; and a judgment in favor of the purchaser for the amount of overpayment affirmed.

Appeal from District Court, Shawnee County.

Action by M. W. Cardwell against A. H. Bennett and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Eugene S. Quinton, of Topeka, for appellants.

Tinkham Veale, of Topeka, for appellee.

DAWSON, J. The plaintiff and defendant are dealers in grain, and their present controversy grows out of a purchase and sale of a carload of wheat.

On July 17, 1917, plaintiff purchased from defendant a carload of No. 2 hard wheat at $2.39 per bushel. Defendant made delivery on July 19, 1917, by handing to plaintiff the bill of lading therefor, and at the same time received plaintiff's check for $3,375 in payment.

When the wheat was officially inspected, it developed that the grain was No. 2 red winter wheat instead of No. 2 hard wheat, and such red winter wheat was worth only $2.09 per bushel; and this lawsuit is for the recovery of the overpayment.

Defendant contends that the contract of purchase and sale was canceled because the plaintiff's check was dishonored at the bank. Plaintiff, however, testified that at the time he gave defendant the check he told the latter he had only about $2,100 in the bank, but that he had already sold the wheat, and would have ample funds in the bank by next morning, and that if defendant would deposit the check in the bank where defendant usually did business and let it arrive at plaintiff's bank in the usual course of business, the check would be duly honored. Plaintiff's testimony is that defendant accepted the check upon that understanding. For some reason not disclosed in the record, defendant did not hold the check until next morning, but dispatched his son to the bank to have the check certified. This being refused by the bank, defendant returned the check and demanded a surrender of the bill of lading. Meantime the wheat had been sold to the Young Grain Company, and by that company had been sold to the Golden Belt Grain Company. In such transactions, title to carloads of wheat passes by delivery of the bill of lading. Meantime, also, the check of the Golden Belt Grain Company for $3,375 had been delivered to the plaintiff, and when defendant returned to the plaintiff's office, and gave back the dishonored check, the plaintiff, after some futile discussion, offered defendant the check of the Golden Belt Grain Company. This he declined, and, as banking hours were past for that day, nothing further was done. Next morning, defendant again appeared at plaintiff's office, and accepted the check of the Golden Belt Grain Company, which plaintiff had tendered him the preceding evening.

Defendant's demurrer to plaintiff's evidence was overruled. Judgment for plaintiff was entered, and defendant appeals.

The foregoing statement leaves practically nothing to discuss. The plaintiff's evidence —which the trial court saw fit to believe— showed that the defendant accepted in payment a check which plaintiff would not have sufficient funds to meet until the next day, and that defendant agreed to deposit that check in his own bank so that, in the usual course of business, it would not arrive at the plaintiff's bank until he should have an opportunity to collect his pay on a resale of the wheat and deposit the same in bank to

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meet the check he had given to defendant. Counsel for defendant inveighs against this sort of practice, "kiting checks," but plaintiff need not be lectured about that practice in this instance, seeing that defendant agreed to it.

A somewhat tenuous argument is made that defendant's later acceptance of the Golden Belt Grain Company's check was on account, and not as payment for the carload of grain. But it takes two people to make a bargain, and plaintiff never assented to that proposition. Moreover, defendant took the check and cashed it. It was for a sum considerably in excess of the market value of the wheat he sold to plaintiff, and the defendant must repay that excess. See Saylor v. Crooker, 97 Kan. 624, 156 Pac. 737, syl. par. 4, Ann. Cas. 1918D, 473; Parrick v. School District, 100 Kan. 569, 573, 164 Pac. 1172.

The judgment is affirmed.

All the Justices concurring.

(105 Kan. 13)

STATE v. KURENT et ux. (No. 21797.)

(Supreme Court of Kansas. June 7, 1919.)

(Syllabus by the Court.)

1. CRIMINAL LAW ⟸585, 622(1)—MOTION FOR SEVERANCE—CONTINUANCE—DISCRETION OF TRIAL COURT.

In misdemeanor cases, where two or more defendants are properly joined in one information, a motion of one defendant to sever and for a continuance is addressed to the sound discretion of the trial court.

2. INTOXICATING LIQUORS ⟸17—BONE DRY LAW—CONSTITUTIONALITY.

The Bone Dry Law is constitutional, following the decision in State v. Macek, 180 Pac. 985, No. 21981, decided May 12, 1919.

3. INDICTMENT AND INFORMATION ⟸137(1)—MOTION TO QUASH—PENDENCY OF ANOTHER CASE.

The pendency of another case in a justice's court involving the same offenses for which a person is being prosecuted in the district court does not require the latter court to sustain a motion to quash, especially when it is admitted in the district court, when the motion to quash is under consideration, that the case in the justice's court had ere then been dismissed.

4. VIOLATION OF LIQUOR LAW—VENUE.

The record examined, and *held* to show conclusively that the offenses charged and proved against defendants were committed in Crawford county.

Appeal from District Court, Crawford County.

Adolph Kurent and wife were convicted of keeping a liquor nuisance and of a violation of the Bone Dry Law, and they appeal. Affirmed.

Thomas W. Clark, of Pittsburg, and E. L. Burton, of Parsons, for appellants.

Richard J. Hopkins, Atty. Gen., George F. Beezley, of Girard, and A. B. Keller and C. A. Burnett, both of Pittsburg, for the State.

DAWSON, J. This is another liquor case. The defendants, husband and wife, were joined and prosecuted on one information, and were convicted on two counts under the Bone Dry Law (Laws 1917, c. 215), and on one count for keeping a liquor nuisance. They appeal.

[1] The defendant Mrs. Kurent filed a motion to sever and for a continuance. There was no evidence offered to prove the facts alleged in the motion, and the motion was submitted to the trial court without argument. In view of this, it must be held that the motion was properly overruled. Even if the motion had been supported by evidence and sincerely argued, the matters of severance and continuance in misdemeanor cases are within the trial court's discretion. Crim. Code, §§ 210, 218 (Gen. St. 1915, §§ 8124, 8139); State v. Davis, 67 Kan. 545, 73 Pac. 87; State v. Tucker, 72 Kan. 481, 491, 84 Pac. 126; State v. Sills & McDonald, 85 Kan. 830, 833, 834, 118 Pac. 867; 16 C. J. 786.

[2] The defendant Adolph Kurent filed a motion to quash the information on various grounds. This motion was overruled. One ground of the motion was a constitutional objection to the Bone Dry Law. That objection was considered, and the statute upheld last month. State v. Macek, 180 Pac. 985, No. 21981. That matter is stare decisis.

[3] Another ground of the motion to quash was based on the allegation that "the said cause is pending for trial in the justice court at Girard." That motion was heard and overruled on December 17, 1917. It was conceded that two days prior thereto, on December 15th, the case pending before the justice in Girard had been dismissed, and the trial court's ruling was correct.

[4] It is suggested that the evidence did not disclose, beyond a reasonable doubt, that the offenses were committed in Crawford county. There was no direct parrotlike utterance of any witness to that effect, but many facts supplied by the witnesses both for the state and for the defendants clearly disclosed that the offenses were committed at a place called Breezy Hill, in Crawford county.

Nothing further can be discerned in the record to justify discussion; no error is disclosed; and the judgment is affirmed.

All the Justices concurring.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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(105 Kan. 4)

WARDERS et ux. v. UNION PAC. R. CO.
(No. 21624.)

(Supreme Court of Kansas. June 7, 1919.)

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(Syllabus by the Court.)

1. DEATH ⟸77—FINANCIAL LOSS TO PARENTS OF CHILD—EVIDENCE.

There was evidence from which the jury could determine the financial loss of the plaintiffs.

2. DEATH ⟸104(5)—TRIAL ⟸255(1)—ACTION FOR DEATH OF CHILD—LIABILITY—INSTRUCTION.

The trial court correctly instructed the jury on the law concerning the defendant's liability to the plaintiffs for negligently causing the death of their daughter. If the defendant desired an additional instruction, or a modification of the one given, it should have submitted such instruction, and requested that it be given to the jury.

3. RAILROADS ⟸348(2)—ACTION FOR DEATH OF CHILD—NEGLIGENCE—EVIDENCE.

There was evidence to sustain the findings of the jury.

(Additional Syllabus by Editorial Staff.)

4. DEATH ⟸77 — ACTION — SUFFICIENCY OF EVIDENCE—MORTALITY TABLES.

While mortality tables are admissible on the issue of life expectancy in an action for death, they are not indispensable.

5. TRIAL ⟸252(1)—ACTION FOR DEATH—INSTRUCTION ON MORTALITY TABLES.

In an action for death, the court may instruct jury as to mortality tables, though not introduced in evidence.

Dawson, J., dissenting.

Appeal from District Court, Marshall County.

Action by H. Greeley Warders and wife against the Union Pacific Railroad Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

R. W. Blair, T. M. Lillard, and A. M. Hambleton, all of Topeka, R. L. Helvering, of Junction City, and C. A. Magaw, of Omaha, Neb., for appellant.

W. W. Redmond, of Marysville, and W. J. Gregg, of Frankfort, for appellees.

MARSHALL, J. The plaintiffs commenced this action to recover damages for the death of their infant child, alleged to have been caused by the negligence of the defendant at a crossing of the defendant's railroad and a public highway. Judgment was rendered in favor of the plaintiffs for $2,400, and the defendant appeals.

The propositions argued are: First, that the evidence to show the plaintiff's financial loss was insufficient; second, that the trial court erred in assuming that the child would have lived until it attained the age of 18 years; and, third, that answers to certain special questions were untrue, and manifested a total disregard of the evidence. These propositions will be considered in the order named.

[1, 4, 5] 1. The defendant contends that—

"The duty of the plaintiffs to sustain the burden of proof by presentation of as definite evidence of the extent of their financial loss as the circumstances of the case would reasonably permit was not discharged."

The defendant quotes from a note found in L. R. A. 1916E, 147, where the author says:

"It is the duty of the plaintiff to present as definite evidence as the circumstances of the case will reasonably permit. In any event there must be proof of facts and circumstances rendering it reasonably probable that actual, substantial, pecuniary damage would result or had resulted to the beneficiaries. There must be more evidence than merely that of the age of the decedent and his death through the wrongful act of the defendant."

The evidence introduced on this question showed that the plaintiffs were the parents of the child; that they lived and worked on a farm, that the child was 18 months old, and was living with its parents; that it was strong and in good health; and that it was killed by being run over by the defendant's motor car.

The jury, from seeing the father, who testified on the trial, could determine his age. From the fact that the mother had given birth to the child 18 months previously, the jury could determine that the mother must have been less than 50 years old. From the evidence, and from the facts proved thereby, the jury could determine the life expectancy of the father, the mother, and the child. Mortality tables might have been introduced, but such introduction was not indispensable. A., T. & S. F. Rd. Co. v. Hughes, 55 Kan. 491, 40 Pac. 919; 17 C. J. 1366. The court could have instructed the jury concerning those tables, although they were not introduced in evidence. Railway Co. v. Ryan, 62 Kan. 682, 64 Pac. 603. No such instruction appears to have been requested, and the defendant cannot complain of the failure of the court to give one. State v. Rook, 42 Kan. 419, 22 Pac. 626; Judy v. Buck, 72 Kan. 106, 82 Pac. 1104; Hamilton v. Railway Co., 95 Kan. 353, 148 Pac. 648; Murphy v. Gas & Oil Co., 96 Kan. 321, 326, 150 Pac. 581; Gailey v. Manufacturing Co., 98 Kan. 53, 56, 157 Pac. 431. It is not contended that all the evidence outlined was the best evidence that might have been introduced; but it was such evidence as justified the jury in

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finding in accordance therewith, even if there had been direct evidence introduced contradictory thereto.

[2] 2. The defendant complains of the following instruction:

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"If, after a full and fair consideration of all the evidence in this case, under the instructions herein given, you, the jury, shall find and believe from a preponderance of the evidence herein that the death of the minor child of plaintiffs was due to the fault and negligence of the defendant as charged, and without any fault or negligence on the part of the plaintiffs, or either of them, and that plaintiffs are entitled to recover in this action, then it would become your duty to ascertain what amount of damages, if any, plaintiffs have suffered, and upon this branch of the case you are instructed that they would be entitled to recover such sum, not exceeding $2,900, as you, after a full and fair consideration of all the evidence in the case, in your judgment honestly exercised, you shall deem to be a reasonable and fair compensation for the value of the service of the minor child during its minority, less the sum that you shall find it would have cost them to support said child until it arrived at that age, to wit, 18 years of age, and also such reasonable sum as you may find from the evidence in this case they are entitled to as pecuniary benefits they might reasonably have expected to receive from the deceased minor child after she should have attained her majority and during the lifetime of the plaintiffs."

The defendant argues that in this instruction—

"the trial court assumed as a settled fact that the deceased infant would have lived to attain its majority, and did not instruct the jury to take into consideration the probability or improbability that it would have lived to be eighteen years of age."

So far as it went, the instruction stated the law correctly. If the defendant desired an additional instruction, it should have submitted one, and requested that it be given. Because of its failure so to do, the defendant cannot complain because the instruction was not given.

[3] 3. The defendant insists that—

"The answers of the jury to special questions Nos. 3 and 4 manifest a total disregard of the evidence, and are untrue."

The questions referred to, and the answers thereto, are as follows:

"3. At the time the child was struck, was it down in the trough of a cattle guard?
"Ans. No.
"4. Does the evidence show that, as soon as the motorman discovered that the object on the track was a child, he did everything that could be done to stop his motor car or train in time to avoid striking it?
"Ans. No."

It is necessary to consider the evidence upon which the answers to these questions were based. That evidence may be summarized as follows: No one saw the accident, except the motorman operating the car and an expert mechanic who was with the motorman. Each testified, in substance, that they were running about 30 miles an hour; that, when about 200 feet from the crossing where the child was killed, they saw an object on the track on the cattle guard on the opposite side of the public road, that the object looked like a brown paper sack or a weed; that when they got a little nearer they saw that the object was a child; that the motorman then immediately applied the emergency brake, threw off the power, and sanded the track, but that they struck the child and ran some 200 or 300 feet beyond the crossing before the car stopped; that the track was free from high weeds, and the view of the road from the car was unobstructed; that they could see the plaintiff's house north about 500 feet away by the side of the road; that they did all they could to stop the car immediately on realizing that it was a child that was on the track; and that the child was sitting down between the rails in the trough between the ties at the cattle guard. That evidence was not contradicted, except by circumstances, a summary of which follows: The family of the plaintiffs consisted of themselves and five children, Alta, 18 years old, Garwood, 10 years old, Cecil, 4 years old, Virgil, 3 years old, and Evelyn, the child that was killed, 18 months old. The child was killed in the morning, about 8:45. The plaintiffs, on that morning, left home and went to perform some labor on another farm some distance across the railroad track. The child wanted to go with them. The small children were left in the care of the daughter Alta, who, on the morning of the accident, after her parents left, was performing household duties and watching the children. The child was killed about 15 minutes after the parents left. After they had gone, and before the child was killed, Alta saw the four small children playing in the yard on the north side of the house. Two or three minutes after she had last seen the baby, Garwood came and asked Alta if she had seen the baby. Alta went outside the house, and saw that the motor car had stopped at a bridge near the crossing. She hunted for the baby, but did not find it, and then saw a crowd gathered at the railroad track. The public road ran north and south, and the railroad from the southeast to the northwest. The car was going from Manhattan to Marysville. A clear view of the public road could be had for a long distance from the southeast. There was a spot of blood about the size of a dollar on the metal part of the cattle guard, and about three or four tie lengths north of the cattle guard blood and flesh were found on the rail. There the body was found, with one leg severed. The trough of the cattle guard

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was 4½ inches deep, the rail 5 or 6 inches high, and the pilot on the car from 3 to 5 inches above the rail.

These circumstances contradicted the evidence of the motorman and his companion. The child had been gone from the house a very short time when the accident occurred; probably the time was too short for her to reach the railroad track, turn aside on the track, and fall into or seat herself in the trough of the cattle guard. When the child was struck, the motion of the car sent the body and the blood in the direction in which the car was going. The body was either thrown or dragged by the car. If the child was standing on the track when struck, the motion of the car sent the body and the blood in the direction in which the car was going, and the body was thrown or dragged to the place where the leg was cut off. If the child had been sitting in the trough of the cattle guard, probably the body would have been left at or very near that place, and would not have been thrown or dragged very far forward.

The evidence supported the finding of the jury that the child was not on the cattle guard when it was struck. If the child was not on the cattle guard, it must have been south of that guard, and it is reasonable to conclude that the child was approaching the railroad track during the time that the car was approaching the crossing; that the child would have been seen, if the motorman and his companion had been carefully watching the railroad track and the highway; and that they would have seen the child in sufficient time to enable them to stop the car and prevent the accident.

The judgment is affirmed.

JOHNSTON, C. J., and BURCH, MASON, PORTER, and WEST, JJ., concur.

DAWSON, J. (dissenting). For parents or custodians of children to permit an 18 months old baby to stray onto a railway track is contributory negligence per se, and I think a recovery would be barred, even if the railway company were guilty of negligence; but here I discern no proof of negligence on the part of the defendant.

I therefore dissent.

(105 Kan. 15)

FARMERS' & MERCHANTS' STATE BANK v. LEMLEY et al. (No. 21816.)

(Supreme Court of Kansas. June 7, 1919.)

(Syllabus by Editorial Staff.)

1. APPEAL AND ERROR ⟸684(1)—ABSTRACT—CONSIDERATION.

Where it was contended that it was the duty of the Supreme Court to determine the question of a bank's liability as garnishee, apparently predicated upon the theory that there was an abstract which sets out the evidence, but where no transcript was procured, that part of the abstract could not be considered.

2. PARTNERSHIP ⟸208(2) — GARNISHMENT — PARTNERSHIP MONEY — SUIT AGAINST A PARTNER.

The money of a partnership cannot be garnished in a suit against one of the partners because it is not due to him, but to the firm.

Appeal from District Court, Labette County.

On motion for rehearing. Denied.

For former opinion, see 180 Pac. 238.

PORTER, J. A motion for rehearing complains of the failure to decide whether the trial court erred in overruling plaintiff's exceptions to the garnishee's answer and the failure to determine the question of the bank's liability as garnishee. It is charged in the motion that the court in the opinion made a misstatement of fact as follows:

"Among the specifications of error is one that the court erred in overruling plaintiff's exceptions to the garnishee's answer, but this goes out of the case, because the plaintiff now admits that the exceptions were not overruled or disposed of until the final judgment, and the evidence upon which the ruling was made has not been brought up."

In reference to this statement it is said in the motion:

"It is not a true statement, and therefore I ask this court to correct it, and to pass upon this question. * * * The final judgment in this case was rendered on the 13th day of February, 1918. The court overruled the exceptions to the answer of the garnishee on the 17th day of October, 1917, as will be shown by the attached certificate of the clerk of the district court of Labette county, Kan. The abstract of appellant stated that the exceptions were overruled, and also stated what the evidence was on the hearing of such exceptions."

If the opinion contains any misstatement of fact, counsel for appellant is alone responsible. It was stated in the abstract and repeated at the oral argument that after hearing the evidence the trial court overruled the exceptions and rendered a judgment against plaintiff for costs and attorney's fees in favor of the bank as garnishee; "that thereupon" plaintiff filed its amended petition making Earl Lemley and the bank additional parties defendant, and asking that the bank be enjoined and restrained from paying any of the money to the partnership until the further order of the court. There was a statement in the abstract of what the evidence showed taken on the hearing of the exceptions, but the appellees challenged the abstract with a motion to strike it from the files because no transcript of the evidence taken

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at the hearing had been made. This motion would have been sustained except for the fact that four or five days after the oral argument counsel for plaintiff sent a letter to the clerk calling our attention to the fact that the statement in his abstract to the effect that the court, after hearing the evidence, overruled the exceptions to the garnishee's answer and rendered a judgment against plaintiff in favor of the garnishee, was an error, "as shown by the records in the office of the clerk of the district court," and stating:

"I inclose you certificate from the clerk showing that no judgment was rendered against plaintiff in that proceeding. * * * No judgment was ever rendered in this case, except the one on the note sued on by plaintiff. * * * The court at no time discharged the garnishee, or rendered any judgment in favor of the garnishee, and I wished the court to know that there was an error in my abstract, which was prepared without looking at the record in the case."

The certificate of the clerk of the district court which accompanied the letter to the clerk of this court recites that on the 24th of July, 1917, when the case was commenced, the garnishee summons issued and was served; that on August 20, 1917, plaintiff filed an amended petition making the bank and Earl Lemley additional parties defendant; that on October 18, 1917, each filed a demurrer to the amended petition, which demurrers were sustained. The certificate contains the following statement of the clerk:

"My records do not show the rendition in this case of any judgment except the one rendered on the 13th day of February, 1918, as above stated."

We naturally assumed that plaintiff, not having procured a transcript of the evidence, realized that his abstract, so far as it related to the evidence, could not stand, and did not intend to rely on his assignment of error in respect to the rulings on the exceptions to the garnishee's answer, and that he desired to rest his case solely on the proposition that the court erred in sustaining the demurrers to the amended petition. For this reason, after we had decided that the amended petition, being in the nature of a creditors' bill, could not be maintained, we supposed the decision of that question disposed of the case. If counsel's statement was true in his letter to the clerk to the effect:

"No judgment was ever rendered in this case, except the one on the note. * * * The court at no time discharged the garnishee, or rendered any judgment in favor of the garnishee"

—then it would seem that the plaintiff had nothing to appeal from with respect to the exceptions to the answer to the garnishee. This would be true even if the evidence on the hearing of the exceptions had been preserved.

We are now presented with a later certificate by the same clerk in which she certifies that her records show that the exceptions to the answer of the garnishee were passed upon and overruled October 18, 1917, which was several months before the final judgment.

It is apparent that counsel attempted to make up a record from his memory without having preserved the evidence on the hearing of the exceptions, and, as he admits, without consulting the records. As we now understand his contention, it is that the garnishee's answer was not sufficient, although the abstract states that it denied the bank had in its possession or under its control any property of the defendants or either of them, denied it was indebted to the defendants or either of them, and denied that it had any money or property in which the defendants or either of them had any interest. The abstract states that this affidavit was in the form prescribed by section 7125, Gen. Stat. 1915.

[1, 2] The further contention that it was the duty of this court to determine the question of the bank's liability as garnishee is apparently predicated upon the theory that there is an abstract which sets out the evidence. Since no transcript was procured, that part of the abstract cannot be considered. Aside from the evidence, however, it is sufficiently shown and seems not to be disputed that, while the action was to foreclose a mortgage against J. A. Lemley, the fund attempted to be held by the garnishment proceedings was a deposit in the bank to the credit of the firm of Lemley & Son, a partnership composed of J. A. and Earl Lemley, and that, reduced to its last analysis, the plaintiff's contention is that the court should have held the fund liable for debts of one of the partners. But the money of a partnership cannot be garnisheed in a suit against one of the partners for the sufficient reason that the money is not due to the defendant in the action, but to the firm. Trickett v. Moore, 34 Kan. 755, 10 Pac. 147.

It is said in the motion:

"It would be a very great injustice to appellant to have the record in this case show the state of facts set out in the opinion, when such statements are not true. The question of the liability of the garnishee in this case is one of the questions in this case."

Without conceding that it is or can become one of the questions, it is quite apparent that it is not a very serious one.

Rehearing denied.

All the Justices concurring.

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(105 Kan. 104)

BANKS et al. v. WATKINS. (No. 22202.)

(Supreme Court of Kansas. June 7, 1919.)

(Syllabus by the Court.)

1. WILLS ⟸614(6)—CONSTRUCTION—LIFE ESTATE.

The provisions of a will are *held* to express clearly the intention of the testatrix to devise to her son a life estate in certain lands, instead of an absolute title in fee simple.

(Additional Syllabus by Editorial Staff.)

2. WILLS ⟸439—CONSTRUCTION—INTENTION OF TESTATOR.

There is no occasion for employing rules for judicial construction of a will in search of the testator's intention, where it is clearly and unequivocally expressed in the will.

Appeal from District Court, Chase County.

Suit to quiet title by S. C. Banks and others against Frank P. Watkins. Judgment for plaintiffs, and defendant appeals. Reversed and remanded, with directions.

Leydig, Geddes & Grant, of El Dorado, for appellant.

F. A. Meckel, of Cottonwood Falls, for appellees.

PORTER, J. [1] In a suit to quiet the title to real estate the sole question for determination is the construction of the last will and testament of Mary K. Lansbury, a widow, who died in 1885. Her will was executed in 1873, when she was 65 years of age. The controversy arises over the following clause of the will:

"I bequeath to my youngest son, Dennis M. Lansbery, all my right and title to the N. W. ¼ of the S. E. ¼ and the N. E. ¼ of the S. W. ¼ of section 17, township 22 S. of range 8 east, being the farm on which I now reside, on the following condition: That this land shall not be sold by my son, Dennis M. Lansbery, during his lifetime, and after his death this land to go to his heirs."

If it was the intention of the testatrix that Dennis M. Lansbury should take a fee simple estate at her death, then the judgment must be affirmed; if he took merely a life estate, then the judgment of the trial court must be reversed. The appellees in their brief print the first part of the clause as a separate sentence, with a period after the word "reside," and then argue that the subsequent part of the paragraph is void as an attempted restraint upon alienation after the testatrix had made a devise in fee simple, and authorities are cited upon that contention. In our view of the matter there is no substantial room for doubt concerning the intention, although the language used is not that of a person skilled in drawing wills. In fact, it requires a most technical application of ancient and discarded rules for the construction of wills, in order to find a basis for any dispute concerning the intention. The entire clause, as well as all other parts of the instrument, which throw any light upon the question of intention, must be considered. If the clause read "on the following condition," etc., "I bequeath to my son Dennis," no one would question the intent to devise to Dennis a life estate. But it was not necessary for the condition to be stated first, since the testatrix bequeaths the property to Dennis "on the following condition": That after his death the land should go to his heirs, and he was not to dispose of it in his lifetime.

The will presents none of the features of testamentary instruments cited in the textbooks, where the testator, having in unqualified terms devised in one part of the will an estate in fee simple, attempts in a subsequent clause to restrain the devisee from alienating the estate already devised; and even where the literal language of the will would present that situation, the rules of construction approved by modern authority do not consider the question as necessarily foreclosed, but if the intention gathered from all portions of the instrument appears to have been to devise a lesser estate, the intent will be carried into effect.

In the recent case of Morse v. Henlon, 97 Kan. 399, 155 Pac. 800, the same contention was made respecting a will in which the scrivener divided the words used to express the making of a gift to a beneficiary into three paragraphs. In the first two paragraphs he gave and devised to his wife certain real estate. In the third item or paragraph the language was:

"I give and devise to Melvina Wade, my beloved wife, all the above-named property for her to have and to hold the use of the same to her for and during her natural life."

And a subsequent clause disposed of the remainder. There was far more room in that case for the contention urged by the appellees in the present case, but it was held that the testator's intention to devise to the wife a life estate only was clearly and unequivocally expressed.

As an additional reason for construing the will as devising only a life estate to the son, the appellant suggests that this was the construction which Dennis placed upon the will himself, and that the evidence shows that after his mother's death he went into possession, but subsequently executed a deed conveying his interest to his daughter, and describing his interest as the life estate.

[2] We think the language of the will is so plain as not to require even this addi-

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tional circumstance to show the intention of the testatrix. As said in the syllabus in Morse v. Henlon, supra:

"There is no occasion for employing rules for judicial construction of a will in search of the testator's intention, where such intention is expressed clearly and unequivocally in the instrument." 97 Kan. 399, 155 Pac. 800, Syl. 1.

The appellees invoke section 59 of the Statute of Wills (Gen. Stat. 1915, § 11810), which reads:

"Every devise of real property in any will shall be construed to convey all the estate of the testator therein which he could lawfully devise, unless it shall clearly appear by the will that the testator intended to convey a less estate."

It is argued that, inasmuch as all the estate which the testatrix could devise was a fee simple, it must have been her intention to give the fee simple to her son, Dennis. She fully complied with this provision of the statute, but she did not see fit to give all the estate which she could lawfully devise to Dennis. On the contrary, she devised to him a life estate, with the remainder to his children.

The judgment will be reversed, and the cause remanded, with directions to proceed accordingly.

All the Justices concurring.

(105 Kan. 9)

STATE v. PATTERSON et al. (No. 21782.)

(Supreme Court of Kansas. June 7, 1919.)

(Syllabus by the Court.)

1. ABORTION ⟸5—INFORMATION—SUFFICIENCY—VITALIZED.

An information, charging that the defendants operated upon a woman "pregnant with vitalized embryo," with the intent to produce an abortion, does not charge an offense under a statute penalizing such act where the woman is "pregnant with a quick child."

2. CRIMINAL LAW ⟸822(4) — CHARGE — WEIGHT OF EVIDENCE.

A statement in the charge to the jury that each of them should be led, from the testimony, to a clear conviction of the defendant's guilt, is *held* from the context to have meant that each juryman should be led to a clear belief that the defendant was guilty before a verdict of conviction could be returned.

3. CRIMINAL LAW ⟸811(2)—CHARGE—SINGLING OUT TESTIMONY.

An instruction that the weight of expert testimony concerning the condition of an anatomical exhibit depended on whether or not a substitution or alteration had been effected is *held* not to warrant a reversal on the ground that it singled out and made unduly emphatic that feature of the matter.

4. CRIMINAL LAW ⟸1169(1)—ADMISSION OF EVIDENCE—INCONSISTENCY WITH DEFENSE—PREJUDICE.

In a prosecution for producing an abortion, it is *held* that the admission of evidence that the subject of the operation, who died as a result thereof, had stated that she was pregnant and was going to see the defendants on that account, was nonprejudicial because not inconsistent with the defense made, whether or not it was technically competent.

(Additional Syllabus by Editorial Staff.)

5. WORDS AND PHRASES—"VITALIZE."

"Vitalize" means endowed with life. Any human embryo which is not dead is "vitalized," and it is no less endowed with life before reaching the stage of development known as quickening than after.

6. WORDS AND PHRASES — "QUICK WITH CHILD."

"Quick with child" means when the motion of the fetus becomes perceptible.

[Ed. Note.—For other definitions, see Words and Phrases, Quick With Child.]

Appeal from District Court, Pratt County.

B. J. Patterson and J. A. Gregoire were convicted of manslaughter in the fourth and first degrees, respectively, and they appeal. Affirmed.

D. E. McCrory, of Pratt, S. B. Amidon, of Wichita, Howard J. Hodgson, of Eureka, and Glenn Porter and S. A. Buckland, both of Wichita, for appellants.

Richard J. Hopkins, Atty. Gen., S. M. Brewster and John Hunt, both of Topeka, and E. R. Barnes and Barrett & Turner, all of Pratt, for the State.

MASON, J. B. J. Patterson and J. A. Gregoire were convicted of manslaughter in the fourth and first degrees, respectively and appeal. The defendants are physicians, and the charge against them is that they operated upon Floris Lewis to produce an abortion, thereby causing her death. She died following an operation at their hands, but they assert that its purpose was to remedy conditions brought about by a venereal disease from which she was suffering, and that she was not pregnant.

[1] 1. Complaint is made of the failure of the court to give an instruction under the section of the statute making it manslaughter in the second degree to administer a drug to a woman "pregnant with a quick child" with intent to destroy it, or to employ an instrument with that purpose, where the death of the child or mother resulted therefrom. Gen. Stat. 1915, § 3376. Such an instruction would not have been proper under the information, which did not charge that Floris Lewis was "pregnant with a quick child." It alleged that she was "preg-

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nant with vitalized embryo," and the contention is made that this expression is equivalent to that of the statute.

[5, 6] "Vitalized," however, merely means endowed with life. Any human embryo which is not dead is "vitalized." It is no less endowed with life before reaching the stage of development known as quickening than after. A woman is said to be pregnant with a quick child, or quick with child, when the motion of the fetus becomes perceptible, usually about the middle of the period of pregnancy. 1 C. J. 312, note 39 (a); 1 R. C. L. 76. Not only was this condition not pleaded, it was not indicated by the evidence.

[2] 2. In the course of the charge the court used this expression:

"Each individual (juryman) should be led, from the testimony, to a clear conviction of the guilt of the defendant."

This language is complained of as tending to lead the jury to believe that the court thought the evidence to be so clear that a conviction should be had. It occurred, however, in a paragraph discussing the degree of certainty necessary to warrant a verdict of guilty, and in the same sentence with a specific statement that there could be no conviction so long as any juror entertained a reasonable doubt of the defendants' guilt. The context showed plainly that what was meant was that, in order to find the defendant guilty, each juryman should be led to a clear conviction of his guilt.

[3] 3. At a post mortem examination of the body of Floris Lewis conducted by the defendants the uterus was removed and placed in a jar of alcohol. At the trial they produced what they represented to be the same jar and contents, together with evidence that its appearance showed that the uterus was not that of a woman who had been pregnant. The court told the jury in substance that in order for the testimony of experts concerning the appearance of the uterus to have weight with them they must first find from the evidence that no substitution had been made, that the organ produced was the one taken from the body, and that it had not been tampered with, but had been exhibited to the witnesses in the same condition as when first removed. This instruction is complained of, not as involving any incorrect statement of a principle of law, but as objectionable because it singled out for comment one particular feature of the testimony, and suggested to the jury that the court itself suspected substitution or alteration. Granting that the specific reference to the question of the genuineness of the exhibit was open to the objection stated, it would not in itself justify a reversal. In State v. Tawney, 81 Kan. 162, 105 Pac. 218, 135 Am. St. Rep. 355, which is cited in behalf of the defendants in this connection, the conviction was set aside on account of the erroneous exclusion of evidence, the materiality of which was enhanced by the instruction there considered. Here in the cross-examination of one of the defendants the possibility that they had substituted another uterus for that of Floris Lewis was dwelt upon at some length. If they had done so, the testimony of expert witnesses to whom the spurious exhibit was shown was so obviously immaterial that there was perhaps little occasion to direct the jury's special attention to the matter; but, on the other hand, the very obviousness of the point makes it unlikely that the verdict was influenced by reference to it.

[4] 4. Several witnesses, including the mother of Floris Lewis, were permitted to testify that Floris had told them that she was pregnant, and was going to go to one of the defendants for an operation on that account. This evidence is objected to as incompetent, as being pure hearsay. It has often been said by courts and text-writers that such testimony is admissible. 1 C. J. 325–326; 1 R. C. L. 84; note, 35 L. R. A. (N. S.) 1084; People v. Fritch, 170 Mich. 258, 136 N. W. 493. Some of the decisions on which these statements are founded were influenced by special circumstances not here present, and it may be that, even if the usual rule favors the admission of such evidence, it is not of universal application. Because of the particular facts of the present case we think no prejudicial error was committed in this regard, whatever view is taken of the general principle.

Floris was married October 12, 1916. Her husband deserted her November 10th. On December 6, 1916, she left her home at Forgan, Okl., with her mother, and went to Pratt, Kan., where she put herself in the hands of the defendants. An operation of some character was performed on her by them December 8th. She died December 20th. Her mother testified that her menstruation had ceased in November; that she had morning sickness; that her face was full and her breasts enlarging; that she had the usual symptoms of pregnancy. The further statement that her daughter had said she was pregnant added nothing material to this. Matters had not progressed far enough so that the daughter could be sure of her condition—she could merely give her opinion. There was a direct issue of veracity between the state's witnesses and the defendants' on the subject. If the mother's story of the proceedings at the hospital was true, her daughter was pregnant, and the defendants discussed the matter with her on that basis.

If incompetent evidence was admitted to the effect that Floris had said that she was pregnant and was going to the defendants

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on that account, it was not prejudicial, because that fact was as consistent with the story told by the defendants as with the theory of the prosecution. Their own version of the affair was that while Floris was really suffering from gonorrhea, and knew it, she had led her mother and neighbors to believe that she was pregnant, and that she was going to Pratt to see the defendants on that account, her purpose being to conceal the fact that she had a venereal disease. The defendant's testimony was to the effect that the mother supposed her daughter to be pregnant until the day of the operation; that her daughter had said that she did not want her mother to know that she had gonorrhea; that "the people at Forgan thought she was in a family way, and her mother knew no different." On cross-examination of Floris' father the defendants brought out as original evidence the fact that she had told him she was pregnant. In view of these considerations we regard it as clear that, even assuming the incompetence of evidence that Floris had said she was pregnant, no substantial prejudice could have resulted to the defendants from its admission.

The judgment is affirmed.

All the Justices concurring.

(105 Kan. 153)

PATRICK v. BOARD OF COM'RS OF HASKELL COUNTY et al. (No. 22428.)

(Supreme Court of Kansas. June 19, 1919.)

(Syllabus by the Court.)

1. COUNTIES ⟸196(3)—REMOVAL OF COUNTY SEAT—ELECTION—INJUNCTION.

A taxpayer may maintain an action, under section 265 of the Code of Civil Procedure (Gen. St. 1915, § 7163), as amended by Laws 1917, c. 247, to enjoin the removal of a county seat, where that removal is attempted to be made in obedience to an election held under an unconstitutional law, and would result in the levy of a tax to provide county buildings and to pay the expense of such removal.

2. COUNTIES ⟸196(7)—REMOVAL OF COUNTY SEAT — INJUNCTION — ALLEGATIONS AND PROOF.

To maintain an action under section 265 of the Code of Civil Procedure (Gen. St. 1915, § 7163), as amended by Laws 1917, c. 247), it is not necessary for the plaintiff to allege or prove that he has no other adequate remedy, or that his injury would be irreparable; it is sufficient to allege and prove the facts which the statute sets forth.

3. COUNTIES ⟸196(3)—REMOVAL OF COUNTY SEAT—ELECTION—TEMPORARY INJUNCTION.

Where a county seat election has been called, and the circumstances are such that, after the result of the election has been ascertained, the county seat may be moved before any injunction can be served, an action to prevent the removal of the county seat may be commenced, and a temporary injunction may be served, before the election is held.

4. STATUTES ⟸76(1) — SPECIAL LAW — CONSTITUTIONALITY.

That part of chapter 161 of the Laws of 1919 which reads, "Provided, in counties having a population of less than two thousand and having a county seat not located on any railroad, and where at an election for that purpose the vote heretofore cast in favor of the removal of the county seat was more than a majority of the votes cast, then in that event another election may be called at any time within two years after the date of such former election, and it shall only require a vote of a majority of the legal electors voting at such election to relocate the county seat and remove it from such place, and the board of county commissioners shall upon the petition of three-fifths of the legal electors of such county order an election for the relocation of such county seat," is unconstitutional, for the reason that it violates section 17 of article 2 of the Constitution; it is a special law where a general law can be made applicable.

5. CONSTITUTIONAL LAW ⟸45 — CONSTITUTIONALITY—SPECIAL LAW.

It is the duty of the courts to uphold a statute rather than to declare it unconstitutional; but, if it is repugnant to the Constitution, it is the duty of the courts to declare the statute invalid, and, if a special act has been passed where a general law can be made applicable, the courts must so declare.

6. CONSTITUTIONAL LAW ⟸48—REMOVAL OF COUNTY SEAT—SPECIAL ACT—CONSTRUCTION.

Where the language of an act providing for an election for the removal of a county seat shows that the Legislature intended that act should apply to but one county, and the act is thereby rendered unconstitutional, that language will not be changed by construction so as to make it apply to other counties, and thus remove its invalidity.

Appeal from District Court, Haskell County.

Action for injunction by James S. Patrick against the Board of County Commissioners of Haskell County and others. Judgment for defendants, and plaintiff appeals. Reversed, and the injunction granted.

Clad Hamilton and Clay Hamilton, both of Topeka, for appellant.

Wm. Easton Hutchison, of Garden City, C. G. Dennis, of Sublette, and C. R. Hope, of Garden City, for appellees.

MARSHALL, J. On May 2, 1919, the plaintiff commenced this action to enjoin the defendants from moving the county seat of Haskell county after an election to be held on May 15, 1919. The election was called

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under chapter 161 of the Laws of 1919. Judgment was rendered in favor of the defendants, and the plaintiff appeals.

[1] 1. The plaintiff's right to maintain the action is not directly challenged, but the defendants, to uphold the judgment, present questions which indirectly involve that right. The statute under which the action was brought reads in part as follows:

"An injunction may be granted to enjoin the illegal levy of any tax, charge or assessment, or the collection of any illegal tax, charge or assessment, or any proceeding to enforce the same, or to enjoin any public officer, board or body from entering into any contract or doing any act not authorized by law that may result in the creation of any public burden or the levy of any illegal tax, charge or assessment; and any number of persons whose property is or may be affected by a tax or assessment so levied, or whose burdens as taxpayers may be increased by the threatened unauthorized contract or act, may unite in the petition filed to obtain such injunction." Civ. Code, § 265 (Gen. St. 1915, § 7163), amended by Laws 1917, c. 247.

This court has declared a number of times that any person whose property may be affected may enjoin any board or body from doing any act not authorized by law, which act may result in the levy of any illegal tax on that property. Bunker v. Hutchinson, 74 Kan. 651, 87 Pac. 884; Gas Co. v. Railway Co., 74 Kan. 661, 87 Pac. 883; Meistrell v. Ellis County, 76 Kan. 319, 323, 91 Pac. 65; Hartzler v. City of Goodland, 97 Kan. 129, 154 Pac. 265; Stevenson v. Shawnee County, 98 Kan. 671, 159 Pac. 5; Abraham v. Weister, 103 Kan. 162, 172 Pac. 998.

The removal of a county seat would result in the levy of a tax to provide county buildings and to pay the expense of that removal; therefore the plaintiff can maintain this action.

[2] 2. The defendants contend "that injunction cannot be maintained if there is any other adequate remedy at law," and that "the invariable rule is that the injury must be irreparable before injunction will lie." These contentions ignore section 265 of the Code of Civil Procedure. That section gives a remedy to a taxpayer against any action, by any board or officer, that will result in the creation of any illegal tax. This court, in the cases cited supra, has said that a taxpayer may maintain such an action. A statement of the allegations contained in the petition in several of these cases is set out in the opinions therein. The allegation that the plaintiff has no other adequate remedy at law, or that he will suffer irreparable injury if an injunction be not granted, is not found in either of these opinions.

Where a statute gives a right of action, it is sufficient to allege in a petition, in an action under the statute, those facts which the statute itself sets forth as the circumstances under which an action may be maintained. When those facts are alleged, a cause of action is stated. Roselle v. Klein, 42 App. Div. 316, 59 N. Y. Supp. 94; Ayers et al. v. Lawrence et al., 59 N. Y. 192; County of Rock Island v. Union Printing Co., 71 Ill. App. 636; 31 Cyc. 115; 10 Encyc. Pleading and Practice, 943.

In Abrahams v. School District, 97 Kan. 325, 327, 155 Pac. 16, this court said:

"It is said that the plaintiffs had a remedy by way of contest of the election. If so, the remedy was not exclusive of that afforded the plaintiffs as taxpayers by section 265 of the Civil Code."

If the defendant's argument is correct, the statute does not mean what it says, for the reason that, when a person alleges facts which bring him within the statute, he has not stated a cause of action; he must go farther and allege, and consequently prove, that he has no adequate remedy at law, and that he will suffer irreparable injury. To give effect to the statute, litigants must be permitted to prosecute actions under it, even if they have another adequate remedy, and even if they do not sustain irreparable injury.

The defendants cite, among other cases, Laithe v. McDonald, 12 Kan. 340, where this court said:

"It is a general rule of equity, with some exceptions, however, that courts of equity will not grant relief where the party has a plain and adequate remedy at law."

An action under section 265 of the Code of Civil Procedure is one under the exceptions mentioned in Laithe v. McDonald.

In criminal pleading, where the statute creates an offense and sets out the facts which constitute it, an information that follows the language of the statute is good. State v. Buis, 83 Kan. 273, 111 Pac. 189. The same rule of pleading should, and does, apply in civil actions.

[3] 3. The present action was tried, the judgment was rendered, the appeal was taken, and a stay order was granted before the election was held. The defendants contend that the contingency on which an injunction might be granted did not occur until after the election. Stated in other words, the defendants contend that the action was prematurely brought. The petition undertook to allege facts justifying the bringing of the action before the election. The election was called for Thursday, May 15th; the board of canvassers would meet on Saturday, May 17th; and the result would probably be declared on that day. If the defendants had been as deeply interested, and would have acted as promptly as interested parties have acted in the past in county seat contests, the county seat would have been moved before any kind of an injunction could have been served, and the liability of the county

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for county buildings and for the expense of moving might have become fixed. A more difficult question would then have been presented for solution, and the plaintiff's rights might have been defeated. Under the circumstances, this court will not say that the contingency giving the plaintiff the right to an injunction had not occurred, and will not say that the action was prematurely brought. These are not questions of fact which were determined by the trial court in favor of the defendants, but are questions of law which this court will review.

[4] 4. The plaintiff attacks the validity of the law under which the election was called. Laws 1919, c. 161. The title of the act reads:

"An act to amend section 2897 of the General statutes of 1915 and to repeal said original section."

The section amended provided for county seat elections, and prescribed restrictions thereon. The amendment to the section is contained in a proviso which reads:

"Provided, in counties having a population of less than two thousand and having a county seat not located on any railroad, and where at an election for that purpose the vote heretofore cast in favor of the removal of the county seat was more than a majority of the votes cast, then in that event another election may be called at any time within two years after the date of such former election, and it shall only require a vote of a majority of the legal electors voting at such election to relocate the county seat and remove it from such place, and the board of county commissioners shall upon the petition of three-fifths of the legal electors of such county order an election for the relocation of such county seat."

The plaintiff argues that the amendment violates section 17 of article 2 of the state Constitution. That section reads:

"All laws of a general nature shall have a uniform operation throughout the state; and in all cases where a general law can be made applicable, no special law shall be enacted; and whether or not a law enacted is repugnant to this provision of the Constitutution shall be construed and determined by the courts of the state."

Prior to 1906 that section read:

"All laws of a general nature shall have a uniform operation throughout the state; and in all cases where a general law can be made applicable, no special law shall be enacted."

In Anderson v. Cloud County, 77 Kan. 721, 731, 95 Pac. 583, 586, this court said:

"It has been estimated that fully one-half of the laws enacted by the state Legislatures in recent years have been special laws. Since 1859 the rapid growth of cities and towns has produced so many changes in social and economic conditions, and added so much to the complex necessities of local communities, that the demand upon Legislatures for this species of class legislation has increased, and the evil effects have multiplied. The Legislature of 1905, which differed in this respect but little from its predecessors, passed no less than 25 special acts relating to bridges, and 35 fixing the fees of officers in various counties and cities. Out of a total of 527 chapters, more than half are special acts. This does not include appropriation laws, which from their nature are inherently special. The first act passed by this Legislature declared a certain young woman the adopted child and heir at law of certain persons. Others changed the names of individuals. Many granted valuable rights and privileges to private corporations. Hundreds granted special favors to municipal corporations, and many others conferred special privileges upon individuals. Such were the conditions which induced the people at the general election in 1906 to change the Constitution by adopting the amendment to section 17 of article 2."

The amendment of the Constitution has checked the abuse, but has not stopped it.

It becomes necessary to determine whether or not this amendment to the general statute is a special act. There are rules for determining that question. The most of them have been declared in cases in which it was argued that section 1 of article 12 of the Constitution had been violated.

The rules that are applicable in determining the validity of an act under section 1 of article 12 of the Constitution should be applied in determining whether an act is general or special under section 17 of article 2. The former reads:

"The Legislature shall pass no special act conferring corporate powers. Corporations may be created under general laws; but all such laws may be amended or repealed."

In City of Topeka v. Gillett, 32 Kan. 431, 436, 4 Pac. 800, 803, this court said:

"We now come to the more particular consideration of the act in controversy. Is it general, or is it special? It excludes from the scope and operation of its provisions all private corporations; all public corporations except cities; all cities of the first class; all cities of the third class; all cities of the second class except such as have a population of 6,000 and over; all cities not obtaining the benefit of the act within 58 days after its passage; all cities not giving notice under the act within 14 days after its passage or within 10 days after its taking effect; and, indeed, excluding all corporations of the state of Kansas, except three cities, to wit, Topeka, Lawrence, and Atchison; and it gives to these three cities only 14 days after its passage within which to commence action under it, and only 58 days after its passage within which to complete such action, and at the expiration of that time the law ceases to have operation and becomes ineffectual and defunct. At the time when this act was passed, there were just ten cities of the second class in the state of Kansas; and this act excluded from its operation all these cities except the three cities above named—Topeka, Lawrence, and Atchison."

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A statute granting corporate power that can apply only to a fixed number of corporations, and cannot possibly at any time apply to any other corporation, is ordinarily regarded as special. Cole v. Dorr, 80 Kan. 251, 259, 101 Pac. 1016, 22 L. R. A. (N. S.) 534; Bull v. Kelley, 83 Kan. 597, 602, 112 Pac. 133; State ex rel. v. City of Lawrence, 101 Kan. 225, 227, 165 Pac. 826.

The mere fact that a statute is general in form will not save it if its operation and effect are necessarily local and special. State ex rel. v. Kansas City, 50 Kan. 508, 516, 31 Pac. 1100.

Another proposition must be disposed of before the statute can be declared unconstitutional. That proposition is: Could a general county seat election law have been made applicable to Haskell county? Prior to the amendment by the act of 1919, a general law was applicable to that county, and no reason has been advanced to show that such a law cannot now be made applicable. The location of county seats has always been a matter of general and vital interest in this state. The subject is one that should be controlled by general legislation, and it can be so controlled. A particular county may wish that the general law were different, so as to enable that county to change or retain the location of the county seat; but the desire of a county to have a different law does not show that a general law cannot be made to apply.

[5] 5. The defendants invoke the rule that it is the duty of the court to uphold the law if possible. There is no question about the rule. It has been declared by this court in a number of instances; but, if an act of the Legislature is repugnant to the Constitution, it is the duty of the courts to declare the act invalid. Mayberry and Others v. Kelly, 1 Kan. 116. The record of that duty performed will be found in many volumes of the reports of this court. The amendment to section 17 of article 2 of the Constitution imposed an additional duty on the courts. They are now commanded to determine whether a general law can be made applicable when a special law has been passed. That command must be obeyed. While it is the duty of the courts to uphold laws passed by the Legislature, yet it is just as much the duty of the courts to uphold the Constitution. If the statute now under consideration be approved, and the principle followed in declaring that approval is observed in the future, the amendment concerning special laws will be of no effect, for the reason that any school district, any township, any city, any county in the state desiring to accomplish anything not authorized by the general law can, by the system that has been followed in framing the present act, secure the enactment of a law general in form, but special in effect, enabling it to accomplish its purpose. Special laws, instead of being direct, will become general in form, but indirectly special, and all the evils of special legislation that brought about the amendment to section 17 of article 2 will be revived.

[6] 6. The defendants argue that the word "heretofore" in the questioned part of the act, should be read "theretofore," and thus avoid the objection that the act is special. The language used by the Legislature contains many evidences of an intention to restrict the law to Haskell county. It was one of five counties that had a population of less than 2,000, and one of six counties that had a county seat not located on a railroad; but both these conditions existed in only three counties, and there was only one of these counties, Haskell, that more than two years prior to the enactment had a county seat election in which more than a majority of votes cast were in favor of the removal of the county seat. These restrictions show that the Legislature intended that the amendment to section 2897 of the General Statutes of 1915 should apply to Haskell county, and to that county alone. If we read the word "heretofore" as though it were written "theretofore," we must do it for the purpose of construing the act as general, and make it apply to two counties to which the Legislature intended that it should not apply. Even if the change were made, it is not clear that the objection to the validity of the act would be avoided.

It follows that the amendment is unconstitutional; that the election was illegally called and held; that the county seat should not be moved under that election; and that the injunction should have been granted by the trial court.

The judgment is reversed, and the injunction is granted.

All the Justices concurring.

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(105 Kan. 79)

BUSH v. CITY OF BELOIT et al.
(No. 22172.)

(Supreme Court of Kansas. June 7, 1919.)

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(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS ⟸958, 977 — TAXATION—VALIDITY—RECOVERY.

Where a city of the second class levies a tax of 3 mills on the dollar for general revenue purposes, under section 11373 of the General Statutes of 1915, and in addition thereto levies a tax of 1½ mills on the dollar for opening, widening, and bringing to grade all streets, avenues, and alleys, and for building bridges, culverts, and sewers, and for footwalks across streets, avenues, and alleys, and levies another and additional tax of three-fourths of a mill on the dollar for paving and improving the squares and areas formed by the crossing of streets, avenues, and alleys, each of the two taxes last named is excessive and illegal, and, if such taxes are involuntarily paid, they may be recovered by the taxpayer.

2. MUNICIPAL CORPORATIONS ⟸958—CITIES OF SECOND CLASS—TAXATION—STATUTES.

Section 11373 of the General Statutes of 1915 authorizes cities of the second class to levy a tax of 3 mills on the dollar for general city purposes.

3. TAXATION ⟸541—ILLEGAL TAX—RECOVERY.

Railway Co. v. City of Humboldt, 87 Kan. 1, 123 Pac. 727, 41 L. R. A. (N. S.) 175, followed concerning the collection of illegal personal property taxes paid on December 20th, under protest.

Appeal from District Court, Mitchell County.

Action for injunction by B. F. Bush, receiver of the Missouri Pacific Railway Company, against the City of Beloit and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded, with directions to enter judgment for plaintiff.

W. P. Waggener and J. M. Challiss, both of Atchison, and C. L. Kagey, of Beloit, for appellant.

J. E. Tice and R. L. Hamilton, both of Beloit, for appellees.

MARSHALL, J. The plaintiff seeks to enjoin the collection of certain taxes levied by the city of Beloit. Judgment was rendered in favor of the defendants, and the plaintiff appeals.

In 1915, the city of Beloit levied a tax of 3 mills on the dollar for general revenue purposes, a tax of 1½ mills on the dollar for opening, widening, and bringing to grade all streets, avenues, and alleys, and for building bridges, culverts, and sewers, and for footwalks across streets, avenues, and alleys, and a tax of three-fourths of a mill on the dollar to pay for paving and improving the squares and areas formed by the crossing of streets, avenues, and alleys. In 1916, the city levied a tax of 3 mills on the dollar for general revenue purposes, and a tax of 1½ mills on the dollar for opening, widening, and bringing to grade all streets, avenues, and alleys, and for building bridges, culverts, and sewers, and for footwalks across streets, avenues, and alleys.

[1] 1. The plaintiff argues that the taxes levied for opening, widening, and bringing to grade the streets, avenues, and alleys, and for building bridges, culverts, and sewers, and for footwalks across streets, avenues, and alleys, and the tax to pay for paving and improving the squares and areas formed by the crossing of streets, avenues, and alleys, were excessive. The plaintiff cites section 11373 of the General Statutes of 1915, and contends that it limits the amount that may be levied by a city for all the purposes named to 3 mills on the dollar. The defendants cite section 1715 of the General Statutes of 1915, and contend that under that statute the limit is placed at 40 mills on the dollar. To determine the correctness of these contentions, it is necessary to examine a number of laws. Section 1715 was enacted in 1872, and does not appear to have been specifically amended or repealed at any time. That section reads:

"At no time shall the levy of all city taxes of the current year for general purposes, exclusive of school taxes, exceed four per cent. of the taxable property of the city as shown by the assessment books of the preceding year."

It is well known that for years property was assessed for taxation at from one-third to one-fourth its actual value. Section 1715 was enacted while that system of assessment was followed. Under that system, a high limitation on the taxing power was necessary. In 1907, the Legislature created the tax commission, and provided for the assessment of property at its actual value. Laws 1907, c. 408. That law has since been amended in a number of particulars. In 1909, chapter 245 of the Laws of 1909 placed limitations on the power of officers of taxing districts to levy taxes. The law covered counties, county high schools, cities of the first, second, and third classes, and the school boards of school districts. Section 20 of that act read:

"The authority of the mayor and council of cities of the second class to levy taxes as provided in chapter 116, Laws of 1905, chapter 135, Laws of 1903, and chapter 104, Laws of 1905, is hereby limited so that the mayor and council of any such city shall not fix a rate of levy for the respective purposes in excess of the following named rates: For general revenue fund, two mills; for opening, widening

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and bringing to grade all streets, avenues and alleys, and for the building of bridges, culverts and sewers, and for footwalks across streets, avenues and alleys, one mill; for park contingent fund, two-tenths of one mill; for library fund, four-tenths of one mill; all other levies for cities of the second class which are authorized by statutes not specifically named in this section are hereby limited to one-fifth of the rates so authorized: Provided, that in cities of the second class for which special acts have been passed the limitations of this section shall not apply so as to prevent the raising of an amount for the general revenue fund of such cities which by virtue of said special acts could have been raised in the tax year of 1907 upon the assessed valuation of that year."

That section appeared in the General Statutes of 1909 as section 9413, and was amended by chapter 361 of the Laws of 1915. Section 11373, Gen. Stat. 1915. It now reads:

"The authority of the mayor and the council, and mayor and commissioner, of all cities of the second class to levy taxes is hereby limited so that said governing bodies shall be authorized to fix a rate of levy, for any one year, for all general city purposes—except for park contingent fund and for library fund—not to exceed three (3) mills on the dollar. They are further authorized to levy for park contingent fund not to exceed two-tenths of one mill for any one year, and for library fund not to exceed four-tenths of one mill for any one year. All other levies for cities of the second class, which are authorized by statute and not specifically named in this section, are hereby limited to one-fifth of the rates so authorized. In cities of the second class for which special acts have been passed the limitations of this section shall not apply so as to prevent the raising of an amount for the general revenue fund of such cities, which, by virtue of said special acts could have been raised in the tax year of 1907 upon assessed valuation of that year."

Chapter 361 of the Laws of 1915 had become effective before the ordinances levying the taxes in question were passed. That law gave cities of the second class authority to levy a tax of 3 mills on the dollar for general city purposes, but struck out the authority to levy a tax for opening, widening, and bringing to grade all streets, avenues, and alleys, and for building bridges, culverts, and sewers, and for footwalks across streets, avenues, and alleys. The statute evidently placed the power of cities of the second class to levy taxes for these purposes under the authority to levy taxes for all general city purposes.

Chapter 245 of the Laws of 1909 declared unlawful any tax in excess of the amounts therein authorized, and provided for the punishment of any officer of any taxing district who should violate any of the provisions of the act. The effect of section 20 of chapter 245 of the Laws of 1909 was to repeal section 1715 of the General Statutes of 1915, and to place a new limitation on the power of cities of the second class to levy taxes for general revenue purposes. The amendment of section 20 of chapter 245 of the Laws of 1909, by chapter 361 of the Laws of 1915, did not revive any statute that had been repealed. Section 10973, subd. 1, Gen. Stat. 1915.

The law giving to cities power to levy taxes for general revenue purposes and for street improvements will be noticed. In 1901, the law authorized the levy of 5 mills on the dollar "for opening, widening and bringing to grade all streets, avenues, and alleys, and for building bridges, culverts and sewers, and for footwalks across streets, avenues and alleys." Section 972, Gen. Stat. 1901. That law was first amended by chapter 133 of the Laws of 1903, and was again amended by chapter 116 of the Laws of 1905. In each of these amendments, the power to levy a 5-mill tax for the purposes named was retained; but section 20 of chapter 245 of the Laws of 1909 reduced the tax that could be levied for these purposes to 1 mill, and by chapter 361 of the Laws of 1915 (section 11373, Gen. Stat. 1915) the power to levy any tax specifically for these purposes was eliminated, and the authority of cities of the second class to levy taxes therefor was placed under the authority to levy taxes for general city purposes.

It follows that, when the city of Beloit levied a tax of 3 mills on the dollar for general revenue purposes, it had no authority to levy any additional tax for opening, widening, and bringing to grade, etc., or for the improvement of squares and areas formed by the crossing of streets, etc., and the taxes for these purposes were illegal, and if involuntarily paid, they may be recovered.

[2] 2. The defendants argue that chapter 361 of the Laws of 1915 is purely a statute of limitations, and does not authorize the levy of any tax. They do not read the statute correctly; it authorizes a rate of 3 mills on the dollar for general city purposes, and authorizes other rates for other purposes.

[3] 3. The defendants contend that, even if the taxes complained of were illegal, the plaintiff cannot recover more than one-half of the amount claimed, for the reason that the taxes were paid on the 20th day of December of each year, and the rebate was thereby secured. The plaintiff, under written protest, paid the taxes on those dates. This question is not a new one. In Railway Co. v. City of Humboldt, 87 Kan. 1, 123 Pac. 727, 41 L. R. A. (N. S.) 175, this court said:

"Where an illegal tax is levied on the property of a taxpayer, which he is compelled to and does pay, it is to be regarded as an involuntary payment which he may recover back, but if he pays the whole of such tax prior to December 20th of that year, including the second half, due in June of the following year, the advance payment made to obtain a rebate is deemed to be voluntary, and is therefore not recoverable."

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See, also, K. P. Ry. Co. v. Comm'rs of Wyandotte County, 16 Kan. 587; A., T. & S. F. Rld. Co. v. City of Atchison, 47 Kan. 712, 28 Pac. 1000; Railway Co. v. Kansas City, 92 Kan. 300, 140 Pac. 1040.

The judgment is reversed, and the cause is remanded, with directions to the trial court to enter judgment for the plaintiff for the amount paid on the illegal taxes due on December 20, 1915, and on December 20, 1916.

All the Justices concurring.

(105 Kan. 134)

STATE ex rel. COUNTY ATTORNEY v. LAMONT et al. (No. 22296.)

(Supreme Court of Kansas. June 7, 1919.)

(Syllabus by the Court.)

1. SCHOOLS AND SCHOOL DISTRICTS ⟸22—STATUTES ⟸73(1), 96(5), 122(4), 141(1)—SUBJECT AND TITLE—AMENDMENT—SPECIAL STATUTE—CLASSIFICATION.

Chapter 284 of the Laws of 1917 is *held* not unconstitutional because of the insufficiency of its title, the application of certain provisions of other acts, the amendment of certain sections of another statute, the classification of rural high school districts or the basis thereof, nor because the act is special or of unequal operation throughout the state.

2. CONSTITUTIONAL LAW ⟸65—DELEGATION OF LEGISLATIVE POWER—SUBMISSION TO VOTE—SCHOOLS.

The provisions of the chapter in question touching the formation of rural high school districts are not void as a delegation of legislative power.

3. SCHOOLS AND SCHOOL DISTRICTS ⟸22—PUBLIC SCHOOLS IN CITIES OF THIRD CLASS—REPEAL.

Such chapter does not repeal section 9175 or 9176 of the General Statute of 1915.

Appeal from District Court, Reno County.

Suit for injunction by the State of Kansas, on the relation of the County Attorney of Reno County, against J. J. Lamont and others. Decree for plaintiff, and defendants appeal, and plaintiff takes a cross-appeal. Affirmed.

F. Dumont Smith, of Hutchinson, for appellants.

F. L. Martin, John M. Martin, W. H. Burnett, and W. F. Jones, all of Hutchinson, for appellee.

WEST, J. The state, on the relation of the county attorney, sought to enjoin the collection of taxes levied for the rural high school located at Turon, Kan., which had been organized under chapter 284 of the laws of 1917, and to disorganize such rural high school district. It was alleged that a petition to disorganize had been presented to the board, and that consideration thereof was refused.

The principal ground of the attack was the alleged invalidity of chapter 284. The court held this act valid and held that when the petition for disorganization was presented the statutory time therefor had passed, and that the provisions of the chapter touching the disorganization of a district formed before the passage of the act did not apply. It was found that certain common school grades were being taught, and the use of the rural high school funds for such purposes was enjoined. Aside from this, the court held for the defendants and divided the costs between the parties.

The district appeals from the order granting the injunction, and the plaintiff, in a cross-appeal, insists upon the invalidity of chapter 284. In their reply brief, the defendants state that the state board of education has, since the decision, expressly authorized the teaching of certain elementary grades as provided by section 7 of the act in question. Assuming this to be correct, the injunction order was proper when made, but would seem now to have spent its force.

[1] This leaves the validity of the statute for consideration. One ground of the attack is that the title contains more than one subject, clearly expressed; another, that it attempts to apply the provisions of an act of 1905 and its amendments, and seeks to amend chapter 311 of the Laws of 1915 without reenactment; also that the classification is bad, and that the statute is not one of equal operation throughout the state.

The title of the act relates to rural high school districts, and amends nearly all of chapter 311 of the Laws of 1915 which was an act relating to the establishment of rural high school districts, so that thus far the title contains but one general subject. Then comes the clause:

"Providing that the provisions of chapter 397 of the Laws of 1905 with amendments thereto shall apply to rural high school districts. * * *"

The features of these provisions sought to be applied to the rural high school are the certification and apportionment of taxes between high school districts and common school districts which send pupils thereto. This is made plain by section 8 of chapter 284 which, after applying these provisions (including chapter 272 of the Laws of 1911, relating to joint high school districts) provides:

"That the rural high school board may levy a tax as provided in section 3 of this act for the purposes therein mentioned to supplement the amount which may be apportioned to said

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rural high school district from the county high school fund."

Section 9 has reference to the duties of the county treasurer to pay over to the treasurer of rural high school districts the proper proportion of the high school funds in accordance with the act of 1905, and its amendments. While this method of legislation is awkward and not to be commended, it cannot be said to violate any part of the Constitution, as it amounts merely to a direction to the proper officials to treat a rural high school district the same in the respects indicated as they would have to treat a common school district under the act of 1905, and its amendments.

The amendment and repeal of certain sections of the act of 1915, relating to rural high school districts, do not impair the validity of the act.

The act, by its own terms, applies to any territory containing not less than 16 square miles, and comprising one or more townships, or parts thereof, the boundaries of such territory having been approved by the county superintendent of public instruction, or when the superintendents of two or more counties fail to agree, by the state superintendent. Section 3 provides that if the territory contains an incorporated town or city of more than 500, certain petitions shall be prerequisite, and a certain majority of voters in and out of such city. We do not see how this fails to have uniform operation throughout the state, or can be deemed a special act. Neither does the population of the incorporated town or city, fixed by the statute as a basis for certain proceedings, amount to an unreasonable or baseless classification, but is within the fair exercise of legislative discretion. It is said that the change in the required population from 300 in the act of 1915 to 500 in the present act was made because cities having more than 300 or less than 500 "desired to organize a large number of sections into a rural high school district, for the purpose of compelling them to support a city high school. The act, instead of being one for rural communities, to organize a rural high school and locate it somewhere in the rural community, thus becomes an act by which cities can compel a rural community to support and maintain a city high school." The petition alleges that Turon has more than 500 inhabitants, but the opinion of the court below states that it was admitted that it has less than 500 inhabitants. This would leave the required territory, including Turon, free from the restriction, requiring a separate petition and a separate vote, but there is nothing on the face of the statute to indicate a legislative intention simply to burden this one vicinity with the expense of a city high school, for there are, doubtless, many others in the state similarly situated. Neither is there anything to show any wrongful motive or object sought to be accomplished.

[2] It is contended that the electors of a certain territory are given authority to form a rural high school district, and that the act is void because it delegates legislative power. The Constitution, article 6, § 2, prescribes that—

"The Legislature shall encourage the promotion of intellectual, moral, scientific and agricultural improvement, by establishing a uniform system of common schools, and schools of a higher grade, embracing normal, preparatory, collegiate and university departments."

Notwithstanding the case of Hutchinson v. Leimbach, 68 Kan. 37, 74 Pac. 598, 63 L. R. A. 630, 104 Am. St. Rep. 384, holding an act void which provided that one or more persons could practically compel an order by the court to vacate property in a city, and Com'rs of Wyandotte County v. Abbott, 52 Kan. 148, 34 Pac. 416, holding an act void because delegating to certain persons the power to tax a given territory for road purposes, the Legislature has for many years made provisions for the formation of various high schools and high school districts upon the petition of the electors of a given territory. It may be said by these enactments to furnish legislation by which such electors, instead of being compelled, are given the choice to assume the burden of such high school concerns. Similar enactments have been tacitly recognized as constitutional. Reese v. Hammond, 94 Kan. 459, 146 Pac. 997; Fisher v. Beck, 99 Kan. 180, 160 Pac. 1012. Whatever may be the proper definition of legislative power, the granting rather than the exercising of authority for certain persons to form themselves into a school district would seem to be within its meaning. In Hill v. Johnson County, 82 Kan. 813, 109 Pac. 163, a "rock road law" was held valid, notwithstanding such highway could be established by 60 per cent. of the landowners along the line who owned 50 per cent. of the land to be taxed, upon a finding, however, by the board that the road was to be a public utility. In Railroad Co. v. Leavenworth County, 89 Kan. 72, 130 Pac. 855, holding the Drainage Act of 1905, chapter 215, valid, it was said in the opinion:

"The operation of the law does not depend on the will of the petitioners, but it is the will of the Legislature which is to be put in force when the board of county commissioners find that the prescribed conditions exist within the district which the petitioners ask to have incorporated." 89 Kan. 79, 130 Pac. 857.

So it may be said here that the will of the petitioners does not govern, but when the provision made by the Legislature is accepted by the electors themselves by the proper vote, it becomes operative. The Legislature gives them permission to form themselves in-

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to such district, and when, by the proper election, they avail themselves of this permission, they are not exercising legislative power, but merely accepting a privilege conferred by a proper exercise of such power. Such granted permission is one means by which the Legislature has seen fit to obey the constitutional mandate to promote education, and such provision is not a violation of the Constitution.

Again, no rural high school district can thus be formed unless its boundaries be first approved by the official at the head of the county school system, and, as the failure or refusal of the superintendent to approve becomes a prerequisite and essential constituent of the scheme, without which the desires and efforts of the petitioners and electors are fruitless. So it cannot be said that the will proceeds from the petitioners or electors alone, and not from the Legislature.

[3] It is argued that under this act the petitioners were authorized to violate the provisions of sections 9175 and 9176 of the General Statutes of 1915, and places cities of the third class, or portions of them, in other districts, but as the trial court well remarked in its opinion, these sections have reference to common schools and not to high schools, and there is nothing in the act complained of which even attempts to authorize the defendant board to place Turon in more than one common school district.

The decree is affirmed.

All the Justices concurring.

(105 Kan. 63)

MISCHLICH v. MORRIS & CO.

(No. 22029.)

(Supreme Court of Kansas. June 7, 1919.)

(Syllabus by the Court.)

MASTER AND SERVANT ⟸411½, New, vol. 5A Key-No. Series—DENIAL OF NEW TRIAL—DISCRETION OF TRIAL COURT.

In a workmen's compensation case, a physician and surgeon testified for defendant that he had examined the plaintiff's injury, and that the alleged stiffness of the ankle was accounted for by keeping the ankle bandaged and failing to exercise it. At the defendant's request, the plaintiff was called and removed his shoe and stocking. The physician examined it in the presence of the jury, and testified that, if plaintiff would relax the muscle, there was normal movement, but that plaintiff was holding his ankle rigid by his own will. Thereupon plaintiff's counsel asked the jurors to come and examine plaintiff's ankle and see whether or not it was stiff. Over the defendant's objections, two of the jurors came and personally examined the ankle. The court refused the defendant's request that the jury be discharged. *Held*, that question whether, under all the circumstances, the jury should have been discharged was in the sound discretion of the court; that there was no abuse of discretion in refusing the request, and no error in denying a new trial.

Dawson and Marshall, JJ., dissenting.

Appeal from District Court, Wyandotte County.

Action by Wesley Mischlich against Morris & Co. Judgment for plaintiff, and defendant appeals. Affirmed.

Keplinger & Trickett, of Kansas City, for appellant.

David F. Carson, of Kansas City, for appellee.

PORTER, J. In an action for workmen's compensation, plaintiff recovered judgment, and the defendant appeals.

The plaintiff claimed that on the 10th day of October, 1915, while in the employ of the defendant at its packing house, he sustained an injury to his ankle which produced a stiffening and hardening of the bone, described as ankylosis; that the injury resulted in the loss of the use of the ankle and part of the leg; and that the condition is permanent. He testified that, while working at night in charge of a cold storage room, he stepped upon a loose board which broke, causing him to fall and spraining his foot and ankle; that he did not return to work for three weeks, when he worked two or three nights, but was unable to continue, and that he was discharged by the foreman; that it was a year and three months before he was able to do any work.

The defendant sought to show that, if plaintiff suffered any accident, he sustained only a trifling injury, and that the condition of his ankle was caused by keeping it constantly bandaged and by the failure to use it. The defendant also contended that the plaintiff first claimed he was injured on October 24th, and that he was absent from work not to exceed eleven days, and was discharged for refusing to obey orders. One of the witnesses for the defendant was its general timekeeper, who produced the pay rolls of the plant for the last six months of the year 1915, and which showed that the plaintiff received his regular wages from October 10th to October 24th, and that he worked from November 4th until December 2d, when he was discharged. The timekeeper testified that when a man reports for work he calls at the time office and is given a check; that after he has completed his work he drops the check in the same window where he received it in the morning and gets credit on the pay roll for the work he has performed. The defendant offered the evidence of several of the plaintiff's neighbors and acquaintances to impeach his reputation for veracity, and

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the plaintiff offered rebuttal testimony to sustain his reputation in this respect.

The jury returned a verdict for plaintiff allowing him $990 compensation, and found that the plaintiff performed no work from October 10th to October 24th, and that he did not go to work on November 4th, and continue to work until about December 2d.

The defendant contends that the verdict was given under bias and prejudice, and that this is evident from the findings, which, it is insisted, are contrary to the overwhelming evidence, including that of the books and records of the timekeeper. The point is urged, however, as a basis for the defendant's principal contention, which is that the court committed error in refusing to discharge the jury because of an incident which occurred during the progress of the trial. The matter arose in this way: A physician and surgeon who had made an examination of plaintiff's ankle about eight months after the alleged injury was called by the defendant as a witness. He testified that when he first examined the plaintiff he found the ankle tightly bandaged, and the plaintiff walking with a cane; that he advised him to remove the bandage and to lay aside the cane and to use his ankle; that otherwise he might have a stiff ankle; that he found no lost motion in the joint, but, in his opinion, keeping the ankle bandaged and walking with a cane accounted for the condition at that time, and also at the time of the trial in 1918. He testified, too, that at the first examination the plaintiff persisted in holding the ankle rigid, but that, upon distracting plaintiff's attention, he was able to move the joint freely, and that the reflex was practically perfect. During the examination of the physician as a witness plaintiff, at the defendant's request, removed his shoe and stocking, and the physician proceeded to explain to the jury the condition of the ankle, and testified that, if plaintiff would relax and let go of the tendon and muscle, there was normal movement; that plaintiff was again holding his ankle rigid by his own will, so that it was almost impossible to move it; but that in the opinion of the witness there was no rigidity due to any injury. Thereupon counsel for plaintiff asked the jurors to leave the jury box and personally feel and examine plaintiff's ankle and see whether or not it was stiff, and at his urgent solicitation two of the jurors came forward and personally examined plaintiff's foot. Counsel for defendant objected, and stated that he did not consider the practice proper, because some jurors would have evidence which others would not have, except by hearsay in the jury room. The court refused to make a ruling upon the objection, and the defendant asked that the jury be discharged and supported the motion by an affidavit reciting the foregoing facts.

The motion to discharge the jury was overruled, and it is claimed that the court erred in this, and also in denying the motion for a new trial. The defendant contends that the situation was the same as where one or more members of the jury have visited the locality or scene of an accident, and subsequently have discussed or argued in the jury room facts discovered by them under such circumstances. The case of Ortman v. Union Pacific Ry. Co., 32 Kan. 419, 4 Pac. 858, and cases cited in the opinion, are relied upon in support of the defendant's contention. In that case it was held that the personal examination of the premises where an accident occurred and the knowledge thereby acquired by certain members of the jury doubtless influenced them in arriving at their verdict, and may have controlled other jurors, and for this reason it was held that the verdict should have been set aside and a new trial ordered. In view of the fact that the incident complained of in this case occurred in the presence of the judge of the district court, the majority take the view that the question whether the jury should have been discharged was one which rested under all the circumstances in the sound discretion of the trial court, and that it cannot be said that the court abused its discretion in refusing to discharge the jury, or that it was error to refuse a new trial.

The judgment is affirmed.

JOHNSTON, C. J., and BURCH, MASON, and WEST, JJ., concur.

DAWSON, J. (dissenting). I think the fact that two of the jurors left the box and personally inspected the plaintiff's alleged injuries was improper and, I fear, prejudicial; and I am quite sure that the conduct of counsel was prejudicial, and so reprehensible that it ought to cause a reversal of the judgment, since there seems to be no other way to stop such misconduct.

In Tidball v. Railway Co., 97 Kan. 396, 399, 155 Pac. 938, 939, Mr. Justice Porter condemned such unseemly behavior. He there said:

"Several times in the course of the trial the court was requested to rule upon objections made to the conduct and statements of plaintiff's counsel in the presence of the jury. I think some of these objections should have been sustained, and that the defendant was prejudiced by the refusal of the court to rule one way or the other. At different stages of the trial the court would have been justified, I think, in discharging the jury and continuing the case. Some of the proceedings bear little resemblance to an orderly trial in a court of record, and I think a new trial should be ordered."

MARSHALL, J., concurs in this dissent.

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(105 Kan. 93)

MARKHAM et al. v. WATERMAN et al.
(No. 22191.)

(Supreme Court of Kansas. June 7, 1919.)

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(Syllabus by the Court.)

1. WILLS ⟸470 — CONSTRUCTION — INTENTION OF TESTATOR.

Rule followed that in the construction of a will, the testator's intention is to be gleaned from the entire text of the testament, and not by giving such controlling significance to any one paragraph as to render abortive other and subsequent provisions of the will, which likewise indicate part of the testator's purposes.

2. WILLS ⟸616(7), 634(7) — CONSTRUCTION —LIFE ESTATE AND REMAINDER—"OWNER"—"COMPLETE CONTROL."

A will which declared that the testator's widow should be the real owner and have complete control of testator's property, etc., named an executor and prescribed his duties and fixed his compensation, directed the sale of his household goods, made a special allowance to whichever one of his children his widow should choose to live with, and provided for a determination of the amount and value of the property aforesaid after the death of the testator's widow, and directed that it be divided equally among his children or their heirs, examined, and *held* that such will bequeathed to the widow a life estate, with power of disposition, and bequeathed a vested remainder to his children.

[Citing 6 Words and Phrases, First and Second Series, Owner.]

3. WILLS ⟸634(15) — BANKRUPTCY ⟸143(9)—PRESENT RIGHT OR INTEREST—TITLE OF TRUSTEE IN BANKRUPTCY.

Under the circumstances outlined in section 2 of the syllabus, the sons of the testator have a present right or interest in the property bequeathed, although their enjoyment thereof is postponed until their mother's death, and such right or interest of each son (not being exempt property) will pass to a trustee in bankruptcy as part of a bankrupt son's estate.

4. REMAINDERS ⟸11 — VESTED REMAINDER —JUDICIAL DISPOSITION.

The certainty that a right of property is vested in a definitely ascertained person, not the value of that right nor the time when it may be enjoyed, determines the question whether that right is an asset of which a court may make judicial disposition.

(Additional Syllabus by Editorial Staff.)

5. REMAINDERS ⟸14—VESTED REMAINDER—SALE—PUBLIC POLICY.

A vested remainder after a life estate, with power of disposition, is the subject of barter and sale, and no rule of public policy is violated by such transaction.

Appeal from District Court, Washington County.

Actions by Harvey Markham, as trustee in bankruptcy, etc., and others against Augusta Waterman and others. Judgment for defendants, and plaintiffs appeal. Reversed, and several causes remanded, with instructions to enter judgment for plaintiffs as trustees in bankruptcy.

W. S. McClintock, of Kansas City, Mo., E. A. Krauthoff, of Washington, D. C., A. L. Quant, of Kansas City, Mo., Edgar Bennett, of Washington, Kan., Jno. L. Kirkpatrick and C. S. Denison, both of Pittsburg, and Joseph G. Logan, of Topeka, for appellants.

J. R. Hyland, of Washington, Kan., and C. L. Hunt, of Concordia, for appellees.

DAWSON, J. The plaintiffs are the trustees in bankruptcy of the estate of four sons of the late Louis Waterman, of Washington county, Kan. Plaintiffs seek a determination of their official interest in the estate of Louis Waterman; and the existence and nature of that interest, if any, depends upon a consideration of the will of Louis Waterman. The will reads:

"This is to certify that I, Louis Waterman, of sound mind, declare this to be my last will and testament:

"1st. That my wife, Augusta Waterman, shall be the real owner and have complete control over all my property, both real and personal.

"2d. That L. C. Waterman, Jr., shall be the executor of this will and shall keep a true and correct account of all interests and rents that shall be received from my property, both real and personal, and shall deposit the same in the Hanover State Bank of Hanover, Kansas, unless the executor sees an opportunity to loan or invest same to better advantage.

"3d. That on the death of my wife, Augusta Waterman, the executor shall determine the amount and value of all real and personal property aforesaid and the same be divided equally between my children or their heirs.

"4th. That after my death a sale of all my household goods and effects shall be held and the proceeds turned over to the executor of this my last will and testament.

"5th. With whichever of the heirs my wife Augusta Waterman shall choose to live shall receive the sum of six dollars ($6.00) per month while she is in good health and able to take care of herself, and twelve dollars ($12.00) per month when she becomes feeble and unable to take care of herself.

"6th. That after the death of my wife, Augusta Waterman, and at the settlement of this estate the executor shall as compensation for his services receive the sum of $100.00.

"7th. In case the present executor should die before this estate is settled then William L. Waterman shall act as executor. * * *

"Louis Waterman."

The testator died in 1905, and his widow elected to take under the will. At various dates in 1917, four of Waterman's sons became bankrupts, and the plaintiffs seek to subject the several interests of the bankrupt estates in the property bequeathed by their

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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father's will to the payment of the debts of the bankrupt sons.

The trial court decided that the will vested in Augusta Waterman, widow of Louis, and mother of the bankrupt sons, a title in fee simple to all the property of her husband; and consequently that the plaintiffs should take nothing in this action.

[1] Plaintiffs appeal. Elaborate briefs are filed for both plaintiffs and defendants construing Waterman's will, and discussing whether it conveyed an estate in fee simple to the widow, or a life estate with power of disposition, or a mere life estate with vested remainders in the heirs of Waterman. This court has no difficulty in deciding that the grant to the widow falls in the second class—a life estate with power of disposition. The old rule that a seemingly unqualified devise in an independent and prior clause of a will cannot be diminished by separate, subsequent clauses of the will (McNutt v. McComb, 61 Kan. 25, 58 Pac. 965; 4 Kent, 270) has been largely superseded by the modern Kansas rule that the testator's intention is to be gleaned "from the four corners of the instrument," from the entire text of the document. Some of our earlier cases foreshadow the coming of this doctrine (Williams v. McKinney; 34 Kan. 514, 519, 9 Pac. 265, Ernst v. Foster, 58 Kan. 438, 49 Pac. 527), and this court was fully committed to it in Bullock v. Wiltberger, 92 Kan. 900, 142 Pac. 950, and has followed it consistently in all the later cases (Morse v. Henlon, 97 Kan. 399, 155 Pac. 800; Postlethwaite v. Edson, 98 Kan. 444, 155 Pac. 802; Id., 102 Kan. 104, 171 Pac. 769, L. R. A. 1918D, 983; Id., 102 Kan. 619, 171 Pac. 769, L. R. A. 1918D, 983; Bryant v. Flanner, 99 Kan. 472, 162 Pac. 280; Brown v. Brown, 101 Kan. 335, 166 Pac. 499; Scott v. Gillespie, 103 Kan. 745, 176 Pac. 132; Otis v. Otis, 104 Kan. 88, 177 Pac. 520).

[2] While the first clause of this will, read by itself and excised from the rest of the text would be construed to vest the title in Amanda Waterman in fee simple, because it bequeaths to her real ownership and complete control (6 Words and Phrases, 5134), yet the other clauses of the will must be considered and given effect in conjunction with the first clause. We find no reason, however, to say that the suceeding clauses so modify the first clause as to whittle down the bequest to the widow to a naked life estate. That she is to be "real owner" and to have "complete control" of the property seems to have been the testator's chief concern, but doubtless he presumed that his wife was not likely to dispose of the property, or to consume or exhaust it entirely, and so he bestowed the remainder upon his children. This view of the matter is strengthened by a critical examination of the various provisions of the will. He names one of his sons as executor, and because he would save the mother of his children the business worries of managing the property he directs that son how to manage the income; he presumes that the widow will not wish to maintain a home by herself after his demise, and so he directs that the household goods be sold after his death; he anticipates that his widow will make her home with one of the children—doubtless the one who was best situated and best disposed to make her feel at home—and so he provides that whichever of his children with whom she chooses to live shall have a small monthly stipend for such considerateness towards the mother, and that that stipend shall increase when her gathering years may render the burden more onerous. It is obvious also that this stipend is not for mere board and lodging for the widow; the monthly allowances are manifestly too small for that, especially when read in connection with the considerable estate left by Louis Waterman, 240 acres of unincumbered Washington county land, etc., the ownership and control of which was bequeathed to her, and which was so favorably considered by the widow that she chose to take under the will rather than stand upon her statutory right to one-half of the entire estate. Clearly Louis Waterman did not intend to require his widow to choose between a pittance of $6 to $12 per month and her statutory half interest in all his property. In short, Louis Waterman intended to bestow his property in such a manner as to make adequate provision for his wife, presuming that it was unlikely that she would make great inroads upon the estate, and intending that his children should have what she did not expend of it during her lifetime. Such a testamentary arrangement is what is commonly known as a life estate with power of disposition. Greenwalt v. Keller, 75 Kan. 578, 90 Pac. 233. See excerpts in Ryan v. Cullen, 96 Kan. 284, at page 290, 150 Pac. 597.

[3, 4] Is the remainder of such an estate liable to seizure for the satisfaction of the remainderman's debts? It seems clear that it is. The interest of the remainderman is one which he himself could sell (Stevenson v. Stevenson, 102 Kan. 80, 169 Pac. 552), and of course the trustee of his bankrupt estate may sell it for him. The fact that the life tenant has the power of disposition, the power to exhaust the property, does not alter the legal status of the remainderman's right. Where the interest is vested, where its status is fixed, it is immaterial that the right or interest may be of indefinite value or that when the efflux of time brings the remainderman into possession it may have no material value. Blanchard v. Blanchard et al., 1 Allen [Mass.] 223; 4 Kent, 198. In Bunting v. Speek, 41 Kan. 424, 434, 21 Pac. 288, 292, 3 L. R. A. 690, it was said:

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"Under the statutes in various states, if the person who is to take the estate is ascertained, he has what is called a vested interest in a contingent remainder, which may be alienated by deed. When the person is ascertained who is to take the remainder when it becomes vested, and he dies, it will pass to his heirs, or may be devised by him. It might always have been released by him to the reversioner. In the case of Putnam v. Story, 132 Mass. 205, it is held that where there was a remainder to heirs, though contingent, it was assignable, it appearing that there were children living at the time. An attempted conveyance by deed will pass the estate by estoppel when it vests. Robertson v. Wilson, 38 N. H. 48. When, however, the contingency is not in reference to the person who is to take, but to the event upon which he is to take, the remainderman may grant his interest, and the grantee will take subject to the contingency. Kenyon v. Lee, 94 N. Y. 563."

Counsel for appellee contends that where a life estate with power of disposition is created, the remainderman does not take title. His interest may not amount to the dignity of title, but he has an interest or property right, nevertheless, although it may be of little value. And it is a property right or interest which he can sell, and consequently it can be sold for the payment of his debts (Strom v. Wood, 100 Kan. 556, 164 Pac. 1100), although we note that Brandenburg in his text-book on bankruptcy, section 806, quotes from a federal case to the contrary. In re Wetmore, 108 Fed. 520, 47 C. C. A. 477. See, also, note in 20 L. R. A. (N. S.) 65 et seq. In this state, the studied and consistent public policy has been to maintain as far as may be the natural simplicity of property rights, uncluttered with artificial refinements of the common law. Simpson v. Mundee & Brown, 3 Kan. 172, 184, 185. Whatever form or sort of property, or interest in property, a man owns in this state may ordinarily be the subject of legitimate barter and sale, and unless it be exempt property the sheriff may sell it to pay his debts.

Measured by all the rules of law, each of these bankrupt sons of Louis Waterman is vested with a clearly existent right or interest in the property bestowed by their father's will (Gen. Stat. 1915, § 10973, subds. 8, 9, 10; Bank v. Murray, 86 Kan. 766, 121 Pac. 1117, 39 L. R. A. (N. S.) 817; Ward v. Benner, 89 Kan. 369, 131 Pac. 609; Strom v. Wood, 100 Kan. 556, 164 Pac. 1100; 32 Cyc. 647-650), and their several interests have passed to their trustees in bankruptcy by operation of law (Scott v. Gillespie, 103 Kan. 745, 176 Pac. 132; Brandenburg on Bankruptcy, § 835; 17 Cyc. 950, 951).

[5] Of course, one who acquires a remainderman's interest in property where the life tenant has the power of disposition or consumption may get little or nothing for his bargain. He may acquire it, however, for no rule of public policy is violated in such a transaction.

The judgments of the district court are reversed, and the several causes are remanded, with instructions to enter judgment for the plaintiffs as trustees in bankruptcy.

All the Justices concurring.

(105 Kan. 54)

HURT v. STOUT et ux. (No. 21991.) *

(Supreme Court of Kansas. June 7, 1919.)

(Syllabus by the Court.)

1. TRIAL ⟸359(2) — SPECIAL FINDINGS — JUDGMENT NOTWITHSTANDING VERDICT.

Special findings of a jury control their verdict, and although one of the findings is set aside for lack of support in the evidence, the court may render judgment on the remaining special findings notwithstanding the verdict, where the discarded finding does not conflict with or impair the force of the other findings, which of themselves settle the substantial issues in the case.

2. ALTERATION OF INSTRUMENTS ⟸4—MATERIAL ALTERATION OF DEED—MORTGAGE INDEBTEDNESS.

In an action for a breach of warranty against incumbrances, where an alteration was made at the request of the grantee, after the execution and delivery of the deed, without the knowledge or consent of the grantors, which substantially reduced the mortgage indebtedness that the grantee was to assume and pay, it is *held* that the alteration was material, and rendered the instrument void, so far as the grantee is concerned.

3. ALTERATION OF INSTRUMENTS ⟸11(1) — PROCUREMENT OF GRANTEE.

An alteration, made by the direction or procurement of the grantee, without the knowledge or consent of the grantors, has the same invalidating effect as if made by the grantee with his own hand.

4. TRIAL ⟸359(2)—SPECIAL FINDINGS—MOTION FOR JUDGMENT—WAIVER.

The filing of a motion for a new trial within three days after the verdict is returned, following the filing of a motion for judgment on the special findings, which remains undetermined, does not operate as a waiver of the motion for judgment on the findings.

Appeal from District Court, Ottawa County.

Action by William A. Hurt against E. E. Stout and wife. Judgment for defendants, and plaintiff appeals. Affirmed.

J. G. Hutchison and William T. Jamison, both of Kansas City, Mo., for appellant.

E. C. Sweet and F. D. Boyce, both of Minneapolis, for appellees.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

* Rehearing denied July 5, 1919.

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JOHNSTON, C. J. William A. Hurt brought this action to recover damages from E. E. Stout and Alice A. Stout, husband and wife, for the breach of a covenant of warranty against incumbrances, and, as the defendants prevailed, he appeals.

In an exchange of properties, the defendants executed a deed to plaintiff for a large tract of land, and in his petition he alleged that the defendants covenanted that the land was clear and free of incumbrances, except an indebtedness "against said property not to exceed $5,600 on the above real estate, incumbrance of record." He stated that it turned out that there were other incumbrances against the property, for the satisfaction of which the property had been sold by due process of law, and that the plaintiff had thereby sustained damages in the sum of $15,000. In their answer defendants alleged that the covenant of warranty in the deed, when executed, contained an exception of an indebtedness "not exceeding fourteen thousand dollars," and that after the execution and delivery of the deed the words "fourteen thousand" were erased, and the words "fifty-six hundred" substituted, and there were added the words "on the above real estate, incumbrance of record." These material alterations, it was alleged, were made without the knowledge or consent of the defendants, and with the knowledge and at the request of the plaintiff. The jury returned a verdict in favor of plaintiff, and with it answers to special questions to the effect that the instrument was changed after execution, and that it was made in the presence of plaintiff, and at his request, and further that the defendants did not know of or authorize the change in the deed. It was further found that the total amount of the incumbrances on the property when the deed was executed was $10,600. Special finding No. 10 related to the value of the property conveyed by the plaintiff to defendants in consideration of the transfer in question, and special finding No. 11 related to the ownership of a certain piece of property conveyed by the defendants to the plaintiff. The defendants asked the court to set aside findings 10 and 11, and in a separate motion asked to have a judgment rendered in their favor on the other special findings. About the same time they filed a motion for a new trial. The court sustained their motion, so far as to set aside special finding No. 10, and then sustained their other motion, awarding judgment to defendants, setting aside the verdict, and giving judgment in their favor upon the remaining special findings. At the same time the court permitted defendants to withdraw their motion for a new trial.

The findings of the jury definitely determined that after the execution of the deed it had been altered at the instance of the plaintiff, and without the knowledge or consent of the defendants, thus reducing the incumbrances assumed by plaintiff from a sum not exceeding $14,000 to an amount not exceeding $5,600. This was the principal issue between the parties, and there is no contention that these findings are without support in the evidence.

[1-3] The first contention is that the court erred in setting aside one of the findings, and then overthrowing the general verdict because it was inconsistent with the remaining findings. Special findings control a general verdict, and therefore the court was authorized to set aside the verdict and give judgment in accordance with the special findings. Civ. Code, § 294 (Gen. St. 1915, § 7194). It is immaterial that a special finding returned was set aside, if those remaining settle the substantial issues and warrant the judgment that was rendered. Did the plaintiff make or cause the making of a material alteration in the deed? was the question that divided the parties. The finding set aside was not in conflict with, nor did it impair the force of, the findings that the plaintiff had changed the covenant in the deed. The invalidating effect of the change would have been the same, however the answer to question 10 had been made, and the court was well within its authority in entering judgment for defendants upon the other findings. According to the special findings the alteration was material, and so far as the plaintiff is concerned the change operated to avoid the altered instrument. 2 C. J. 1185. The law does not allow a party to obtain an advantage through his own wrong and fraud. It is true that he did not guide the pen when the erasure and change were made, but it was done in his presence and at his request, without the knowledge or consent of the grantors. An alteration by his procurement is chargeable to him, just the same as if it was made with his own hand. 2 C. J. 1237.

[4] Nor is there anything substantial in the contention that, when the defendants filed their motion for a new trial, it amounted to an election to stand upon that remedy, and constituted a waiver of the motion for judgment. Under the circumstances, defendants were entitled to ask for relief under both motions, as the motion for judgment upon the findings was taken under advisement and was not to be determined within three days; and as a motion for a new trial, to be effective, must be filed within three days after the verdict is returned, it was incumbent upon the defendants for their own protection to place the motion for a new trial on file before the disposition of the first motion. The filing of the latter did not waive the right to have the former considered, and when judgment

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on the findings was given in their favor the motion for a new trial became immaterial, and, as it required no further consideration, its withdrawal was proper. Railroad Co. v. Holland, 58 Kan. 317, 49 Pac. 71; Railway Co. v. Osburn, 79 Kan. 348, 100 Pac. 473; Linker v. Railroad Co., 87 Kan. 186, 123 Pac. 745; Tacha v. Railway Co., 97 Kan. 571, 155 Pac. 922.

Something is said by plaintiff about the ratification of the alteration by defendants, but no such issue was raised in the pleadings. If plaintiff relied on ratification or estoppel, he should have pleaded the facts on which such a defense was based. No such issue is presented in the pleadings, and there is nothing in the record to show that any evidence was introduced on the subject.

Some other contentions are made by plaintiff, but we find nothing substantial in any of them.

Judgment affirmed.

All the Justices concurring.

(105 Kan. 161)

NORTH AMERICAN PETROLEUM CO. v. HOPKINS, Atty. Gen., et al. (No. 22451.)

(Supreme Court of Kansas. June 21, 1919.)

(Syllabus by the Court.)

CORPORATIONS ⟸648 — FOREIGN CORPORATION — PERMISSION TO DO BUSINESS IN STATE.

A foreign corporation, organized with shares of stock that are without any nominal or par value, may be admitted to do business in this state; and the charter board cannot lawfully refuse to make the inquiry concerning such corporation directed by section 2136 of the General Statutes of 1915, where the corporation, in its application to do business in this state, fully complies with section 2137 of the General Statutes of 1915.

Johnston, C. J., and Marshall, J., dissenting.

Original mandamus by the North American Petroleum Company against Richard J. Hopkins, Attorney General, and others. Heard on demurrer to the petition, and writ of mandamus issued.

E. L. Foulke, of Wichita, and John J. Jones, of Chanute, for plaintiff.

Richard J. Hopkins, Atty. Gen., for defendants.

MARSHALL, J. The plaintiff, by mandamus, seeks to compel the defendants to consider the plaintiff's application to do business in this state as a foreign corporation. The petition alleges, among other things:

"That on the 7th day of May, 1919, the plaintiff filed with the said defendants an application for permission to do business as a foreign corporation in the state of Kansas. That said application was filed upon the printed forms furnished by the secretary of state of the state of Kansas, and that said application set forth the following: (1) The certified copy of its charter or articles of incorporation; (2) the place where the principal office of the corporation was located; (3) the place where the principal office and place of business in the state of Kansas was to be located; (4) the full nature of the business that said corporation is to conduct in the state of Kansas; (5) the name and address of each of its trustees, officers, and directors; (6) a detailed statement of the assets and liabilities of the corporation, sworn to by the president and secretary; (7) the written consent irrevocable that action might be commenced against it in any county of this state—all in due form as provided by the statutes of the state of Kansas.

"Plaintiff further states: That it is a corporation duly organized in accordance with the laws of the state of Delaware. That its capital is unimpaired, and that it is organized for a purpose for which a domestic corporation may be formed, and the business which the corporation is to engage in, in the state of Kansas, is such business as is not prohibited by the laws of the state of Kansas, and for which business a domestic corporation may be organized to transact.

"Plaintiff further states that in due time said application to engage in business in the state of Kansas as a foreign corporation was duly presented to the charter board of the state of Kansas, and that on the 31st day of May, 1919, said charter board, at a special meeting, entered an order and finding in words and figures as follows:

" 'Now, upon this 31st day of May, 1919, at a special meeting of the state charter board, all members being present, the application of the North American Petroleum Company for permission to do business in this state is presented for consideration. The board finds that said company has been incorporated under the laws of the state of Delaware, and that its certificate of incorporation provides that its shares of stock are without any nominal or par value, and the board finds that a corporation of such nature is not such a corporation as is contemplated by the laws of Kansas, and that such foreign corporation should not be admitted to do business in the state of Kansas for that reason.

" 'And the board further finds that, on account of the findings as above stated, it is unnecessary for the board to make any inquiry with reference to the solvency of such corporation, or to determine whether or not its capital is unimpaired, and therefore the board declines to make any inquiry or investigation of the corporation, or as to whether or not its capital is unimpaired, and does therefore decline to grant its permission to said corporation to do business in the state, or to issse any certificate setting forth the fact that the application of the corporation to do business in the state has been approved, or that such cor-

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poration is authorized to do business in this state."

"The plaintiff further alleges that it is entitled to do busines in the state of Kansas as a foreign corporation, and has complied with all the statutes of the state of Kansas on its part, and with all the rules and regulations of the charter board of the state of Kansas.

"That plaintiff further alleges that said defendants refuse to consider its said application for permission to do business as a foreign corporation in the state of Kansas wholly and solely upon the ground that, being a foreign corporation organized with no par value stock, it could not be admitted as a foreign corporation under the laws of the state of Kansas."

The defendants have demurred to the petition, and the cause is heard on the demurrer. A consideration of section 2136 of the General Statutes of 1915 is necessary. That statute reads:

"The state charter board, in passing upon the application of a foreign corporation, shall make special inquiry with reference to the solvency of such corporation, and for this purpose may require such information and evidence as they may deem proper. If they shall determine that the corporation is organized in accordance with the laws of the state, territory or foreign country under which it is incorporated, that its capital is unimpaired, and that it is organized for a purpose for which a domestic corporation may be formed, the application shall be granted, and the approval of the charter board indorsed thereon, and, upon the payment of the fees provided by this act to be paid, the application shall be filed in the office of the secretary of state, and the secretary of state shall issue a certificate setting forth the fact that the application of the corporation has been approved by the charter board and that such corporation is authorized to engage in business in this state."

This statute declares that when the showing prescribed thereby has been made the application shall be granted. The petition alleges facts which show that the plaintiff complied with this statute.

Section 2137 of the General Statutes of 1915 must also be considered. This section reads:

"Any corporation organized under the laws of any other state, territory, or foreign country, and seeking to do business in this state, shall make application to the state charter board, upon blank forms supplied by the secretary of state, for authority to engage in business in this state as a foreign corporation. Such application shall set forth: (1) A certified copy of its charter or articles of incorporation. (2) The place where the principal office of the corporation is located. (3) The place where the principal office or place of business in this state is to be located. (4) The full nature and character of the business the corporation proposes to conduct in this state. (5) The name and address of each of the officers, trustees or directors of the corporation. (6) A detailed statement of the assets and liabilities of the corporation, which shall be subscribed and sworn to by the president and secretary of the corporation. (7) The written consent of the corporation, irrevocable, that actions may be commenced against it in the proper court of any county in this state in which a cause of action may arise or in which the plaintiff may reside by the service of process on the secretary of state, and stipulating and agreeing that such service shall be taken and held, in all courts, to be as valid and binding as if due service had been made upon the president and secretary of the corporation, and shall be executed by the president and secretary of the company and authenticated by the seal thereof, and shall be accompanied by a duly certified copy of the order or resolution of the board of directors, trustees or managers of the corporation authorizing the said secretary and president to execute the same."

The petition shows that the plaintiff, in its application to the charter board, complied with this section.

The statute explicitly requires the application of a foreign corporation to be granted, if these three facts are found to exist: (1) It is organized in accordance with the laws of the state under which it is incorporated; (2) its capital is unimpaired; (3) it is organized for a purpose for which a domestic corporation may be formed.

In the view of the court, the language used shows that the Legislature considered how far the character of a foreign corporation seeking permission to do business here must correspond with that of a domestic corporation; that in requiring the organization to be in accordance with the laws of the creating state, and to be for a purpose for which a corporation could be here created, the Legislature marked the limits of its exactions in that regard, and by fair implication declared it to be unnecessary that the framework of the corporation, so long as its purpose was one for which a charter might be granted in Kansas, should be the same as that employed in this state. Until 1906, our Constitution contained the provision that "dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder" (article 12, § 2); but foreign corporations were never barred from the state because organized under laws which did not impose this double liability—a difference both of form and substance that seems to the court greater than that now under consideration.

The defendants say that, because the shares of stock of the plaintiff have no fixed or nominal par value, it will be difficult for the officials of this state to determine the amount of annual fees that the corporation should pay, and that there is no means of knowing what the capital stock of the plaintiff is, without an examination of its assets. These objections arise out of the fact that the plaintiff corporation is organized on a plan that does not call for a di-

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vision of its capital into shares, each representing so many dollars of capital. Under the plaintiff's plan of organization, the capital may be much or little, and that capital is not divided into money shares, but into fractional parts. This makes it necessary to consider chapter 121 of the Laws of 1917, which in part reads:

"Every foreign corporation authorized by the charter board to engage in business in this state shall, before such certificate of authority is issued, pay to the secretary of state a fee to be known as capitalization fee, based upon that proportion of its lawfully issued capital which it proposes to invest and use in the exercise and enjoyment of its corporate privileges within this state, to wit: (a) For a corporation proposing to use one hundred thousand dollars of its capital stock in the state of Kansas, or any less amount, the fee shall be one-tenth of one per cent. of the amount: Provided, that the minimum capitalization fee to be paid by any corporation shall be ten dollars; (b) For a corporation proposing to use a greater amount of its capital in business within the state of Kansas than one hundred thousand dollars, the capitalization fee shall be one hundred dollars, and in addition thereto one-twentieth of one per cent. of the amount of such capital to be used in Kansas over or in excess of one hundred thousand dollars."

The problem of determining the solvency and bona fide capitalization of the plaintiff presents no unusual difficulty. The fact that the shares of its stock have no nominal par value is of little consequence. Any prudent charter board, in determining whether a foreign corporation is worthy of admission to do business in Kansas, would attach little importance to the nominal value of its shares of stock, even if they have a nominal value. As in all other cases, the charter board should concern itself earnestly to ascertain the genuine capital—those assets permanently devoted to the corporate business as a basis for its business credit, and upon which its hope of profits is rationally founded.

The "lawfully issued capital" and the "capital stock" of such corporations are the assets that it devotes to the prosecution of its business. When the value of those assets is ascertained, the fee, required to be paid by law, can be based on that portion of the assets which the corporation proposes to "invest and use in the exercise and enjoyment of its corporate privileges within this state."

The defendants contend that the plaintiff is not such an organization as is called a corporation in the Constitution and laws of this state. This contention is based on the same facts as are the other contentions just disposed of. The answer to this contention is that corporations without capital stock and without shares of stock are not new. They are as old as corporations themselves, and have existed in England and in this country for many years. Our Constitution recognizes them, and we have laws for their control and government.

The plaintiff can be admitted to do business in this state, and the defendants cannot refuse to make the inquiry concerning it directed by section 2136 of the General Statutes of 1915.

It follows that a writ of mandamus should and will issue.

BURCH, MASON, PORTER, WEST, and DAWSON, JJ., concur.

MARSHALL, J. (dissenting). Under our statutes admitting foreign corporations to do business in this state, such as are not admitted must be considered as excluded; at least when those statutes are applied to private corporations organized for profit.

The Constitution and laws of Kansas recognize three classes of corporations, public, charitable, and those organized for profit. Of the last two classes there are 55 distinct groups provided for. Gen. Stat. 1915, § 2099. The charter of a corporation organized for profit, under the laws of this state, must set forth the amount of its capital, the number of shares into which that capital is divided, and the number of shares held by each stockholder. Gen. Stat. 1915, § 2106. It follows that, in this state, a private corporation for profit cannot be organized as the plaintiff corporation is organized.

It will probably not be contended by any one that a foreign public corporation can be admitted to do business in this state under our law concerning foreign corporations, and it probably will not be contended that our foreign corporation law applies to foreign charitable corporations. If these assumptions are correct, neither foreign public nor charitable corporations will be admitted to do business in this state under our present law.

We have laws regulating public and charitable corporations, but further consideration of them is unnecessary. The plaintiff is neither; it is a private corporation organized for profit. All the laws of this state relating to foreign corporations concern those that are organized for profit. These laws are based on the principle that all corporations organized for profit have a named or fixed capital stock, divided into shares, each representing so many dollars of that stock. In addition to this, foreign corporations admitted to do business are subject to the same laws and control as domestic corporations. Gen. Stat. 1915, § 2140.

The difficulties, which have been summarized in the opinion, suggested by the defendants, strengthen the argument to show that the laws of this state do not apply to corporations organized as the plaintiff is, and that such corporations cannot be admitted

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to do business in this state. The law of this state does not provide for the admission of a corporation such as the plaintiff is. It is therefore excluded; and the defendants were right when they refused to consider the plaintiff's application. These conclusions are supported by Kansas City Bridge & Iron Co. v. Com'rs of Wyandotte County, 35 Kan. 557, 560, 11 Pac. 366, 362, where this court said:

"That a corporation created in a foreign state may transact business in this state, if not repugnant to or prejudicial to our laws, is too well settled to need comment"

—and by State v. Telegraph Co., 75 Kan. 609, 90 Pac. 299, where this court held that:

"For failure to comply with the law, a foreign corporation engaged in interstate commerce and transacting business for the federal government may be ousted from the privilege of engaging in nongovernmental intrastate business."

JOHNSTON, C. J., joins in the dissent.

(105 Kan. 116)

SIGLER v. PHARES et al. (No. 22222.)

(Supreme Court of Kansas. June 7, 1919.)

(Syllabus by the Court.)

1. MORTGAGES ⟸624(3)—FORECLOSURE SALE —REDEMPTION BY OWNER—RIGHT OF SECOND MORTGAGEE.

The holder of a first mortgage on a tract of land brought an action to foreclose it. A second mortgagee, who was made a party, asked the foreclosure of his lien as well. The owner of the fee pleaded that the second mortgage had been paid. The trial of this issue was postponed to a later term of court. Before it was had, judgment was rendered in favor of the first mortgagee, and the land was sold thereon and bid in by him for the amount of his lien; the sale being confirmed. Four months after the sale a judgment was rendered in favor of the second mortgagee, declaring that he held a second lien and was entitled to all the rights and benefits of the redemption laws with respect to the sale under the first lien. Eleven months after the sale the owner of the fee made a redemption therefrom. Two months later the second mortgagee attempted to redeem by paying the amount of the bid, with interest and costs, to the clerk. *Held*, that such attempted redemption was ineffectual, inasmuch as the exercise of the owner's exclusive right to redeem within 12 months of the sale vested in him a title freed from all claims of the second mortgagee.

2. MORTGAGES ⟸594(3)—CONVEYANCE SUBJECT TO MORTGAGE — FORECLOSURE — "DEFENDANT OWNER."

One to whom land has been conveyed subject to a mortgage, and who is made a party in an action to foreclose it, is the person referred to by the statute giving an exclusive right of redemption for 12 months to the "defendant owner."

3. MORTGAGES ⟸624(3)—FORECLOSURE AND REDEMPTION — RIGHTS OF SECOND MORTGAGEE.

The circumstances presented are *held* not to justify an interference upon equitable grounds with the ordinary operation of the redemption law.

Appeal from District Court, Trego County.

Action by Joseph Sigler against J. W. Phares and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded, with directions to render judgment against plaintiff.

Herman Long, of Wakeeney, for appellants.

David Ritchie, of Salina, and S. M. Hutzel, of Wakeeney, for appellee.

MASON, J. In 1909 Lou A. Sigler, the owner of a tract of land, executed a first mortgage upon it for $1,600 to T. M. Patterson, and a second mortgage for $800 to Joseph Sigler, his wife joining in the execution of the mortgages and the notes which they secured. In 1913 Lou A. Sigler was adjudged a bankrupt and his trustee conveyed the land, subject to all liens and incumbrances, to J. W. Phares, for $25. In December, 1914, Patterson brought an action to foreclose his mortgage, Phares and Joseph Sigler, the second mortgagee, being among the defendants. The mortgagors were also named as parties, but were served only by publication and did not appear. Joseph Sigler filed a cross-petition asking the foreclosure of his mortgage, and Phares answered alleging that it had been paid. On March 2, 1915, a judgment was rendered in favor of the first mortgagee, Patterson, the trial of the issue between the second mortgagee and the owner being postponed until the September term of court. In May, 1915, an order of sale was issued on the judgment already rendered, and the land was sold to Patterson for substantially the amount of his lien, confirmation being made the same month. In September, 1915, Joseph Sigler obtained a judgment finding that he had a second lien on the land for the amount of his claim, and adjudging that he was entitled to redeem from the sale under the first mortgage. In April, 1916, Phares redeemed the land by paying the amount of the bid, with interest. In the following June Joseph Sigler deposited with the clerk of the court a like amount, with the additional interest, for the purpose of effecting a redemption in his own behalf. In December, 1917, he brought the present action asking that the land be sold to pay

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his lien, and for such other relief as might be deemed just. Judgment was rendered in his favor declaring that his attempt to redeem was effective, and ordering the sheriff to make him a deed. Phares appeals; other defendants joining with him.

[1] The decision of the case depends largely upon the interpretation of the judgment rendered in the former action. The portion of the record thereof material for present purposes reads as follows:

"And thereupon this cause is tried to the court, and the court, after hearing the evidence, finds: That the allegations and averments of the answer and cross-petition herein are true. That there is due from the defendants Lou A. Sigler and Lillie B. Sigler, his wife, to the defendant Joseph Sigler the sum of one thousand two hundred and seventy-four dollars and thirty-four cents ($1,274.34) on the note and mortgage sued on in the cross-petition herein. That said note specifies that said indebtedness shall bear and draw interest at the rate of eight (8) per cent. per annum from its date until paid. The court further finds that the lien claim and judgment of the said Joseph Sigler is a second lien on the land and tenements described in his cross-petition and set forth in the petition of the plaintiff. * * * It is therefore considered, ordered, and adjudged by the court: That the said defendant Joseph Sigler do have and recover of and from the said defendants in rem the said sum of one thousand two hundred and seventy-four and 34/100 dollars, the amount so as aforesaid found to be due, to said defendant. That said judgment for $1,274.34 draw and bear interest at the rate of eight (8) per cent. per annum from this date until paid, and upon request of the said Joseph Sigler execution issue. That the said defendant Joseph Sigler is a judgment creditor of the said defendants Lou A. Sigler and Lillie B. Sigler, and entitled to all the rights and benefits of the redemption laws of the state of Kansas from the sale of the said real estate under the mortgage lien of the plaintiff herein, T. M. Patterson."

We regard this record merely as a statement that the court had decided the issue of fact between Joseph Sigler and Phares —as to whether the second mortgage had been paid—in favor of Sigler, and in addition thereto a recital of the legal consequences resulting from such decision; the announcement of a decree carrying into effect the rights that attached to the ownership of the mortgage, now that it was found not to have been extinguished by payment. Inasmuch as personal service had not been made upon the mortgagors, and they had not appeared in the action, the judgment did not run against them personally, and Joseph Sigler's only lien was in virtue of his mortgage, although we do not see that the result would be any different if the fact were otherwise. The language in which the judgment is couched shows no purpose to create a lien; it indicates rather that the lien created by the mortgage is found to be still in existence. This seems the reasonable construction, although there is a sense in which all pre-existing liens may be said to have been extinguished by the sale and confirmation, and in which by a somewhat literal reading the declaration that Joseph Sigler's claim still constitutes a lien might be thought to imply that new life had been given it. That such was not the meaning intended is obvious from the fact that the lien is described as a second one, implying to the same extent the continued existence of the first. The same verbal difficulty (if it be regarded as such) appears in the statute, which allows redemption to be made by a creditor whose claim becomes a lien prior to the expiration of fifteen months from the day of sale (Gen. Stat. 1915, §§ 7382, 7383 [Code Civ. Proc. §§ 478, 479]), although a creditor, by putting his claim in judgment after the sale, can hardly in strictness be said to acquire a lien on the land, in view of the fact that "the right of redemption shall not be subject to levy or sale on execution" (Gen. Stat. 1915, § 7396 [Code Civ. Proc. § 492])—a provision not found in the Iowa statute, from which our own is taken. Yet a judgment obtained after the sale, which gives a lien upon the real estate of the debtor owner, is held by this court to confer a right to redeem. Case v. Lanyon, 62 Kan. 69, 61 Pac. 406; Gille v. Enright, 73 Kan. 245, 84 Pac. 992. And such is the practice elsewhere. See Falbe v. Caves, 151 Wis. 54, 138 N. W. 87; Brown v. Markley, 58 Iowa, 689, 12 N. W. 721.

The clause of the judgment providing that Joseph Sigler should be "entitled to all the rights and benefits of the redemption laws of the state of Kansas from the sale of said real estate under the mortgage lien of the plaintiff herein, T. M. Patterson," means, as we interpret it, that Sigler's rights of redemption are those defined by the statute. No purpose is shown to treat the case as exceptional, and to allow him other rights than such as under the general law flow from the fact that he has been found to be the owner of a valid second mortgage. By virtue of such ownership he was entitled to redeem, but this right was held by him in subordination to the exclusive right lodged by the statute in the owner of the fee, provided redemption should be made within 12 months after the sale. Gen. Stat. 1915, § 7381 (Code Civ. Proc. § 477). If the owner had failed to act within that period, Joseph Sigler could have redeemed by paying the selling price, with interest and costs, thereby adding the amount of his claim (or so much thereof as he should see fit to release) to the sum which any one else would have been required to pay in order to redeem from him. Gen. Stat. 1915, § 7391 (Code Civ. Proc. § 487).

This interpretation of the judgment and

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statute results in the second mortgagee being placed at this disadvantage: In order fully to protect himself against the loss of the fruits of his lien he was required to make a bid at the sheriff's sale (or see that one was made) larger than the amount of the first mortgage debt, at a time when the existence of his own claim was contested, and when possibly he might not have been sure that it would be upheld. He was entitled to have his claim adjudicated before the sale, if this could be done without prejudice to other interests. Hines v. Kays, 93 Kan. 209, 144 Pac. 240. That result could have been accomplished by an order of the court postponing the sale until the decision of the question whether the mortgage had been paid; but such a postponement might have worked an injustice to the first mortgagee. Lynn v. McCue, 96 Kan. 114, 116, 150 Pac. 523. Except for the disadvantage referred to, which appears to be a necessary consequence of the statute, and to be in accordance with the general statutory purpose of protecting primarily the interests of the owner whose land is sold on execution or order of sale, the second mortgagee was left in just as favorable a situation as though his lien had been confirmed as a part of the original judgment foreclosing the first mortgage. By exercising his exclusive right to redeem within 12 months after the sale, the owner obtained a title freed from the claim of the second mortgagee, by virtue of the provision of the statute that—

"Real estate once sold upon order of sale, special execution or general execution shall not again be liable for sale for any balance due upon the judgment or decree under which the same is sold, or any judgment or lien inferior thereto, and under which the holder of such lien had a right to redeem within the fifteen months hereinbefore provided for." Gen. Stat. 1915, § 7401 (Code Civ. Proc. § 497).

[2] 2. In behalf of the second mortgagee it is contended that Phares, claiming only under a deed made subject to the existing mortgages, could not obtain full title without paying them off, and was not the "defendant owner," within the meaning of that term as used in the statute giving the person so described the exclusive right to redeem within 12 months after the sale. It is argued that the word "defendant" in this connection applies only to one who is making a defense against an obligation he was required to perform or to protect his property against a claim made in an action at law, as distinguished from an equitable proceeding. We think it clear that Phares, although taking the land subject to the mortgages (as the original owner held it after their execution), was the person to whom in this case the phrase "defendant owner" refers; moreover, he could have exercised the same rights as the holder of the legal title. Gen. St. 1915, § 7397 (Code Civ. Proc. § 493).

[3] 3. Under exceptional circumstances, upon equitable considerations, the right of redemption has sometimes been extended somewhat beyond the bare letter of the statute. We do not regard the situation here presented as of such a character as to justify judicial interference with the ordinary operation of the law. The sale was legally made, and the statute gives the owner of the fee the right to redeem by paying the amount of the bid. The exercise of that right cut off the remedy of the second mortgagee against the land. His loss results from the property having brought at the sale no more than the amount of the first lien.

A reversal is ordered, and the cause is remanded, with directions to render judgment against the second mortgagee.

All the Justices concurring, except DAWSON, J., who did not sit.

(105 Kan. 139)

STATE v. HEITMAN. (No. 22299.)

(Supreme Court of Kansas. June 7, 1919.)

(Syllabus by the Court.)

CONSTITUTIONAL LAW ⟸206(1), 224—CRIMINAL LAW ⟸1206(1) — PRIVILEGES AND IMMUNITIES — EQUAL PROTECTION OF THE LAWS—SENTENCE—INEQUALITY AS BETWEEN MEN AND WOMEN.

Chapter 298 of the Laws of 1917, establishing an institution known as the state industrial farm for women, for the detention and care of women convicted of criminal offenses, does not violate any of the provisions of the Fourteenth Amendment of the Constitution of the United States, because a woman convicted of misdemeanor is sentenced to the farm for an undetermined period, with a maximum limit, while a man convicted of the same misdemeanor is sentenced, under the general law, to the county jail for a definite period, within the same maximum limit.

Appeal from District Court, Shawnee County.

Mrs. L. O. Heitman was convicted of keeping a liquor nuisance, and sentenced to pay a fine of $100 and committed to the state industrial farm for women until discharged according to law. From the part of the judgment assessing the penalty, she appeals. Affirmed.

Edward Rooney, of Topeka, for appellant.

Richard J. Hopkins, Atty. Gen., and Hugh T. Fisher, of Topeka, for the State.

BURCH, J. The defendant was convicted of keeping a liquor nuisance. She was sen-

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tenced to pay a fine of $100, and was committed to the state industrial farm for women until discharged according to law. She appeals from the portion of the judgment assessing penalty.

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The statute under which the defendant was convicted is section 1 of chapter 232 of the Laws of 1901. After declaring what places are common nuisances, the statute provides as follows:

"Every person who maintains or assists in maintaining such common nuisance shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and by imprisonment in the county jail not less than thirty days nor more than six months, for each offense." Gen. Stat. 1915, § 5524.

The fine was assessed under this statute. The commitment was adjudged under the provisions of section 5 of chapter 298 of the Laws of 1917, reading as follows:

"Every female person, above the age of eighteen years, who shall be convicted of any offense against the criminal laws of this state, punishable by imprisonment, shall be sentenced to the state industrial farm for women, but the court imposing such sentence shall not fix the limit or duration of the sentence. The term of imprisonment of any person so convicted and sentenced shall be terminated by the state board of administration, as authorized by this act, but such imprisonment shall not exceed the maximum term provided by law for the crime for which the person was convicted: Provided, that where the person, so convicted and sentenced to said industrial farm for women, is not more than twenty-five years of age and said conviction is for her first offense, the board of administration may parole or release such person under rules and regulations prescribed by said board before the expiration of the minimum term, but in all other cases, the person so committed to said institution shall not be eligible to parole by the board of administration until the expiration of the minimum term fixed by law for the punishment of the offense for which she has been convicted: Provided further, that where any person has been committed to such institution on conviction for murder in the first or second degree, such person shall not be released from said institution until the expiration of the term for which such person is sentenced, except by action of the Governor exercising his pardoning or parole power."

The detention portion of the defendant's sentence was therefore indeterminate, with a maximum limit of six months. If the defendant had been a man, the sentence would have been to the county jail for some definite period within the maximum and minimum limits fixed by the statute in 1901. Because the defendant was sentenced to detention for an undetermined period at the state industrial farm for women, she contends she has been denied the equal protection of the law, and that her privileges and immunities have been abridged, contrary to the Fourteenth Amendment to the Constitution of the United States. Some other objections to the industrial farm law are proposed, but they have already been disposed of in the cases of State v. Dunkerton, 103 Kan. 748, 175 Pac. 981, and In re Dunkerton, 104 Kan. 481, 179 Pac. 347.

In support of the defendant's contention, the familiar decisions are cited which declare that, in the administration of criminal justice, no different or higher punishment shall be imposed on one than that which is prescribed for all, for the same offense. The reason for striving to base justice on equality is probably best stated in Rudolf von Ihering's Law as a Means to an End, chapter VII, section 11, translated from the German and published as volume 5 of the Modern Legal Philosophy Series:

"What is there so great in equality that we measure the highest concept of right—for this is what justice is—by it? Why should law strive after equality, when all nature denies it? And what value has equality independently of any particular content? Equality may be as much as anything else equality of misery. Is it a consolation for the criminal to know that the punishment which has overtaken him will also strike all others in the same position? The desire for equality seems to have its ultimate ground in an ugly trait of the human heart; in ill will and envy. No one shall be better or less badly off than I; if I am miserable, everybody else, too, shall be so.

"But the reason we want equality in law is not because it is something worth striving after in itself, for it is not so at all. We see to it that, with all the equalizing powers of the law, inequality finds its way back again by a thousand paths. But, indeed, our reason for wanting it is because it is the condition of the welfare of society. When the burdens which society imposes upon its members are distributed unequally, not only does that part suffer which is too heavily laden, but the whole of society. The center of gravity is displaced, the equilibrium is disturbed, and the natural consequence is a social struggle for the purpose of re-establishing equilibrium; which under certain conditions becomes a highly dangerous menace, and is always a shock to the existing social order." Page 276.

Differences, however, cannot be denied or disregarded, and the very principle of equality, not only approves, but necessitates, classification, without which fixation of the social center of gravity and stable equilibrium of the social order would be impossible. It would revolt justice if youthful first offenders were subjected to the same penal regimen as mature recidivists. Hence the decisions are numerous and familiar that equal protection of the law is secured if the law operate in the same way on all who belong in the same class. Classes may not be created arbitrarily or unreasonably, or the principle of equality would be violated. There must be some difference in character, condition, or situation

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to justify distinction, and this difference must bear a just and proper relation to the proposed classification and regulation; otherwise, the classification is forced and unreal, and greater burdens are, in fact, imposed on some than on others of the same desert. The defendant asserts that sex does not constitute a just and reasonable ground for substituting an indeterminate sentence, within a stated limit, to the industrial farm for women, in place of a definite sentence, within the same limit, to the county jail.

In the years between enactment of the statutes of 1901 and 1917, application of the scientific method in dealing with the subjects of crime and punishment has produced noteworthy results. Crime is no longer treated abstractly, according to the a priori method, and punishment no longer consists of penalties sawed into stock lengths and corded up by the judges' bench, for use in passing sentence.

Every act condemned by our Penal Code is proper, perhaps laudable, somewhere in the world. Each civil society governmentally organized has a conception, more or less definite, of its own best interest and welfare, and sets up standards of conduct to which the individual is supposed to conform. Failure to measure up to the prescribed standards may be of such public concern that the state must attach sanctions to its regulations. When the state shall do this is a practical question, to be determined with respect to circumstances and conditions. Departure from the standard thus sanctioned we call crime, and the nonconformist we call a criminal.

Investigation of the facts discloses that the nonconformist generally acts through the prompting of some perfectly natural instinct, such as the pugnacious instinct, the sex instinct, or the acquisitive instinct. The state itself, by the creation or toleration of untoward conditions, may contribute to delinquency. Statistics have been published showing that, in the year 1916, in the state of Massachusetts, 176,000 arrests were made. Of these, 104,000 were for drunkenness; and consequently the legally recognized sale of intoxicating liquor under government license was directly responsible for crime. Conditions resulting from social and economic pressure are contributing causes of crime; but the nonconformist fails to measure up to the normal standard, primarily and principally, on account of some personal subnormality or abnormality of body or mind or both. The result is that the study of crime, not neglecting the social factor, becomes largely the study of individuals.

Individuals cannot be studied en masse. They may be classified into groups, on the basis of common characteristics; but the individual cannot be assigned to his proper group until he has been segregated, and his peculiar physical and mental endowments, or lack of endowments, have been considered in the light of his heredity and environment.

The method which has just been described must be employed in affixing punishment. Care must be taken that, in denouncing punishment, which is done in the interest of society, society itself does not suffer, for punishment is a two-edged sword. In ancient barbarous days it was discovered that it was to the advantage of the conqueror not to kill his captives; they were more profitable kept alive, fed well, well cared for, and put to work. In the same way, society now loses if it punish one of its members in a way that crushes him, when it might rehabilitate him and restore him to conformity and usefulness.

The old theory of vengeance and retribution, carried out in medieval times in torture chambers with implements of torture, and in modern times by means more degrading, if less severe, wholly failed to better social conditions. The theory of deterrence by horrible example did no better. In the reign of Henry VIII, 70,000 thieves were hung, and it was found more pockets were picked during the hangings than at any other time. For a remarkably long time our criminal and penal jurisprudence suffered from the paralysis of outgrown traditions, the application of antiquated methods, and the employment of archaic equipment. As the results of patient, careful, scientific study and experiment, sifted, compared, and corrected in conferences and congresses, national and international, became generally known, and the practical work of individual criminologists, penologists, and social reformers commenced to attract general attention, the public mind and conscience slowly awakened. State Legislatures commenced to take notice. In very recent years progress has been rapid, and there are now few to deny that it is best for society—is simply common sense—to try to float from off the rocks of the penal law and save, if possible, for future profitable voyaging, human vessels stranded there, whether by fog, or ill wind, or defective steering gear, or bad seamanship.

Quite obviously it is of fundamental importance that the nature of the particular vessel be considered, in order that proper measures may be adopted to save it; and Mrs. Jessie D. Hodder, superintendent of the reformatory for women at Framingham, Mass., made the following classification of women sentenced to reformatories for crime:

> With reference to intellect, they may be imbecile, moron, subnormal, dull, fair, or good; with reference to nervous organization, they may be normal, neuropathic, psychopathic, epileptic, or hysterical. These are only some of the factors which determine whether or not a delinquent woman needs permanent custodial care, may safely be returned to society after training, or presents a special and peculiar disciplinary problem. Proceedings of International Conference of Social Work, 45th Annual Session (1918) page 117.

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The one unqualifiedly reprobated and repudiated punitive institution is the county jail. It has no defenders, except local officials, jealous of centralized authority, and the sheriff, elected irrespective of qualification to rehabilitate men and women, even if he had facilities and opportunity, and whose compensation depends in part on fees for keeping and boarding prisoners. There is no opportunity for segregation, differentiation, and proper classification. There is no opportunity for discipline at all, much less discipline appropriate to individual need. There is nothing but detention, and detention in caged and demoralizing idleness, injurious to body and mind, crushing to the spirit, and tending to moral contamination and induration, rather than to moral upbuilding. The consensus of enlightened opinion is that the county jail is impossible as a place of punishment, and has no justification for its existence, except as a place of temporary keeping, in default of bail, pending final conviction.

Another relic of the stone age of penological theory and practice is the definite sentence for a fixed period for a specific crime. It has been well said that it is just as stupid, and infinitely more cruel, to sentence misdemeanants to jail for fixed periods as it would be to sentence sick people to a hospital for fixed periods. All penologists agree that the definite sentence should be abolished, because, if the primary object be to return to society as future assets those who are present liabilities, there must be classification, and there must be time, according to susceptibility and capability, for the remedial, reformatory, and educational processes to have their effect. In a given case, the period of detention may be quite short; but, according to need, the brain must be cooled, the nerves nourished and quieted, the clouded or deadened conscience cleared or quickened, the weakened will strengthened, the disordered mind, with its confused notions of right and morality, stabilized, and fresh impulses given outward, away from the old self, forward to new and hopeful things, and upward to self-respect and self-control.

Comprehension of the fact that punishment ought to fit, in some degree, not simply the crime, but the offender, led the Legislature to adopt the system of maximum and minimum penalties found in the Crimes Act and related statutes. Clearer comprehension led it to adopt, in recent years, the indeterminate sentence for felonies, except murder and treason (1903), and the parole system (1907).

Experience teaches that the greatest evil of prison life is idleness, and that the greatest benefaction which can be conferred on a prisoner is work adapted to his abilities and performed under clever plan and guidance. Work is indispensable to order and discipline, to physical and mental health, and to growth in moral strength and stature. Work should not be merely useless or formal, but should be at something capable of arousing interest and generating the feeling that what is done is worth while. There should even be some division of the profit from labor between the workman and his employer, the state. The best results are attained when work is performed in an environment as nearly as possible natural and normal, and the results of work done in the sunshine and wind and free air of the open outdoors, away from barred cells and frowning, guard-mounted walls, have been most gratifying. Some of the states are able to present records of success attending this method of treatment which, contrasted with old prison policies, are quite marvelous.

The circumstance that the new method of dealing with convicts happens to be more humanitarian than the old does not detract from its virtue. It has been adopted after trial, not from sentiment, but because of its demonstrated efficiency in protecting and promoting the true and ultimate welfare of society as a whole.

Long ago the Legislature made the first and most obvious classification of delinquents, and provided for segregaton of youthful offenders, and treatment of boys and girls in separate corrective institutions. By enactment of the industrial farm statute, the Legislature made the next most obvious classification, based on the distinction between male and female, and abolished the county jail and the penitentiary as places for the reformatory treatment of women.

The industrial farm law puts into practice the most advanced tenets of the new penology. The farm is under supervision of the state board of administration, the central body having control of all correctional, charitable, and educational institutions of the state. The superintendent is a woman. The farm is in fact a farm, and the buildings are constructed on the cottage plan. Provision is made against overcrowding, and there are no cells or bars or restraining walls. Careful classifications are made, according to the results of searching physical, mental, and moral diagnosis, and complete records are kept of all facts throwing light on cause of detention, proper plan of treatment, and progress of the individual. Medical and surgical treatment is administered. The discipline is educative and reformative, and the work includes agriculture, dairying, poultry raising, manufacturing, and practice of domestic arts and sciences. Small wages are allowed, and provision is made for parole and final discharge whenever compatible with the welfare of society, with full restoration of all civil rights.

It required no anatomist, or physiologist, or psychologist, or psychiatrist to tell the Legislature that women are different from men. In structure and function human beings are still as they were in the beginning "Male and female created He them." It is a

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patent and deep-lying fact that these fundamental anatomical and physiological differences affect the whole psychic organization. They create the differences in personality between men and women, and personality is the predominating factor in delinquent careers. It was inevitable that, in the ages during which woman has been bearer of the race, her unique and absolutely personal experiences, from the time of conception to the time when developed offspring attains maturity, should react on personality, and produce what we understand to be embraced by the term "womanhood." Woman enters spheres of sensation, perception, emotion, desire, knowledge, and experience, of an intensity and of a kind which man cannot know. Her individualities and peculiarities are fostered by education and by social custom—whether false and artificial or not is of no consequence here; and the result is a feminine type radically different from the masculine type, which demands special consideration in the study and treatment of nonconformity to law.

It is not worth while discussing the necessity of preventing promiscuous association of the sexes in prison. There must be complete segregation. Female wards in men's prisons, and female annexes to men's prisons, merely separate the sexes. They do not differentiate the problems of the delinquent female from the problems of the delinquent male. In 1869 the Legislature of the state of Indiana undertook to do this, by establishing a separate prison for women, to be officered and managed by women, and conducted according to the reformatory method as then apprehended. Since 1869 some 13 other states have established separate institutions for the treatment of delinquent women, on the definite principle of reclamation as opposed to naked punishment. The industrial farm, with buildings constructed on the cottage plan, has become an accepted type, and the indeterminate sentence has been almost, though not quite, universally adopted. An extended analysis of the statutes in existence prior to January 1, 1917, which therefore does not include the later statutes of Connecticut, Kansas, Michigan, and Rhode Island, may be found in volume 8 of the Journal of Criminal Law and Criminology, at page 518.

Many facts might be marshaled leading to the conclusion that the female offender not merely requires, but deserves, on account of matters touching the perpetuation and virility of the human species, correctional treatment different from the male offender, both in kind and in degree; but the general considerations, merely outlined above, are sufficient. Let it be conceded that the industrial farm for women may fail to accomplish the results hoped for; the statute represents a serious effort on the part of the Legislature to deal justly with a subject of great public concern, the proposed regulations are justified by reasoning apparently sound, supported by experience apparently verifying, and this court is not authorized to declare that the classification which the statute establishes is either arbitrary or unreasonable.

The judgment of the district court is affirmed.

All the Justices concurring.

(105 Kan. 121)

BONNETT v. FARMERS' & GROWERS' SHIPPING ASS'N et al.

(No. 22224.)

(Supreme Court of Kansas. June 7, 1919.)

(Syllabus by the Court.)

1. SALES ⟸4(5)—"BAILMENT" OR "SALE"—DELIVERY OF GRAIN TO ELEVATOR.

Plaintiff deposited grain in an elevator with the understanding that it was to be indiscriminately mixed in a mass with other grain from which the owner of the elevator had the privilege of shipping. There was no agreement that the elevator company would keep on hand an amount of wheat of like grade and quantity until plaintiff saw fit to dispose of his wheat, but it was the intention of plaintiff when the price was satisfactory to present to the elevator owner his scale ticket and receive the prevailing market price for the wheat. *Held*, that the transaction constituted a "sale," and not a "bailment."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bailment; Sale.]

2. WAREHOUSEMEN ⟸34(7) — CONVERSION — FINDINGS—EVIDENCE.

The evidence is considered, and *held* to sustain the findings of fact.

3. WAREHOUSEMEN ⟸34(7) — DELIVERY OF WHEAT TO ELEVATOR — FINDINGS — EVIDENCE.

From the plaintiff's admissions and other circumstances it is *held* to have been a reasonable inference that he understood he was to be paid in cash or grain of an equal amount and quality.

4. JUDGMENT ⟸241—SALES ⟸4(5)—DELIVERY OF WHEAT TO ELEVATOR—INCONSISTENT CAUSES OF ACTION—JOINDER.

The transaction being a sale, and not a bailment, it was the right of the elevator owner to treat the grain as its own and to make any disposition thereof it saw fit, being responsible to the plaintiff for the value; and in an action where plaintiff seeks and recovers damages for conversion against the corporation owning the elevator, he is not entitled to recover against officers of the corporation upon the ground that they permitted it to engage in unlawful grain speculations whereby it became insolvent, because the two remedies are inconsistent.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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(Additional Syllabus by Editorial Staff.)

5. SALES ⟸4(5)—DELIVERY TO ELEVATOR.

To establish fact of a bailment it was necessary for plaintiff, delivering wheat to an elevator, to show that from the inception of the transaction he retained the right to elect to demand the return of his wheat or other wheat of like grade.

Appeal from District Court, Rice County.

Action for conversion by Lee Bonnett against the Farmers' & Growers' Shipping Association and A. L. McMurphy, and others, as its stockholders and officers. Judgment for plaintiff against the defendant Association, denying judgment against the other defendants, and plaintiff appeals. Affirmed.

F. L. Martin, C. M. Williams, Van M. Martin, John M. Martin, and D. C. Martindell, all of Hutchinson, for appellant.

Sam Jones, of Lyons, J. R. Beeching, of Hutchinson, and Ben Jones, of Lyons, for appellees.

PORTER, J. The action was for the conversion of wheat which plaintiff alleged he had delivered to the defendant association to be placed in bins in its elevator and to be kept and held for storage. The shipping association is insolvent, and plaintiff joined as defendants several of its stockholders and officers, and alleged that they had converted the wheat to their own use, that certain of the directors, with the consent of others, caused the association to engage in illegal speculations in grain in the name of the association and for its benefit, and that some of the individual defendants had been engaged in the same kind of illegal transactions. Judgment was asked against all the defendants for the value of the wheat. Plaintiff was given judgment against the insolvent corporation for the value of the wheat, but was denied judgment against the other defendants, and appeals.

[1] The answer of the association alleged that the wheat was sold to the association, and was mixed and mingled with other wheat of different grades and kinds; that it was to be paid for at such time as plaintiff desired to settle, and at the market price on the date of settlement which was to be selected by him.

The principal question involved is whether the delivery of the wheat constituted a sale or a bailment. When it was delivered the association issued to plaintiff the usual scale ticket showing the number of bushels and grade, but otherwise the arrangement was verbal. The court, after making findings of fact, held that the transaction was a sale, and not a bailment. The following is the finding upon which the case turns:

"I find that the plaintiff placed 330 bushels of wheat in the elevator of the Farmers' & Growers' Shipping Association at Sterling, Kan., in the months of October and November, 1916, with the understanding that he was to be charged nothing for a short time and a reasonable charge thereafter; that the same was graded and weighed in to the company, and the loss by shrinkage was to fall upon the elevator company; that the said wheat was mixed and mingled with wheat belonging to the elevator company, and to various other persons, of varying grade and weight, with the knowledge and consent of the plaintiff; that there was no agreement or understanding between him and the elevator company that it would at all times keep on hand an amount of wheat of like grade and character as his until he saw fit to dispose of his wheat; that it was his understanding that it was optional with the elevator company to return to him on demand an equal amount of wheat of like grade and quality or to pay the then prevailing market price therefor; that it was the purpose and intention of the plaintiff, when the price was satisfactory to him, to present to the defendant the Farmers' & Growers' Shipping Association his scale tickets and to receive the price therefor in money; that he had no intention of receiving back a like amount and quality of wheat, unless the elevator company refused to pay the market value at the time of demand."

As conclusions of law the court held that under the facts and circumstances testified to by the plaintiff himself the transaction amounted to a sale, and not a bailment, and that, being a sale, there was consequently no conversion, and that plaintiff was not entitled to recover against any of the defendants, except the shipping association.

The court held, and we think properly, that the case falls within the rule declared in Barnes v. McCrea, 75 Iowa, 267, 39 N. W. 392, 9 Am. St. Rep. 473, where it was held that the transaction is a sale, and not a bailment—

"where grain is delivered to an elevator owner under an alleged oral agreement that the latter was to have the grain on paying the highest market price, or, in case he did not buy, to receive pay for weighing, but not for storage; it being known to the party who delivered the grain that it was indiscriminately mixed in a mass with other grain, from which the elevator owner was accustomed to ship when prices suited him."

The same general rule was stated in Scott v. Shultz, 67 Kan. 605, 607, 73 Pac. 903, where it is said:

"If the identical thing delivered is to be returned, it is a bailment, and there is no transfer of title; but if the one to whom it is delivered may return another thing of the same kind, or an equivalent in the form of money, or otherwise, it will ordinarily constitute a sale and effect a change of title."

"Where, however, grain is delivered to a warehouseman, who mixes it with that of others, under an express contract, or a contract

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implied from the usual course of business, that when the depositor chooses to call for it the warehouseman will pay the highest market price or return the same amount of grain of like quality, the transaction will not be deemed a bailment, but a sale with an option on the part of the purchaser to pay either in money or property as stipulated." 3 R. C. L. 76.

In Dobie on Bailments it is said:

"But, when the obligation imposed on the elevator keeper by the receipt of the grain is merely to return grain of a certain quantity and quality, then the transaction cannot be a bailment. The same is true when the keeper has the right to use any and all of the grain on payment therefor, either in money or other grain, without any duty of substitution of other grain therefor in the elevator, and also when the keeper has the option whether he shall return the grain delivered or pay for the grain. In all of these cases the keeper could destroy the grain when received without impairing the legal rights of the depositor, and this is here inconsistent with the legal notion of a bailment." Page 9.

[2, 5] It is insisted that the court did not properly consider evidence on the question of fact, and that the evidence clearly shows that plaintiff placed the wheat in the elevator with the express declaration that he was not ready to sell it, did not intend to sell it, and that other circumstances, including the fact that the shipping association made no return to the tax assessor indicating that the wheat belonged to it, showed the transaction was treated by the parties as a bailment, and not a sale. We think the plaintiff's admissions on his cross-examination were sufficient to support the findings.

But it is insisted that the finding to the effect that there was no agreement by the association to keep a like quantity or grade of wheat until demanded is unsupported by any evidence. In the first place, it devolved upon plaintiff to prove this. The controlling fact shown by plaintiff's testimony is that he was waiting for a price before he settled for his wheat, and that it was his understanding that, when he got ready to dispose of it, he would take his ticket in and they would settle with him at the market price. In order to establish the fact of a bailment, it was necessary for him to show that from the inception of the transaction he retained the right whether to elect to demand the return of his wheat, or other wheat of like grade, because, if he surrendered to the shipping association the right to pay either in money or in grain, the transaction constituted a sale. Savage v. Salem Mills Co., 48 Or. 1, 85 Pac. 69, 10 Ann. Cas. 1065. In a note to the same case in 10 Ann. Cas. 1076, authorities are cited holding that an agreement may be inferred to the effect that the depositor's wheat could be sold without keeping it or any other wheat to replace it, and in the note it is said, quoting from Lyon v. Lenon, 106 Ind. 567, 7 N. E. 311, that —

"The distinction is: Can the depositor by his contract compel a delivery of wheat, whether the dealer is willing or not? If he can, the transaction is a bailment. If the dealer has the option to pay for it in money or other wheat, it is a sale."

Other cases more directly in point are cited to the effect that, where grain is delivered to a warehouseman under an agreement that he may make such disposal of it as he sees fit, and that he shall pay the market price on the demand of the depositor, it is a contract of sale, and not of bailment merely. The present case falls within this distinction. The effect given by the trial court to the plaintiff's testimony is that he understood when he deposited the wheat that its identity was not to be preserved, and that he left it with the association to make such disposal of it as the association saw fit, with the agreement to pay him the market price on demand.

[3] The contention is made that the evidence does not sustain the finding that the shipping association was given the option to pay the market price on demand or to deliver the same kind and quantity of wheat. Plaintiff's own admissions show that the agreement and understanding was that his own wheat was not to be returned. He took it to the elevator and dumped it with the wheat of his neighbors and others who were waiting, as he was, for a price; he knew the capacity of the elevator and the usages of the business. He testifies:

"We had been hauling wheat and leaving it there till I got ready to sell it. I had wheat there all summer before, and I sold in September."

He further testifies:

That the wheat was put in the elevator and weighed, and that on the day he got ready to sell he would go in there on that test of the wheat, and settle with them for it.

"Q. Now, that was the understanding you had with them? A. There was never no understanding; it was my opinion.

"Q. That is the way they had been doing it? A. Yes, sir.

"Q. And you understood this was the way this was to be done? A. I supposed it was."

We think it was a reasonable inference to be drawn from his admissions that he understood his rights, and understood he was to be paid in cash or grain of an equal amount and quality.

[4] The petition set up the illegal acts of the individual defendants and that they had actual notice and knowledge of the acts of Forewalder, who made unlawful speculations in options, and that they participated in these transactions. The court made findings of fact upon the questions, and found that, be-

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ginning in February, 1916, the manager of the corporation began dealing in futures and options, that these transactions were carried on until they aggregated many thousand bushels of wheat and corn and ran into many thousand dollars, and that the company sustained heavy losses thereby, and that some of the defendants who were officers of the association knew of these facts. The contention is made that the court should have rendered judgment against the individual defendants because of fraud. It is insisted that, when the plaintiff delivered his wheat to the association, he was not aware of the unlawful transactions in which the company was engaged, and that by reason of the concealment of this from him at the time he has now a right to recover against the individuals. In our opinion, the court properly held that it was the right of the shipping association to treat the grain as its own and to make any disposition of it which it saw fit, being responsible for the value thereof to the plaintiff. The petition as drawn stated a cause of action for conversion with a prayer for damages. The ground upon which plaintiff sought to recover was that his wheat had been unlawfully converted by the corporation and the individual defendants. It is true that the unlawful transactions in which the company was permitted to engage with the knowledge and consent of the other defendants were alleged; but the plaintiff took the position and sought to establish the fact that he remained all the time the owner of the wheat. The two remedies are inconsistent. Ullrich v. Bigger, 81 Kan. 756, 106 Pac. 1073; James v. Lane, 103 Kan. 540, 175 Pac. 387; Pantel v. Bower, 104 Kan. 18, 178 Pac. 241.

The judgment is affirmed.

All the Justices concurring.

(180 Cal. 413)

In re McGUE'S ESTATE.

McGUE et al. v. McGUE.

(L. A. 5577.)

(Supreme Court of California. May 28, 1919.)

1. INSANE PERSONS ⟸42(3) — ORDER SETTLING ACCOUNTS OF GUARDIAN—CONCLUSIVENESS.

Where wife, as guardian of her husband, charged herself with entire interest in a note in which she had a half interest, as property belonging to the husband, the order of the court settling her account as guardian, and directing her to turn over the balance of said estate to administratrix of estate of husband, now deceased, was an adjudication against her that estate of deceased was the owner of the note and the whole thereof, and, where not appealed from, revoked, or reopened, is conclusive against her, and cannot be collaterally attacked.

2. INSANE PERSONS ⟸44—GUARDIAN—SETTLEMENTS OF ACCOUNT—DEATH OF WARD—JURISDICTION.

In view of Code Civ. Proc. § 1774, the court has jurisdiction in guardianship proceeding to settle the account of the guardian of an insane person after the death of the ward.

Department 1.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of John P. McGue, deceased. From an order of the superior court settling an account rendered by Elizabeth E. McGue, as administratrix of the estate of said deceased, Abram L. McGue and another appeal. Reversed.

Stephens & Stephens, of Los Angeles, for appellants.

Bordwell & Mathews and D. C. Burrey, all of Los Angeles, for respondent.

SHAW, J. The appeal herein is taken from an order of the superior court settling an account current rendered by Elizabeth E. McGue as administratrix of the estate of John P. McCue, deceased.

In the account the administratrix charged against herself the sum of $138,068.41 as the amount of inventory and appraisement. This inventory and appraisement included a one-half interest in a certain note executed by one Boggs on December 16, 1913, payable to the decedent, John P. McGue, and the said Elizabeth E. McGue, who was then his wife, for the sum of $8,500. In the inventory the estate was given credit for only a one-half interest in this note, and it was appraised therein at $4,250. Consequently the account covered but a one-half interest in the note. Abram L. McGue, a brother of the decedent, and Delbert McGue, the son of a deceased brother, the appellants herein, filed exceptions to the account, alleging that the decedent at the time of his death owned the entire interest in the Boggs note, and that the account was incorrect and false in so far as it failed to charge against the administratrix and credit to the estate the whole amount of said note. The appellants are heirs of the decedent, but not the only heirs.

The respondent in answer to the exceptions alleged that at the time of the execution of the Boggs note in 1913 McGue made a gift to her of a one-half interest in the note and in the mortgage given to secure the same, and that she thereby became the owner of said one-half as her own property. She further alleged that thereafter, on September 22, 1915, some four months before McGue's death, he was duly adjudged to be an incompetent person and that she was appointed his guardian; that as such guardian she filed an inventory and appraisement of his estate, in

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which the entire interest in said note was by mistake listed as belonging to the ward and was valued at $8,500; that her said husband died on January 21, 1916; that thereafter, in preparing a final account as such guardian, she failed to observe said error in the inventory; and that by charging herself with the amount of said inventory she charged herself as guardian with the entire interest in said note as property belonging to her said husband. She also alleged that she did not discover said mistake and was not aware that this said account and inventory included the entire interest in said note as the property of the ward until shortly afterwards, when she came to make out her inventory as the administratrix of the estate of said decedent.

Upon the trial the court made findings to the effect that the administratrix was the owner of the one-half interest in said note at all times, and that the estate of McGue, deceased, owned the other one-half interest therein, and that she should be charged with only one-half thereof in her account current as administratrix, and settled the account accordingly. The appellants claim that the evidence does not support the finding that Mrs. McGue was at all times the owner of said one-half interest in said note.

We do not find it necessary to examine carefully the evidence in proof of the gift by John P. McGue to his wife, of a one-half interest in the Boggs note. Assuming it to have been sufficient to support the express finding that such gift was made, we are nevertheless of the opinion that such proof was unavailing to support the order, for reasons presently to be stated.

[1] On the trial there was introduced in evidence the inventory rendered by Mrs. McGue as guardian of her said husband, her final account as such guardian, and the order of the court settling said account and directing her as such guardian "to turn over the balance of said estate to the legally appointed administratrix of the estate of John P. McGue, deceased." This order was an adjudication against her of the fact that the estate of her deceased husband, and not herself, was the owner of said note and of the whole thereof, and, as it had become final, it was conclusive of that fact as against her. Brodrib v. Brodrib, 56 Cal. 563; Guardianship of Wells, 140 Cal. 353, 73 Pac. 1065. The law is thus stated by Mr. Woerner:

"On the termination of the guardianship * * * the accounting between the guardian and ward, or between them and their respective representatives, is final, and the order, judgment, or decree thereon by the court having jurisdiction is necessarily conclusive against all the world, like any other judgment by the court having jurisdiction of the subject-matter and of the parties. * * * Unless appealed from, revoked, or reopened, such settlement cannot be collaterally attacked * * * in any collateral proceeding." Woerner on Guardianship, p. 327, § 98.

He states only this qualification of the doctrine:

"As to all matters lawfully embraced therein, the final settlement is conclusive; but matters not embraced therein are not concluded, and the ward may recover of the guardian personally a fund which came to the guardian's hands before his appointment, and which was never accounted for in his settlements." (Id. p. 340.)

[2] The court has jurisdiction, in the guardianship proceeding, to settle the account of a guardian after the death of the ward. Code Civ. Proc. § 1774.

In view of these principles we are bound to conclude that the finding that the respondent is the owner in her own right of one-half interest in the Boggs note is contrary to the law and the evidence.

The order is reversed.

We concur: OLNEY, J.; LAWLOR, J.

(180 Cal. 396)

In re ROUNDS' ESTATE. (L. A. 5945.)

(Supreme Court of California. May 20, 1919.)

1. WILLS ⟸489(1)—INTENT OF TESTATRIX—SUFFICIENCY OF EVIDENCE.

Evidence *held* insufficient to prove that a bequest to sisters and brothers "living" meant those living at time of execution of will.

2. WILLS ⟸440 — CONSTRUCTION — PHRASEOLOGY.

Court, in construing will, is bound by its phraseology as written.

3. WILLS ⟸524(2) — CONSTRUCTION — "LIVING."

Where bequest was to sisters and brothers "living," children of sister and brother living at time of execution of will, but who predeceased testatrix, were not entitled to share in bequest as descendants under Civ. Code, § 1310; the word "living," in view of section 1336, referring to time of testatrix's death.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Living.]

Department 2.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Sarah C. Rounds, deceased. From an order refusing to make partial distribution of assets of estate to certain nieces and nephews of deceased, they appeal. Affirmed.

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Hammack & Hammack and D. S. Hammack, all of Los Angeles, for appellants.

Charles Lantz, Howard F. Shepherd, Marc Ryan, L. V. Shafer, Mulford & Dryer, Porter & Sutton, and Slosson & Mitchell, all of Los Angeles, for respondents.

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MELVIN, J. This is an appeal by certain nieces and nephews of Sarah C. Rounds from an order refusing to make a partial distribution to them of the assets of her estate by reason of the fact that they are heirs, respectively, of her sister, Mary E. Barbour, and her brother, Hiram Edwards.

Mrs. Rounds died testate. She left certain legacies to charity and to nephews and nieces, and her will contained the following provision: "To each of my sisters and brothers living five hundred ($500) dollars." At the time the will was executed she had two sisters and a brother living. Two of them Hiram A. Edwards and Mrs. Mary E. Barbour, predeceased the testatrix. Appellants here, who are the sons and daughters of the deceased sister and brother of Mrs. Rounds, are, under section 1310 of the Civil Code, as they assert, entitled to take, as descendants, their proportions of the legacies of these predeceased beneficiaries under the will of Mrs. Rounds.

[1] The whole question presented to this court turns upon the interpretation of the word "living" as used in the will. Appellants cheerfully concede that ordinarily a will speaks as of the time of the death of the testator or testatrix, but they insist that in the present case the evidence indicates, conceding its admissibility, that the testatrix intended to use the word as applying to the time of the execution of the testament. With this view we are unable to agree. The only witness whose testimony appears in the record is Mary C. Rodgers, a friend of Mrs Rounds, who advised and assisted her in her business matters and who drew her will. Mrs. Rodgers made several rough drafts of wills for her friend before the one now in course of probate was executed. One of these contained the following provision:

"To each of my brothers and sisters living two hundred ($200.00) dollars. Their names Mrs. Mary M. Barber, Mrs. Helen Augusta McOmber, William J. Edwards and Hiram A. Edwards."

[2, 3] After the preparation of this rough draft William Edwards died, and his sister then drew a pencil line through his name. Mrs. Rounds then told Mrs. Rodgers that she had one brother and two sisters who were still alive, and that she wanted provision made for them to the extent of $500 each. Mrs. Rodgers then wrote the clause of the will which is here in dispute, and she testified: "I do not think that Mrs. Rounds suggested the use of the word 'living' in this connection." We do not see how this testimony indicates the intention of the testatrix to use the word "living" as of the date of the execution of the will. Surely the mere elimination of the name of her deceased brother, William, from the rough draft would indicate no such intention unless it were accompanied by some direction that his share should be apportioned according to the statute of descents or in some similar manner ratably. The fact that Mrs. Rodgers used her own phraseology rather than that of Mrs. Rounds is not at all significant, because by subscribing the instrument Mrs. Rounds adopted the language, and we are bound by the phraseology as written. Words in a will referring to survivorship simply relate to the time of the testator's death. Section 1336, Civ. Code; Estate of Alexander, 149 Cal. 146, 85 Pac. 308, 9 Ann. Cas. 1141; In re Winter, 114 Cal. 186, 45 Pac. 1063. In many other jurisdictions this, too, seems to be the general rule. 40 Cyc. p. 1424; McCoury's Executors v. Leek, 14 N. J. Eq. 70, 76.

The order from which this appeal is taken is affirmed.

We concur: LENNON, J.; WILBUR, J.

(180 Cal. 395)

In re CLARK'S ESTATE.

Appeal of O'BARN.

(S. F. 8714.)

(Supreme Court of California. May 21, 1919.)

1. APPEAL AND ERROR ⟸930(2) — PRESUMPTION—CORRECT INSTRUCTION FOLLOWED.

It cannot be presumed that jury disobeyed instructions and decided case outside of issues.

2. APPEAL AND ERROR ⟸1066 — REVIEW — HARMLESS ERROR.

An instruction, correct in law but on subjects outside the issues, is not cause for reversal, unless it tends to mislead the jury as to the question for decision.

3. WILLS ⟸323 — PROBATE PROCEEDINGS — ARGUMENT OF COUNSEL.

That testatrix had previously executed similar wills and was then of sound mind is a legitimate subject for argument as to her sanity while executing the will in question.

4. TRIAL ⟸240—INSTRUCTIONS—ARGUMENTATIVE INSTRUCTIONS.

While the giving of an instruction argumentative in form may not always be cause for reversal, the court is not bound to give it, even if the argument therein be a legitimate one.

5. TRIAL ⟸244(3)—PROBATE PROCEEDINGS—INSTRUCTIONS EMPHASIZING FACTS.

A requested instruction that testatrix had previously executed similar wills and was then

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of sound mind, and that such fact did not necessarily establish her sanity when executing the will in question, was erroneous, as emphasizing facts tending to prove or disprove an ultimate fact in issue.

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6. TRIAL ⟸253(8)—INSTRUCTIONS—IGNORING ADMITTED FACT—TESTAMENTARY CAPACITY.

Where execution of will was admitted, the phrase "at the time it is claimed the said will was made," in a requested instruction on testamentary capacity, improperly suggests that execution was still in issue, and was correctly modified by substituting the phrase, "at the time of the execution of the will."

7. WILLS ⟸330(1)—PROBATE PROCEEDINGS—INSTRUCTIONS—TESTAMENTARY CAPACITY.

A requested instruction on testamentary capacity, stating that the jury have "a right to consider" the terms of the will, is properly modified by substituting the statement that the jury "are to consider all the evidence."

8. WILLS ⟸330(1)—PROBATE PROCEEDINGS—INSTRUCTIONS—TESTAMENTARY CAPACITY.

A requested instruction that testatrix was of unsound mind if she did not understand while signing the will "each and all of its provisions" was not improperly modified by substituting the phrase "its provisions."

9. WILLS ⟸383—PROBATE PROCEEDINGS—INSTRUCTIONS—HARMLESS ERROR.

The elimination of the phrase, "I charge you her mind was unsound," in a requested instruction, was not harmful, where the succeeding phrase stated substantially the same thing.

10. APPEAL AND ERROR ⟸1170(9)—REVIEW—HARMLESS ERROR.

In a will contest on the ground of mental incapacity, rulings as to instructions, if technically erroneous, will not cause a reversal, where the case made by contestants that testatrix was of unsound mind was extremely weak, while the great preponderance of the evidence was in favor of proponents, in view of Const. art. 6, § 4½.

Department 1.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Proceedings to probate the will of Bridget Clark, deceased, in which James Egan and E. M. Leonard as executors were proponents and John J. O'Barn was contestant. Revocation of an order admitting the will to probate was refused, and John J. O'Barn appeals. Affirmed.

Walter H. Linforth and Samuel M. Samter, both of San Francisco, for appellant.

Edward I. Coffey, Jeremiah B. Coffey, Garret W. McEnerney, Andrew F. Burke, and Edward M. Leonard, all of San Francisco, for respondents.

SHAW, J. This is an appeal from an order refusing to revoke a previous order admitting to probate a certain document as the last will of Bridget Clark, deceased.

It was admitted that the will was duly executed. The only ground of contest presented at the trial was that at the time of its execution the decedent was not mentally competent to make a will. The verdict was against the contestants. The only points urged in support of the appeal are certain rulings in the giving and refusing of instructions.

One of the instructions given was to the effect that the will purported to give more than one-third of the estate to charitable purposes, and "that the amount by which the sums so bequeathed for charitable purposes exceed one-third of the estate of said decedent will go to the persons and in the proportions in which the estate of said decedent would have descended had she died intestate."

The appellant concedes that this is a correct statement of the law on the subject, but objects to it on the ground that it was directed to a point that was not in issue, that it was irrelevant, and that the jury may have been induced to give a decision against the contestant because of the fact that it informed them that he would receive a substantial part of the estate, even if the will, which gave him nothing, were allowed to stand unrevoked.

The closing instruction was as follows:

"Gentlemen, the only issue for you to determine in this case is the question whether or not Bridget Clark was of sound and disposing mind at the date of the execution of the will in question, which was on the 21st of September, 1915, and to that you will answer yes, or no, according as nine of your number conclude."

The court then gave the jury a prepared form of verdict, which the jury answered and returned as follows:

"We, the jury in the above-entitled cause find a special issue. Was the decedent, Bridget Clark of sound and disposing mind on the 21st of September, 1915, at the time of the execution of the will in question? Answer: Yes. Edward A. Dakin, Foreman."

[1, 2] Over and over again the instructions repeated the statement that this was the only thing the jury was to decide, and that it must be decided from the evidence in the case. The instructions on the subject were complete, elaborate, and clear. We cannot, on appeal, indulge in the surmise that the jury may have disobeyed these elaborate and express instructions of the court, disregarded their oaths to decide the cause from the evidence introduced and in accordance with the law as given them by the court, and may have gone afield upon an inquiry as to the extent of the estate and the amounts which the interested parties would ultimately receive. The instruction objected to did not

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direct them to such inquiry. The giving of it may have been suggested by the closing argument of counsel for appellant to the jury, wherein he erroneously stated that under the provisions of the will, as made, $24,000 of the $39,000 estate would go to the church. But, however this may be, the instruction was correct in point of law, and, though it may have been irrelevant to the issue, there was nothing in it which could tend to mislead or confuse the jury with regard to a question so clearly and precisely submitted for its decision. An instruction correct in law, but upon a subject that is outside the issues, is not cause for a reversal, unless it tends to mislead the jury as to the question for decision. George v. Los Angeles Ry. Co., 126 Cal. 361, 58 Pac. 819, 46 L. R. A. 829, 77 Am. St. Rep. 184; 14 Ruling Case Law, 782; People v. Park, 62 Cal. 206.

Two previous wills of the testatrix, one dated July 12, 1910, the other November 14, 1912, each making dispositions of her estate similar to those made in the will in question, were admitted in evidence. The appellant asked the court to instruct the jury that these wills were to be considered as well as all the other evidence admitted, and that if they should find they were executed by her, and that she was then of sound mind, "it does not necessarily follow from these facts, and these facts alone, that at the time of the alleged execution of the will in question she was of sound mind," and that they "should give these facts only such consideration as in your judgment they may be entitled to."

[3-5] The statement included in the instruction that the fact that she had previously executed similar wills, and was then of sound mind, did not necessarily establish the fact that she was of sound mind when she executed the later will in controversy is in the nature of an argument to the jury. It was a legitimate argument for the appellant's attorney to advance in his address to the jury. Opposing counsel could with equal propriety argue that the fact of the execution of two similar wills when she was admittedly of sound mind was sufficient evidence to satisfy the jury of her sanity when she made the will in question. But it is not the province of the court to make an argument to the jury, and though the giving of an instruction argumentative in form may not always be cause for reversal, it is also true that the court is not bound to give such an instruction even if the argument be a legitimate one, and the refusal thereof is not error. People v. Stanton, 106 Cal. 139, 142, 39 Pac. 525; People v. Williams, 17 Cal. 147; People v. Hertz, 105 Cal. 665, 39 Pac. 32; Birmingham, etc., Co. v. Martin, 148 Ala. 8, 42 South. 618; 38 Cyc. 1600. Furthermore, it violated the rule that the court need not give an instruction which emphasizes one of the facts, among others, which tend to prove or disprove an ultimate fact in issue. The instructions given were to the effect that the jury should consider all the evidence introduced at the trial bearing on the condition of her mind prior to, at the time of, and subsequent to the date of the will in question, and that the jury should consider her state of mind on other occasions only in so far as the same sheds light upon her state of mind when the will in question was executed. The refusal of the instruction could not have been prejudicial.

The third ruling complained of was in modifying the following instruction asked by the appellant:

"In determining the question of the soundness or unsoundness of mind of Bridget Clark, at the time it is claimed the said will was made, you have a right to consider the terms and provisions thereof, and if you believe from the evidence that, at the time of the signing of the said instrument, she did not have the mental capacity to understand each and all of its provisions, and in fact did not understand each and all of its provisions, then I charge you her mind was unsound, and your answer to the issue, Was she of sound mind at that time? will be No."

As modified by the court and given it was as follows:

"In determining the question of the soundness or unsoundness of mind of Bridget Clark, at the time of the execution of the will in question, you are to consider all of the evidence herein, and if you believe from the evidence that, at the time of the signing of the said instrument, she did not have the mental capacity to understand its provisions, and in fact did not understand its provisions, then your answer to the issue, Was she of sound and disposing mind at that time? will be No."

[6-9] The court correctly struck out the phrase "at the time it is claimed the said will was made" and inserted in lieu thereof the phrase "at the time of the execution of the will." At the trial the execution of the will was admitted, and it was improper for the court to suggest, as the requested instruction did, that its execution was still under consideration. The substitution of the statement that the jury "are to consider" the evidence, for the statement requested that they have "a right to consider" it, was, of course, correct. Instead of limiting their attention, as the instruction requested provided, to "the terms and provisions" of the will in question, the instruction as given directed the jury to consider all of the evidence herein. This was a correct instruction, while that requested might have misled the jury to confine their consideration to the will alone. The substitution of the phrase "its provisions," referring to the will, for the phrase "each and all of its provisions," was

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not improper. The elimination of the phrase in the requested instruction, "I charge you her mind was unsound," was not harmful, inasmuch as the succeeding phrase stated substantially the same thing.

[10] Finally, it may be said that even if the rulings complained of had been technically erroneous, it cannot be said that they were prejudicial or that their effect was such as to cause a miscarriage of justice. The case made by the appellant regarding the mental condition of the testatrix at the time of the execution of the will was an extremely weak one. On the other hand, the proponents of the will introduced an abundance of evidence satisfactory in character, showing that the decedent was then of sound mind. The great preponderance of the evidence was in favor of the proponents. Under these circumstances, the judgment cannot be reversed. Constitution, art. 6, § 4½.

The order is affirmed.

We concur: LAWLOR, J.; OLNEY, J.

(180 Cal. 437)

PERKINS v. TRUEBLOOD. (L. A. 4951.)

(Supreme Court of California. May 29, 1919.)

1. PHYSICIANS AND SURGEONS ⟸18(7)—MALPRACTICE—EVIDENCE—ADMISSIBILITY.

In a malpractice case, evidence regarding a fracture, and condition of plaintiff's leg previous to defendant's alleged negligent treatment thereof, *held* admissible.

2. LIMITATION OF ACTIONS ⟸55(3) — MALPRACTICE CASE.

A malpractice case, instituted within one year of defendant's alleged negligent treatment, but over a year after plaintiff's leg had been fractured and defendant's treatment had commenced, was not barred by Code Civ. Proc. § 340, subd. 3, prescribing a one-year limitation period in such cases.

3. PHYSICIANS AND SURGEONS ⟸18(8)—MALPRACTICE—SUFFICIENCY OF EVIDENCE.

Evidence *held* not to sustain finding that defendant physician was negligent in setting and treating plaintiff's fractured leg.

Department 2.

Appeal from the Superior Court of Kern County; Howard A. Peairs, Judge.

Action by C. W. Perkins against W. E. Trueblood. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Stratton & Kaufman and Wm. P. Hubbard, all of San Francisco, and Rowen Irwin, of Bakersfield, for appellant.

Emmons & Hudson, of Bakersfield, for respondent.

LENNON, J. This is an action for damages, wherein the plaintiff recovered judgment against the defendant, a physician and surgeon, for alleged negligence in the performance of a surgical operation upon the plaintiff in setting a broken leg. The negligence relied upon for a cause of action is charged in those allegations of the complaint which aver:

"That the plaintiff herein by an accident broke his leg during the month of April, 1912. That thereafter the plaintiff employed the defendant, who is a surgeon, as such surgeon, for a reasonable reward to be paid therefor, to set and heal the same. That the defendant so negligently and unskillfully conducted himself, in attempting to set said leg of the said plaintiff, that the broken portions of the said leg were not joined, and that at both ends of the said fracture the parts overlapped, and the same did not heal or become strong, and that subsequently the same leg broke again at the same place without any fault of the said plaintiff."

The denial of these allegations, coupled with the defense of the statute of limitations, which was specially pleaded, presented the only issues in the case.

The complaint in the action was filed on April 9, 1913. The court below tried the case without a jury, and made its findings in favor of the plaintiff, which in substance were that the plaintiff broke his leg in March, 1912; that the defendant was employed to reduce the fracture; that, the fracture not satisfactorily healing, the defendant separated the surfaces of the bone during the month of April, 1912, and again set the plaintiff's leg; that the defendant performed the latter operation negligently; and that by reason thereof the plaintiff had suffered damage in the sum of $1,250.

[1, 2] The appeal is from the judgment, and presents the question of the sufficiency of the evidence to support the findings and also the question of the correctness of rulings admitting evidence concerning the plaintiff's condition and the defendant's surgical treatment of him prior to April 9, 1912. While the court's findings rested the plaintiff's cause of action upon the defendant's negligent resetting of the plaintiff's leg in April, 1912, nevertheless it would seem that the trial court proceeded upon the theory, and correctly so, we think, that the negligence ultimately found against the defendant was dependent in a measure upon the condition of the plaintiff's leg at the time of and subsequent to the setting of the original fracture which the trial court found, and the undisputed evidence shows, occurred in March, 1912. Upon this theory, evidence relative to the original fracture, its treatment and progress, and process of its healing, was admissible, to the end that it might be determined whether or not the

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methods resorted to by the defendant in resetting the leg on or after April 9, 1912, were of a nature which an ordinarily skillful surgeon would have given to a leg in such a condition. This being the theory of the case and the judgment, it follows that there is no merit in the contention that the commencement of the action was barred by subdivision 3 of section 340 of the Code of Civil Procedure.

[3] The plaintiff's case, as revealed by the evidence, seems to rest upon the contention that as a result of the defendant's negligent treatment of the fractured leg on and after April 9, 1912, he was caused great physical pain and suffering, that he could not pursue his usual vocation by reason of the fact that he did not have the full use of the leg, and that some 10 months later the same leg was again broken in the same place in a fall which would not have fractured the leg, if it had been properly treated by the defendant upon the occasion of the second setting. In this connection, it will be noted that, in spite of the great suffering and financial loss claimed to have been endured by the plaintiff for a period of 10 months following the last treatment by the defendant, it affirmatively appears that the defendant was not requested to give any further treatment, and that the plaintiff failed to place himself under the care of any other surgeon. Moreover, apart from the testimony of Dr. Rogers that the plaintiff said that the second fracture was caused by a fall of 3 or 4 feet on an oil rig, and the testimony of the plaintiff that he did not fall over 12 inches, there is no evidence of any circumstance preceding or attending the fall. In view of the fact that a person may snap a perfectly sound leg in a fall of 12 inches or less, the claim that the defendant's negligence was the proximate cause of the second fracture finds, to say the least, very slight support from the facts revealed by the record. Upon this analysis of the case, we find it difficult to consider seriously the claims advanced by the plaintiff. Nevertheless the trial court has entered its findings in favor of those claims, and we shall review the evidence adduced upon the whole case, in order to determine whether it is sufficient to support the findings.

The only evidence which appears to support the finding that the surfaces of the bones were separated in April, 1912, is found in the testimony of Dr. C. A. Rogers. Upon being handed an X-ray photograph of the leg, taken on April 28 or April 29, 1912, Dr. Rogers remarked that, inasmuch as no sign of a callus appeared, he should judge that the leg had been set very recently—a few days prior to the date of the photograph. A callus is a formation of new bony tissue found between and around the fractured ends of a broken bone in the process of reuniting, and we must infer from Dr. Rogers' testimony that, if it forms at all, it begins to show in an X-ray photograph within a few days after the process of reuniting begins. Therefore the fact that Dr. Rogers saw no sign of a callus in the photograph taken on April 28 or April 29, 1912, merely tends to show that no callus was ever formed around the break in question prior to that date. But that fact, if true, cannot serve as the basis for the further inference that a setting of the leg took place a few days prior to the date of the photograph. That this must be so appears from the undisputed fact that the plaintiff originally broke his leg on March 6, 1912, and that it was set on the following day. Since it necessarily follows from Dr. Rogers' testimony that no callus formation appeared at all or at any time after that setting and prior to the date of the photograph, the absence of a callus cannot be taken to indicate a resetting a few days prior to April 28 or April 29, 1912.

But, even assuming that the evidence supports the findings that the defendant separated the surfaces of the fractured bone and reset the leg in April, 1912, still we are of the opinion that the evidence does not show that the defendant failed to use reasonable prudence and skill in performing that operation or in treating the leg thereafter. It is true that there is some evidence which tends to show that at the time of the fall and the second fracture the ends of the broken bone overlapped nearly one-half of an inch, and that there was no complete bony union prior to the treatment of another physician for the final fracture resulting from the fall. In the absence, however, of a showing that such a condition would have been at least improbable, had the leg received reasonably prudent and ordinarily skillful surgical treatment, it cannot be said that the mere pathological condition of the leg in and of itself sufficed to show negligence on the part of the defendant in resetting the leg.

"The difficulties and uncertainties in the practice of medicine and surgery are such that no practitioner can be required to guarantee results, and all the law demands is that he bring and apply to the case in hand that degree of skill, care, knowledge, and attention ordinarily possessed and exercised by practitioners of the medical profession under like circumstances." Zoterell v. Repp, 187 Mich. 330, 153 N. W. 695.

With respect to the failure to attain a complete bony union, the plaintiff's experts themselves testified that there was no way for an average or even a skilled surgeon to tell whether ligamentous or bony tissue was being deposited between and around the fractured ends of a broken bone in the process of reuniting, without opening the wound. While Dr. C. A. Rogers testified

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that it was good surgery to open the wound and staple the bone, especially where, as here, there was an oblique fracture, none of the experts gave it as their opinion that it was not good practice to rely altogether upon casts and splints, as did the defendant in the instant case.

Concerning the overlapping, the plaintiff's expert, Dr. C. A. Rogers, said:

"Sometimes you will have a bone slip with the best in putting on splints anyway."

Again, referring to the break treated by the defendant, he said:

"The break runs obliquely, as distinguished from straight across. Where a bone is broken in that form, it is absolutely a general proposition in surgery more difficult to set that bone in place and hold it in place than where it is straight across. We do not expect to get a perfect alignment of the bone, where the character of the break is such as was this bone."

Dr. Homer Rogers added:

"It is more difficult to reduce a fracture of that character than in reducing a transverse fracture. I would not insure that the reduction of a fracture of the character in question would be perfect."

None of the experts gave it as their opinion that the use of reasonable care and skill would have insured a more perfect reduction.

It follows, from the foregoing analysis of the evidence, that negligence on the part of the defendant must be predicated, if at all, upon some act or omission in the course of the treatment of the fracture by the defendant shown to have been imprudent or unskillful. There is no direct testimony to the effect that the surfaces of the bone were in fact separated during the month of April. There is therefore no direct testimony as to the method adopted by the defendant in aligning the bones and reducing the fracture at that time, even assuming that he did make an attempt to realign the bones and reduce the fracture anew. In the absence of evidence, it cannot be assumed that he proceeded, if he proceeded at all, without ordinary care or skill. It will be necessary, therefore, upon this view of the case, to confine our attention to a consideration of the acts of the defendant as to which there is evidence in the record. It appears that a plaster of paris cast was put on the leg on April 9, 1912; that another cast was put on on April 12, and possibly another on April 17; that the cast was removed on April 25; and that a yucca splint was then put on and held in place by a light bandage. The following testimony of the defendant concerning the circumstances attending and following the treatment of April 25, 1912, is uncontradicted:

"I put on what is called a yucca splint—a splint made from material gotten from the yucca plant for that particular purpose. I put that on and bandaged, and the patient wanted to go to the ranch, I believe the Panama ranch, and I told him he could go by being careful and using his crutch all the time, keeping the splint on for about two weeks from the time that I put it on. * * * I did not see him any more for some time, as he went to the Panama ranch, or some place else, I don't know where. * * * I do not remember of having seen him between that and the time I saw him in April [July], as in the meantime I had gone South on a vacation, and he knew I was going. I told him, if this thing didn't go right, to go on to Dr. Kellogg, or some doctor, to see to it for him during my absence."

There is no evidence to show that he was thereafter called upon to give any further treatment, or to take any further responsibility in the case. There was no testimony of any expert witness who said that anything covered by this treatment was improper, or that there was anything lacking in the treatment which would have been included by a reasonably prudent and skillful surgeon.

In McGraw v. Kerr, 23 Colo. App. 163, 128 Pac. 873, it is said:

"Negligence on the part of a physician consists in his doing something which he should not have done, or in omitting to do something which he should have done."

Quoting further from the same case:

"The authorities are practically uniform in holding * * * that as to what is or is not proper practice in examination and treatment, or the usual practice and treatment, is a question for experts, and can be established only by their testimony."

See, also, Houghton v. Dickson, 29 Cal. App. 321, 155 Pac. 128; Hesler v. California Hospital Co., 174 Pac. 654.

The evidence wholly fails to show any lack of care and skill on the part of defendant in setting and treating the fractured bone of plaintiff's leg.

The judgment appealed from is reversed, and the case remanded for a new trial.

We concur: WILBUR, J.; MELVIN, J.

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(180 Cal. 430)

In re HOYTEMA'S ESTATE. (S. F. 8843.)

(Supreme Court of California. May 29, 1919. Rehearing Denied June 28, 1919.)

1. WILLS ⟸865(1)—CONSTRUCTION—PARTIAL INTESTACY.

A will directing that in case of testatrix's death it be sent to her brother, and that, should he be dead, named nieces were to sell testatrix's property and divide it between children of a named sister, with two specific bequests of $500 each, *held* to make division of the property among the children of the named sister contingent and conditional upon testatrix's brother's death, so that, he being alive, the two specific bequests constituted the only effective disposition made by the will, and as to the residuum testatrix died intestate.

2. WILLS ⟸448—CONSTRUCTION FAVORABLE TO TESTACY.

Constructions leading to intestacy, total or partial, are not favored, and will be rejected when the language used reasonably admits of a construction that renders the will effective as to all the property of the decedent.

3. WILLS ⟸440 — CONSTRUCTION — INTENT—LANGUAGE OF WILL.

Although the language used must be liberally construed with a view to carrying into effect what the will as a whole shows was testator's true intent, this intent must, according to Civ. Code, § 1318, be found in the language used in the will, taking into view, in cases of uncertainty arising upon its face, the circumstances under which it was made.

4. WILLS ⟸448 — CONSTRUCTION FAVORING TESTACY.

Courts are not permitted, in order to avoid a conclusion of intestacy, to adopt a construction based on conjecture as to what the testator may have intended, although not expressed.

Shaw, Lawlor, and Olney, JJ., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the estate of Jennie Hoytema. Appeal from decree of partial distribution. Affirmed.

Shelton & Levy, of San Francisco, for appellants.

Lloyd S. Ackerman, Joseph E. Reardon, Wm. M. Abbott, and Wm. M. Cannon, all of San Francisco (Kingsley Cannon, of San Francisco, of counsel), for respondent.

ANGELLOTTI, C. J. This is an appeal from a decree of partial distribution. The only appellants are the four children of decedent's deceased sister, Anna Mathieson, residents of the kingdom of Denmark, who claim that under a writing admitted to probate as the last will of decedent they are entitled to all of the estate of deceased except two legacies of $500 each. The lower court concluded that such writing was insufficient as a will or otherwise to dispose of the estate of decedent except as to the said two legacies, and that as to all of the estate over $1,000 so disposed of the decedent must be held to have died intestate. The effect of the decision is that, except as to $1,000 to be paid on the two legacies, the estate of decedent will go, one-third to Hans Peter Nelson, surviving brother of decedent; one-third to the three surviving children of her deceased sister, Bena G. Edwardson, one of whom is named Agnes; and one-third to the appellants here, the surviving children of her deceased sister Anna Mathieson, these being all of her heirs at law.

The record is such that we are bound by the finding of the lower court as to the contents of the will, which, the bill of exceptions shows, was entirely written, dated, and signed by the hand of the decedent, and was almost entirely in the Danish language. The trial court by a finding unquestioned by any specification of insufficiency, declared the same to be in the words and figures following:

"San Francisco, October 5, 1915.

"I am writing these lines in case I should meet with an accident or in any other way die then it is my wish if my brother Hans Peter Nelson is alive send this letter to him. Should he be dead then it is my wish that by brother's daughter Emma and my dead sister Bena's daughter who lives in Chicago, her name is Agnes, shall together sell all my property and divide equally between my dead sister Anna's children by name Engeborg, Anna, Alfrida, and Otto, living in Copenhagen and Nakskov. It is my wish that my niece Emma Nelson receive $500 extra for her taking care of me. It is also my wish that my friend Mrs. Rosa Friis shall be given $500.

"Mrs. Jennie Hoytema,
"94 Sanches Street."

"P. S. My safe deposit box is in the Humboldt Savings Bank No. 295."

The niece, Emma Nelson, referred to herein is the daughter of the brother, Hans Peter Nelson, who survived decedent.

[1-4] The lower court was of the opinion that the testamentary disposition so apparently made in favor of the children of the dead sister Anna was conditioned upon the death before her own death of her brother, Hans Peter Nelson. This view was upheld by the decision of Department 2 of this court, the opinion being written by Mr. Justice Lennon, and upon mature consideration we believe this to be the correct view. We recognize that this construction results in almost total intestacy, in view of the fact that her brother survived decedent, and also that constructions leading to intestacy, total or par-

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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tial, are not favored, and will be rejected when the language used reasonably admits of a construction that renders the will effective as to all the property of the decedent. It is also an elementary rule in the construction of wills that the language used must be liberally construed with a view to carrying into effect what the will as a whole shows was the real intent of the testator. This intent, however, must be found in the language used in the will, taking into view in cases of uncertainty arising upon its face the circumstances under which it was made. Civ. Code, § 1318. Courts are not permitted in order to avoid a conclusion of intestacy to adopt a construction based on conjecture as to what the testator may have intended, although not expressed. In the case at bar we have a testatrix whose next of kin were a brother and the children of two deceased sisters. Her brother was her nearest relative. No reason whatever appears why in disposing of her property she should discriminate against him in favor of children of one or both of her deceased sisters. Certainly in her very informal will she does not do so in plain and unambiguous terms. To the contrary, her first thought is of him, and her first expression of desire is, "It is my wish if my brother, Hans Peter Nelson is alive, send this letter to him." No expression direction or desire as to what is to become of her property in that contingency or what he is to do in the matter appears. It is as though in the mind of the testatrix this was to be the end of the whole matter. If we were at liberty to resort to conjecture as to the intent we might well conclude from the language that she thought she was giving the property to him in this contingency or that he would then take the property as her nearest relative. It is only "should he be dead" that she has any desire to express in regard to the disposition of her property, and her desire in that contingency is that her dead brother's daughter, Emma, and her dead sister Bena's daughter should sell the property and dispose of it in the way indicated. Appellants seek to make the primary object of the instrument the distribution of the property in any event in the manner specified in the portion commencing "should he be dead," and to do this find it necessary to construe the directions to Emma and Agnes as being intended as applicable to the brother in the event that he survived decedent, although no such idea is expressed. It is sufficient to say that no such intention is expressed with reasonable certainty, and that under the circumstances any such conclusion would be based solely on conjecture. As was said in the department opinion:

"Only through speculation and conjecture may the construction contended for by appellants be confirmed. And this cannot be countenanced in view of the cardinal rule to the effect that in the interpretation of wills it is not the probable intent which may have existed in the mind of the testatrix which prevails, but only that which is expressed in the language of the will. Estate of Blake, 157 Cal. 448, 108 Pac. 287."

We are satisfied that the appellants cannot fairly be held to take anything under the will. By the decree they are adjudged their rightful share as heirs of deceased. No objection is made by them as to the allowance of the two legacies of $500 each, a matter apparently settled by the decree. All parties to the estate have acquiesced in their allowance.

It may be noted that appellants claim that the translation of the will embodied in the court's finding is not entirely correct, and append to their brief what they call a "literal translation." While we are bound by the transiation found, we do not think that the so-called "literal translation" would materially help appellants. In the same connection respondents suggest that, properly translated, the provision as to the disposition of the property by Emma and Agnes is that they "shall together sell all my property and share with (instead of divide between) Anna's children; the Danish word "udele" used meaning "share" and not "divide." This would produce the very natural and reasonable conclusion that even had the brother predeceased the decedent, appellants under the will could take only one-third of the property, and would entirely explain the use of the word "extra" in the $500 bequest to Emma Nelson.

The decree is affirmed.

We concur: LENNON, J; WILBUR, J.; MELVIN, J.

SHAW, J. I dissent. In my opinion certain well-established rules of interpretation applying especially to wills, when considered in connection with this will, give it a meaning different from that given to it by the majority opinion.

The primary object of a court, when an ambiguous will is before it, must be to ascertain, as far as possible from its language, the intention of the testator. Civ. Code, § 1318. All its parts are to be construed in relation to each other, and so as, if possible, to form one consistent whole. "Of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy." Civ. Code, § 1326. Words which are irreconcilable with the general context may be rejected, whatever the local position which they happen to occupy. 1 Jarman, *445. Where it is clear on the face of a will that the testator's meaning is not completely expressed by the words used, and it is also clear what are the words which he has omitted, those words may be supplied in order to effectuate the intention, as collected from the context. 1 Jarman, *p. 451; 1 Redf. on Wills, 454. Many instances of this rule are given by Mr. Jarman at page *455. Where an expression, otherwise senseless or contradictory, can be

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rendered consistent with the context by being transposed, such transposition is warranted. Id. *466; 1 Redf. on Wills, 467. Punctuation may be disregarded if a change in that respect will render its meaning more obvious. 1 Redf. 434. In construing wills drawn by persons unskilled in the art "it is the duty of the courts to spell out the probable relative importance of the different provisions, and how far one was intended to yie'd to another, when it becomes impracticable to carry all into effect." 1 Redf. on Wills, 452.

A striking instance of the liberality indulged in these particulars in considering olographic wills drawn by illiterate persons is found in the decision of this court in Estate of Stratton, 112 Cal. 517, 44 Pac. 1028. The will in that case, after a number of specific gifts, concluded as follows:

"Common Beadsteads with Feather Bead and all the rest of the Furniture and all Money in what Ever Shape he will have full controle after all Expenses is Paid of my sickness and death. Mrs. Georgiana Hanham Stratton.
"my Husband
"Thomas Stratton."

It was held that the will could be made clear by transposing the words "my Husband Thomas Stratton" from the place below the signature of the testatrix to a place immediately after the word "he"; and, this being done, it was construed to make a gift to the husband of the residue of the estate.

Coming now to the will here involved, we repeat it in full to facilitate the discussion:

"San Francisco, October 5, 1915.

"I am writing these lines in case I should meet with an accident or in any other way die then it is my wish if my brother Hans Peter Nelson is alive send this letter to him. Should he be dead then it is my wish that my brother's daughter Emma and my dead sister Bena's daughter who lives in Chicago, her name is Agnes, shall together sell all my property and divide equally between my dead sister Anna's children by name Engeborg, Anna, Alfrida, and Otto, living in Copenhagen and Nakskov. It is my wish that my niece Emma Nelson receive $500 extra for her taking care of me. It is also my wish that my friend Mrs. Rosa Friis shall be given $500.

"Mrs. Jennie Hoytema,
"94 Sanchez Street.

"P. S. My safe deposit box is in the Humboldt Savings Bank No. 295."

The opening sentence disclosed the testamentary intent. The mind of the writer then turned to the selection of a person to carry out her intent, to act as executor. It may readily be supposed that her brother would be preferred for that office, and, accordingly she named him, saying, "Send this letter to him" if he is alive. In her ignorance, she evidently believed that if the letter were placed in his hands he would be thereby authorized to dispose of the property as the will directed. But it occurred to her that he might be dead, and in that event a substitute must be designated. For that purpose she chose two nieces, Emma, daughter of the brother, and Agnes Edwardson, daughter of her sister. She then came to the point of stating what was to be done with the property. The instructions to these to whom the office of executor should fall were "to sell all my property and divide equally between my dead sister Anna's children, by name Engeborg, Anna, Alfrida, and Otto, living in Copenhagen and Nakskov." These words are certain, and their effect is absolutely clear. They cannot be given any other meaning than that conveyed by the ordinary sense of the words, unless a clear intention to use them in some other sense can be collected from the context or from extrinsic facts. Civ. Code, § 1324. No extrinsic facts appear, and the context furnishes no cause for giving them other than their ordinary import. The use of the word "extra" in the gift of $500 to Emma is easily explained. The gift shows on its face that Emma had been taking care of the testatrix. Apparently Emma was the only relative she had in California. Her brother lived in Idaho, and the other heirs in Illinois and Denmark. It is to be supposed that Emma had already received something for this service, and the intent evidently was, as the words indicate, to give her an additional compensation therefor. To give it the effect of qualifying or explaining the meaning of the preceding disposition in any manner would violate the rule that "a clear and distinct devise or bequest cannot be affected" by any other words "not equally clear and distinct."

I think the will on its face clearly gives the residue of the estate to the children of Anna, the deceased sister of the testatrix, and that it left nothing undisposed of to go to the other heirs.

I concur: LAWLOR, J.
I concur with Justice SHAW: OLNEY, J.

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(180 Cal. 368)

In re PUSEY'S ESTATE. (L. A. 5922.)

(Supreme Court of California. May 14, 1919.)

1. JUDGMENT ⟸818(6) — FOREIGN JUDGMENT—IMPEACHMENT—WANT OF JURISDICTION.

A recital in a foreign judgment of facts sufficient to give the court jurisdiction can be impeached by a bare preponderance of evidence inconsistent with the recital.

2. DIVORCE ⟸328—FOREIGN DECREE—IMPEACHMENT—EVIDENCE.

Evidence *held* sufficient to support finding that a second affidavit was not filed in a foreign divorce suit, notwithstanding a recital in the judgment record of the filing of such affidavit.

3. WITNESSES ⟸195—PRIVILEGED COMMUNICATIONS—HUSBAND AND WIFE—EFFECT OF DIVORCE.

Where, after a divorce decree, the validity of which is attacked, both parties remarried, one of them seeking to establish the validity of the decree cannot object to the introduction of testimony by the former spouse as to matters occurring after the alleged divorce on the ground that it was a privileged communication between husband and wife within Code Civ. Proc. § 1881.

4. WITNESSES ⟸188(2) — PRIVILEGED COMMUNICATION—HUSBAND AND WIFE—EFFECT OF DIVORCE.

Code Civ. Proc. § 1881, providing that neither spouse can after termination of their marriage relation be examined without the consent of the other as to any communication between them during marriage, does not prevent the introduction of testimony, the purpose of which is to show the act of communicating, and not the character of communication.

5. JUDGMENT ⟸818(6)—FOREIGN JUDGMENT—COLLATERAL ATTACK—STATUTE OF LIMITATIONS—LACHES.

Laches and the bar of the statute of limitations have no application to a collateral attack upon a foreign judgment rendered without jurisdiction.

6. DIVORCE ⟸328—JUDGMENT—COLLATERAL ATTACK—RIGHT TO ATTACK IN PROBATE OF A WILL.

Where the probate of a will was contested because of revocation by marriage and sought to be upheld because testatrix's husband was never validly divorced from his first wife, proponents are entitled to attack the foreign judgment in the divorce action on the ground of being void for want of jurisdiction in that there was no sufficient affidavit for the publication of summons.

Department 2.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Probate of the will of Gertrude C. Pusey, also designated as Gertrude C. Finley Pusey, deceased, opposed by Henry F. Pusey and another. From an order admitting the will to probate, contestants appeal. Affirmed.

See, also, 173 Cal. 141, 159 Pac. 433; 170 Pac. 846.

C. D. Latourette, of Oregon City, Or., and R. Y. Williams and A. W. Rutan, both of Santa Ana, for appellants.

Steele Finley, of Santa Ana, and E. J. Fleming, B. F. Woodard, Michael F. Shannon, and E. L. Kolb, all of Los Angeles, for respondents.

LENNON, J. For the third time this case is here on appeal. The question heretofore presented and now again presented for review involves the correctness of an order of the lower court admitting the will of Gertrude C. Pusey to probate upon the petition of the respondent S. H. Finley. The appellants are Henry F. Pusey, who contested the probate of the will, and C. S. Crookshank, who, as nominee of the said Henry F. Pusey, petitioned for letters of administration upon the estate of the deceased. These appellants now, as heretofore, contend that the will in question was revoked by the marriage of the testatrix to Henry F. Pusey. The respondents, on the other hand, contend that the testatrix never in fact became the wife of Pusey, because he had never been validly divorced from his former wife. In 1893, a decree of divorce in favor of Henry F. Pusey was entered by an Oregon court of competent jurisdiction, which recited that jurisdiction of the defendant had been obtained by publication of summons. The respondents assert, however, that the decree of divorce was void for want of jurisdiction over the defendant, because there was no sufficient affidavit for the publication of summons. The said decree was admitted in evidence. It contains, among other things, a recital that service of summons by publication had been ordered "upon due and proper affidavits. * * *" However, only one affidavit to support the order for publication of summons appeared in the record of the divorce action. This affidavit was decreed by the trial court to be insufficient as a basis for the order of publication of summons, because it contained no averment or attempted averment that due diligence had been employed to ascertain the residence of the defendant in the divorce action or that such residence could not have been ascertained by the exercise of due diligence.

Upon the first trial in the probate proceeding, it was not affirmatively shown that the defendant in the divorce action was alive at the time of Pusey's marriage to the testatrix. Upon an appeal to this court, it was then held that a presumption should be raised in favor of the validity of the marriage, whereby it should be assumed that the defendant

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in the divorce action was dead at the time of the marriage. The order of the lower court admitting the will to probate was reversed for the error of the court in failing to consider this presumption. Estate of Pusey, 178 Cal. 141, 159 Pac. 433.

A second trial in the probate proceeding was thereupon had, wherein it was shown and found that the defendant in the divorce action was alive at the time of Pusey's marriage to the testatrix. Upon the appeal in that case, this court emphasized the fact that the decree of divorce recited that service of summons by publication had been ordered "upon due and proper affidavits. * * *" It was held that this recital imported that more than one affidavit was filed to obtain the order, wherefore, the attack on the judgment being collateral, it would be presumed in its favor that there was at least one other affidavit in addition to the defective affidavit appearing in the record, that such second affidavit was sufficient, and that it was lost after being duly filed. For the error of the lower court in failing to consider this presumption the order admitting the will to probate was again reversed. Estate of Pusey, 170 Pac. 846.

A third trial was had. Inasmuch as any possible objection to the allowance of such a new trial is fully and finally answered in the opinion rendered in the second appeal in this case (170 Pac. 846), we need not again consider the point here. Conflicting evidence was introduced bearing on the issue of the filing of a second affidavit to support the order for publication of summons. The court found that no such affidavit was in fact filed, and again made an order admitting the will to probate.

The appellants attack the order upon various grounds: (1) That the evidence is insufficient to support the finding; (2) that some of the evidence was improperly received; (3) that any attack on the judgment is barred by the statute of limitations or by the equitable doctrine of laches; and finally (4) that it is not competent for a stranger to the record, who had no interest in the outcome of a judgment at the time it was made, to attack it collaterally, even on the ground that it is void for want of jurisdiction.

[1] In support of the first contention, appellants lay great emphasis upon a statement in a former decision of this case that a recital in a foreign judgment of facts sufficient to give the court jurisdiction could be impeached only by proof of necessity inconsistent with the recital. But the words "of necessity" refer to the nature, and not to the weight, of such independent proof. If there was a bare preponderance of evidence of a nature of necessity inconsistent with the recital, that would be sufficient to impeach it.

[2] It was proved that the register of actions recorded the filing of but one affidavit in the divorce action in question. Of course, a second affidavit might have been filed and never recorded. But an examination of the files for a period of six months before and six months after the filing of the complaint in the divorce action was proved to have resulted in failure to discover a second affidavit. This evidence was of a nature necessarily inconsistent with the recital that proper affidavits were filed, but it might be urged that a second affidavit, though filed, might have been not only not recorded, but also lost. To prove that such was the case appellants placed Senator Brownell on the stand. He had been Pusey's attorney in the divorce action in question. The material portion of his testimony relied on by the appellants reads as follows:

"My recollection is absolutely that my affidavit was defective on the ground that I did not show sufficient diligence. Now that is my idea. Now, although I don't say that positively, but it must have been that, because I can see right in that affidavit that I left it out. I can't remember the details, but I know the judge told me my affidavit was wrong, and I came back here and saw Pusey and made an additional affidavit, and I am satisfied it was to show that he exercised the proper diligence in trying to ascertain what her residence was. Now, that is my recollection. I cannot in all these years go into detail, because I don't know."

It is significant to observe that Brownell here expressed his idea of the preparation, and not of the filing, of the alleged second affidavit. Moreover, it was the province of the trial judge to pass upon the credibility of the witness. Numerous depositions were offered to the effect that the reputation of the witness for truth, honesty, and integrity was not good. While these were met by other depositions, the trial court might properly, we think, have wholly disbelieved the testimony quoted, and such a conclusion would be further supported by the consideration that the statement was quite possibly influenced by a desire to make it appear that there had been no negligence in handling the divorce action. In addition to these considerations, Brownell's testimony itself not only tends to impeach the statement quoted, but contains admissions which positively support the contention of the respondents. Being presented with an affidavit in another divorce action brought by him at about the same time as the one in question which was defective in the same particular as the affidavit filed in the Pusey Case, he stated:

"Oh, I made a great many affidavits that way. I haven't any doubt but what I did. I was practicing politics in those days more than anything else and was very careless in my business."

This statement could have been properly considered by the court as evidence that a

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second affidavit was not prepared, or that, if it was prepared, it was not filed.

Finally, we have the testimony of the defendant in the divorce action which the appellants evidently regard as very damaging to their case. And so in fact it is. Describing an interview with Pusey subsequent to the divorce, she states:

"He had very little to say. I was trying to tell him all the time that he did know where I was all the time. I couldn't hardly realize what this was all about. I remember so well I kept saying to Pusey, 'You did know I was there, Henry; you used to write to me all the time.' He didn't answer me for a while, and finally he said, 'Yes; I did know where you were.'"

If the court believed this testimony, as it might properly have done, it would follow that Pusey could only have executed a proper affidavit by committing perjury. We are not ready to hold that the court was bound to presume that he made a second affidavit if it had further to presume and say that in so doing he made a perjured affidavit.

We are satisfied that the evidence, considered as a whole, is sufficient to support the finding that no second affidavit was in fact filed.

[3] But it is contended on behalf of the appellants that the testimony of Julia Proctor, the defendant in the divorce action, was improperly received. The effect of the decision of the court was to hold that Julia Proctor was at all times the wife of the appellant Henry F. Pusey. The appellants, however, were contending throughout the case that the decree of divorce was valid, and that from and after that decree Julia Proctor ceased to be the wife of the appellant Pusey. Under these circumstances, the appellants offered the objection that her testimony was incompetent, irrelevant, and immaterial. Under some circumstances this general objection might be considered sufficient to raise the point that the testimony sought to be adduced was privileged under that portion of section 1881 of the Code of Civil Procedure which reads:

"A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband, without his consent." Humphrey v. Pope, 1 Cal. App. 374, 82 Pac. 223.

In this case, however, there had been a decree of divorce the validity of which was the matter in dispute. After that decree, both parties to the marriage had attempted to contract marriage and had entered into the marriage relation with other parties. The appellants, who were seeking to establish the validity of the decree of divorce, cannot, then, well be allowed to claim that by their general objection they were seeking the benefit of a relation which they claimed did not in fact exist. To properly apprise the court of its nature the objection should, to say the least, have been made in definite and unequivocal language.

[4] It is true that Julia Proctor testified to communications between herself and her husband before as well as after the decree of divorce, and that it is further provided in section 1881 of the Code of Civil Procedure that neither husband nor wife can, even after the termination of the marriage, be examined, without the consent of the other, as to any communication made by one to the other during the marriage. It is to be noted, however, that the point sought to be shown by the communications here in question was the act of communicating, and not the nature or character of the communications themselves; the purpose of the inquiry being to show that the appellant Pusey knew the whereabouts of his wife. These circumstances present a proper case for the application of the rule stated in 4 Wigmore on Evidence, § 2337:

"The privilege has for its object the security from apprehension of disclosure, a security in consequence of which confidences will be freely given and not withheld. The protection therefore extends only to communications, i. e., utterances, not acts; the reasoning being analogous to that which establishes a similar limitation for communications between attorney and client. * * *"

We think, therefore, that the purpose of the inquiry being to show the act of communicating and not the disclosures involved in the communications, the testimony does not come within the inhibition of the statute.

[5] Considering the contention that the attack upon the judgment is barred by laches or by the statute of limitations, we find that the appellants have cited no statute the effect of which would be to bar the attack upon the judgment in question. They do indeed cite Estudillo v. Security Loan, etc., Co., 149 Cal. 556, 87 Pac. 19, but the language in that case is applicable only to actions in equity for relief on the ground of fraud. Since the judgment here in question is attacked, not upon the ground that it is voidable for fraud, but upon the ground that it is void for lack of jurisdiction, that case has no bearing upon the issue. Appellants cite numerous cases bearing on the doctrine of laches, but they have failed to show how that doctrine can apply to this case. Nor can it, we think, be asserted that the respondents have in any way slept upon their rights.

[6] Were it not for the elaborate array of cases presented by the appellants, we should consider that any discussion of their fourth point was concluded by the statements in Forbes v. Hyde, 31 Cal. 342, 348:

"A judgment absolutely void * * * may be attacked anywhere, directly or collaterally, whenever it presents itself, either by parties

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or strangers. It is simply a nullity, and can be neither a basis nor evidence of any right whatever."

See, also, Pioneer Land Co. v. Maddux, 109 Cal. 638, 42 Pac. 295, 50 Am. St. Rep. 67, and Adams v. Adams, 154 Mass. 290, 28 N. E. 260, 13 L. R. A. 275.

An examination of appellants' cases, however, reveals the fact that, practically without exception, it was assumed or clearly shown that the defendant in the action wherein the judgment which was being attacked had been rendered had been regularly brought within the jurisdiction of the court. It is indeed stated in 23 Cyc. 1068, that strangers to the record can attack a judgment only when rights accruing to them prior to its rendition are affected. We have examined all the cases cited to support this statement. In each case property rights had been the subject of adjudication, and the rights of the party attacking the judgment had arisen with respect to the property in question after the judgment had been rendered. The judgment was in no case alleged to be void. Obviously no rule based on these cases has any application to the case at bar. McLeod v. McLeod, 144 Ga. 359, 87 S. E. 286, appears at first glance to support the appellants, but we note that the court decided, not that a stranger could not attack a void judgment, but that the judgment in question was not void. It remains only to consider the case of Harpold v. Doyle, 16 Idaho, 671, 102 Pac. 159. We do find language in support of the appellants' contention in the opinion of Sullivan, J. It appears, however, to be dictum. It was dissented from by Stewart, J., and upon a rehearing of the case it was so qualified as to remove any support it may formerly have afforded to the argument of appellants. Under the circumstances of this case, the respondents are entitled to attack the judgment in the divorce action on the ground that it is void for lack of jurisdiction. They have, we think, been successful in this attack.

The order appealed from is affirmed.

We concur: WILBUR, J.; MELVIN, J.

(180 Cal. 356)

HUTCHINSON CO. v. GOULD et al.
(S. F. 8214.)

(Supreme Court of California. May 9, 1919.)

1. PRINCIPAL AND AGENT ⟸166(2)—RATIFICATION—KNOWLEDGE OF FACTS—CONFIDENCE IN AGENT.

An owner of city lots, who, upon being told that his agent had signed a contract for street improvements upon them, said that it was satisfactory to him, will be deemed to have ratified the contract, though he did not have full knowledge of the facts at the time; his confidence in his agent appearing such that he was willing to trust to his judgment and ratify his act without making further inquiry.

2. FRAUDS, STATUTE OF ⟸56(4)—INTEREST IN REAL ESTATE—CONTRACT FOR STREET IMPROVEMENTS—ORAL RATIFICATION.

A written contract for street improvements providing for a lien under Code Civ. Proc. § 1191, does not make it a contract providing for an interest in real estate, required by Code Civ. Proc. § 1971, to be in writing, as well as a ratification thereof, according to Civ. Code, §§ 2309, 2310, since the lien is created by statute.

In Bank.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by the Hutchinson Company, a corporation, against Charles B. Gould and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Reed, Nusbaumer & Bingham, of Oakland, for appellants.

Robinson, Robinson & Price and R. W. Macdonald, all of Oakland, for respondent.

WILBUR, J. This is an action to foreclose a mechanics' lien upon certain lots owned by defendant Charles B. Gould for street work done under private contract by the plaintiff. Plaintiff had judgment and defendant Gould appealed.

[1] The street work was done under a written contract signed by S. S. Austin on behalf of Gould, the owner of the lots sought to be subjected to the lien. The only question in the case is whether or not the finding of the trial court that appellant is bound by the signature of Austin to the contracts for street work is sustained by sufficient evidence. A consideration of the evidence most favorable to the finding of the trial court leads us to the conclusion that there was sufficient evidence to justify the findings of the trial court. The vice president and general manager of respondent testified that after the signing of the contracts in question by Austin he told appellant that:

"Mr. Austin has signed our contract for Gray street and Douglas street. * * * I told him that Mr. Austin had signed our contracts for the improvement of these two streets, Boulevard Park tract, and asked him if Mr. Austin was authorized to do it. He said, 'Did Mr. Austin sign it?' I said, 'Yes, he has signed our contract.' He said, 'That is satisfactory to me.'"

The appellant contends that this conversation did not amount to a ratification, and that, if it did, it was a ratification without a full knowledge of the facts, and therefore not binding on the appellant. In order to understand the situation of the parties and the significance of the conversation it will be nec-

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essary to state additional evidence. Appellant was the owner of unsold lots in the Boulevard Park tract. The Union Bank of Savings held a mortgage thereon and all sales of unsold lots were handled at the bank. Miss Baker, an employé in the bank, held appellant's general power of attorney. The appellant testified that he did not handle these properties at all. S. S. Austin was the sales agent of the tract. For six or seven years he had been daily upon the property, occupying a branch office thereon. He had sold most of the property and had handled the improving and selling of the tract. When anything was required to be done, the usual procedure was for Austin to notify the bank and for them to authorize him to proceed. Mr. Austin had signed a protest against the street improvement for appellant. He had caused a sidewalk to be laid in front of the lots in this litigation, which was paid for. At the request of the other property owners along Gray and Douglas streets, Mr. Austin signed a contract for the improvment of these streets on behalf of appellant and with all the other property holders fronting on these streets. It was under these circumstances that respondent's general manager told Mr. Gould that Mr. Austin had signed "our contracts for the improvements of these two streets, Boulevard Park tract, and asked him if Mr. Austin was authorized to do it" and received the reply "That is satisfactory to me."

Appellant contends this is not a sufficient ratification, for the reason that he had insufficient information at the time of the nature and character of the contract to ratify the same, and for the further reason that the ratification was not in writing. It is true that the nature and character of the proposed improvements and the price therefor and the extent thereof—essential features of the contract—were not disclosed by the statement and question of Mr. Hutchinson. On the other hand, Mr. Gould knew of his ownership of the lots fronting upon the streets in question, knew Mr. Austin and his familiarity with the contract and with the conditions necessary for successful sales, and his question concerning the contract, "Did Mr. Austin sign it?" showed that he was willing to trust to the judgment of Mr. Austin in regard to the matters not disclosed by Mr. Hutchinson's question. As is said in 2 Corpus Juris, 481:

"The lack of full knowledge does not protect a principal who is willfully ignorant, and deliberately chooses to act without such knowledge, as where, knowing that he is ignorant of some of the facts, he has such confidence in his agent that he is willing to assume the risk and ratify the act without making inquiry for further information than he at the time possesses, or where he intentionally and deliberately ratifies without full knowledge, under circumstances which are sufficient to put a reasonable man upon inquiry."

See, also, to the same effect, Mechem on Agency (2d Ed.) § 404; Ballard v. Nye, 138 Cal. 588, 598, 72 Pac. 156; Pope v. Armsby, 111 Cal. 159, 43 Pac. 589; Phillips v. Phillips, 163 Cal. 530, 535, 127 Pac. 346.

[2] Appellant contends that as the contract in question provided for a lien, it is a contract providing for an interest in real estate required by the provisions of section 1971, Code of Civil Procedure, to be in writing and that, therefore, under the provisions of section 2310, Civil Code, the ratification in question must have been in writing. The lien for the contract price for work done upon a public street is created by law. Section 1191, Code Civ. Proc. The contract does no more than expressly recognize this fact. It therein provides for liens "as provided by section 1191 of the Code of Civil Procedure of the state of California," thus by reference making the law concerning liens for work done on public streets a part of the contract. It has been held by this court that contracts for the performance of work upon public streets by private contract need not be in writing. Kreuzberger v. Wingfield, 96 Cal. 251, 31 Pac. 109. The effect of the contract would have been the same, with or without the stipulation concerning the liens for the value of the work done. Such stipulation is not a material part of the contract and may be disregarded. Authority to execute the contract might rest in parol and its ratification therefore can rest in parol. Civ. Code, § 2309.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; LAWLOR, J.

(180 Cal. 404)

SELOWSKY v. SUPERIOR COURT OF NAPA COUNTY. (S. F. 8927.)

(Supreme Court of California. May 27, 1919.)

1. CONTEMPT ⟨⟹20—DISOBEDIENCE OF DECREE.

Under Code Civ. Proc. § 1209, and Pen. Code, § 166, willful disobedience of a decree of a court having jurisdiction to make it ordinarily constitutes "contempt."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contempt.]

2. NUISANCE ⟨⟹86—VIOLATION OF INJUNCTION—CONTEMPT.

Pursuant to Code Civ. Proc. § 1211, the superior court which had under St. 1913, p. 20, known as the Red Light Abatement Act, enjoined petitioner from using or permitting the use of premises for the purpose of lewdness, may, on presentation of an affidavit setting forth the facts, take cognizance of a contempt arising out of disobedience of the order.

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3. CONTEMPT ⟸54(4) — AFFIDAVIT — SUFFICIENCY.

A proceeding to punish for contempt is criminal in character, and the affidavit which is made the basis of the proceeding is the counterpart of a complaint in a criminal action; so, while a sufficient affidavit is necessary, the affidavit charging a contempt need not be more specific in its averments than a complaint or information charging a crime.

4. DISORDERLY HOUSE ⟸12 — OFFENSES — COMPLAINT.

A general allegation that premises were used for the purposes of lewdness, assignation, and prostitution is sufficient to charge violation of Pen. Code, § 315, without alleging the names or characters of the frequenters of the premises.

5. NUISANCE ⟸86 — VIOLATION OF INJUNCTION — CONTEMPT — AFFIDAVIT — SUFFICIENCY.

In view of the fact that false allegations in an affidavit charging contempt in the violation of a decree made under St. 1913, p. 20, enjoining petitioner from using premises for prostitution, would be perjury under Pen. Code, §§ 118, 125, *held*, that an affidavit alleging that after the decree petitioner used the premises for purposes of lewdness, assignation, and prostitution was sufficient to support a judgment punishing petitioner for contempt.

6. NUISANCE ⟸86—VIOLATION OF INJUNCTION—FINDINGS—SUFFICIENCY.

Where petitioner was charged with contempt in using premises for purposes of lewdness, assignation, and prostitution after such use had been enjoined in a proceeding under St. 1913, p. 20, findings that petitioner, in violation of the decree, conducted the premises for that purpose, are sufficient, without findings of any particular acts of lewdness, etc., to support a judgment punishing her for contempt.

7. STATUTES ⟸71—UNIFORM OPERATION OF GENERAL LAWS.

The provision of Const. art. 1, § 11, that all laws of a general nature shall have a uniform operation merely requires a law to act uniformly upon all persons in the same category, and operation upon different classes is proper if there is a reasonable basis for the classification.

8. STATUTES ⟸74(1)—UNIFORM OPERATION—PUNISHMENT FOR CONTEMPT.

As the mere keeping of a house of prostitution is a crime denounced by Pen. Code, § 315, petitioner, who was found guilty of contempt in violating an order made under St. 1913, p. 20, enjoining her from using premises for immoral purposes, may be punished as provided in section 6 of that act, notwithstanding the punishment was more severe than the general punishment provided for contempts; for such a classification was reasonable and did not violate Const. art. 1, § 11, requiring general laws to have a uniform operation.

9. STATUTES ⟸110½(1) — VALIDITY — TITLE OF ACT—RED LIGHT ABATEMENT LAW.

The title of St. 1913, p. 20, known as the Red Light Abatement Act, entitled "An act declaring all buildings and places nuisances wherein or upon which acts of lewdness, assignation or prostitution are held or occur, * * * and providing for the abatement and prevention of such nuisances by injunction," is sufficient to cover provisions fixing penalties for violations of the injunction.

10. NUISANCE ⟸77—INJUNCTION—REMEDY.

Though courts already had power under the general laws to enjoin the maintenance of bawdyhouses, the provisions for an injunction in St. 1913, p. 20, known as the Red Light Abatement Act, are not nugatory; for the Legislature may provide two or more concurrent modes for obtaining a given end.

11. NUISANCE ⟸77—INJUNCTION—RELIEF.

Under St. 1913, p. 20, known as the Red Light Abatement Act, the court may, pursuant to sections 3 and 6, enjoin the maintenance of premises as a bawdyhouse, without necessarily including the order of abatement contemplated by section 7.

In Bank.

Mary M. Selowsky was convicted of contempt of court, and she applies for writ of certiorari against the Superior Court of the County of Napa to review and annul the proceedings and judgment. Affirmed.

See, also, 177 Pac. 301.

Frank J. Murphy, of San Francisco, for petitioner.

Nathan F. Coombs and Frank L. Coombs, both of Napa, for respondent.

LENNON, J. Certiorari to review and annul certain proceedings culminating in a judgment entered by the superior court of Napa county convicting the petitioner of contempt of court and sentencing her to pay a fine of $1,000 and to serve a term of six months' imprisonment in the county jail.

On November 19, 1917, the superior court of Napa county found, in an action instituted under the provisions of a statute known as the "Red Light Abatement Act" (Stats. 1913, p. 20), that the "Stone Bridge Saloon," situated within the said county, was owned, in the possession of, and maintained and conducted by the petitioner herein as a place of lewdness, assignation, and prostitution. A decree was duly entered in that action adjudging and declaring the said premises to be a nuisance and perpetually enjoining the petitioner from directly or indirectly using or permitting the use of the said premises for the purpose of lewdness, assignation, or prostitution. On July 9, 1918, the said court, having found that the petitioner had used the said premises for the purpose of lewdness, assignation, and prostitution on or about May 18, 1918, entered the contempt judgment here complained of.

The petitioner attacks this judgment on four grounds: (1) That none of the affidavits upon which the contempt proceeding was

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instituted alleged facts with sufficient detail to give the court jurisdiction to proceed in the matter; (2) that the findings upon which the contempt judgment is based are fatally defective in that they fail to detail any particular and specific act of lewdness, assignation, or prostitution found to have been permitted by the petitioner upon the premises in question; (3) that, in so far as the contempt judgment purports to be entered pursuant to section 6 of the statute in question, it is void, in this, that the said section 6 is violative of section 11 of article 1 of the Constitution of the state of California; (4) that the judgment is not in fact authorized by section 6 of the statute in question, and was not in fact entered pursuant thereto, and that there is no other statutory provision providing for and permitting the particular penalty imposed.

[1-3] Prior to the institution of the contempt proceedings, the court had entered a valid decree prohibiting the use of the premises in question for the purpose of lewdness, assignation, or prostitution. The petitioner was duly served with a copy of the decree. Willful disobedience of the decree of a court having jurisdiction to make it ordinarily constitutes a contempt. Code Civ. Proc. § 1209; Pen. Code, § 166. Pursuant to section 1211 of the Code of Civil Procedure, the court was empowered to take cognizance of a contempt thus committed in a proceeding instituted by the presentation of an affidavit setting forth the fact or facts constituting the contempt. The contempt charged in the proceedings here in controversy consisted in the willful use of the premises in question by the petitioner in defiance of the court's decree for the purpose of lewdness, assignation, and prostitution. A sufficient allegation in the affidavit by which the contempt proceedings were instituted to the effect that the premises were so used was essential. But a proceeding to punish for contempt is criminal in character, and the affidavit which is made the basis of the proceeding is the counterpart of the complaint in a criminal action. Frowley v. Superior Court, 158 Cal. 222, 110 Pac. 817; Ex parte Gould, 99 Cal. 360, 33 Pac. 1112, 21 L. R. A. 751, 37 Am. St. Rep. 57. Therefore an affidavit charging the commission of a contempt need not be more specific in its averments of the facts constituting the contempt than a complaint or an information charging a crime.

[4, 5] In support of the contempt proceedings and judgment, the record shows the affidavit of one Kelton, sheriff of Napa county, wherein it is alleged:

"That on the 18th day of May, 1918, he, in company with officers of the law, visited the premises belonging to Mrs. M. Salowsky, mentioned and set forth in the judgment in said cause made, signed, and filed herein on the 10th day of November, 1917, and that at said time said Mrs. M. Salowsky was still the owner and in charge of said premises, and was keeping and maintaining a house of lewdness, assignation, and prostitution, assisted by one Florence Ponta, as follows:

"That at said time said Florence Ponta occupied a room at said premises with a man, and, affiant verily believes, committed with him then and there the acts of illicit sexual intercourse.

"That thereafter, and on the same day, said Florence Ponta occupied a room at said premises with another man and, as affiant believes, committed such acts.

"That said premises set forth in said judgment hereinbefore referred to, and occupied by said Mrs. M. Salowsky, sometimes known as and called Mary M. Selowsky and Mrs. M. Krueger, on the 18th day of May, 1918, were in charge of said Mrs. M. Salowsky as the owner thereof, and was conducted as a house of lewdness, assignation, and prostitution.

"That Florence Ponta, one of the inmates thereof, is a prostitute, and was working in said house for said Mrs. M. Salowsky as a prostitute.

"That affiant, by reason of his long experience as a sheriff, is familiar with houses of prostitution and knows of his own knowledge that said premises, on said date, were being maintained, conducted, and operated by said Mrs. M. Salowsky as a house of lewdness, assignation, and prostitution, and that all of said acts of lewdness, assignation, and prostitution committed on said premises were committed with the knowledge and approval of said Mrs. M. Salowsky, and for her personal financial gain, and for the purpose of lewdness, assignation, and prostitution."

The petitioner contends that the affidavit was insufficient in that no specific act of lewdness, assignation, or prostitution was alleged except upon the belief of the affiant, and that the grounds upon which that belief was based were not set forth. Conceding that there may be no sufficient allegation of any specific act of lewdness, assignation, or prostitution, we are nevertheless of the opinion that the affidavit as a whole was sufficient to institute the contempt proceedings and to support the judgment. Ex parte Selowsky, 177 Pac. 301. The allegations of Kelton's affidavit that he knew of his own knowledge that the premises in question were in the possession of the petitioner and were being used and conducted by her as a place of lewdness, assignation, and prostitution stated an essential and ultimate fact. Clearly, if Kelton willfully and contrary to his oath averred that to be true which he knew to be false or which he did not know to be true, he was guilty of perjury. Pen. Code, §§ 118 and 125. Such a general allegation of the use of premises as a place of lewdness, assignation, and prostitution would be proof against demurrer in a complaint charging the violation of section 315 of the Penal Code, namely, the keeping of a house of ill fame. It is well set-

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tled that a general allegation of the use of premises for the purpose of lewdness, assignation, and prostitution is sufficient in a complaint, and that it is unnecessary to allege the name or character of the frequenters of the house, or to allege particular acts of lewdness, assignation, or prostitution. State v. Patterson, 29 N. C. 70, 45 Am. Dec. 506; State v. Dame, 60 N. H. 479, 49 Am. Rep. 331; State v. Brunell, 29 Wis. 435; Betts v. State, 93 Ind. 375; State v. Schaffer, 74 Iowa, 704, 39 N. W. 89; Drake v. State, 14 Neb. 535, 17 N. W. 117; State v. Mamie Jones, 53 W. Va. 613, 45 S. E. 916. By a parity of reasoning, we are constrained to hold that the affidavit of Kelton was sufficient to give the court jurisdiction to proceed and to pronounce judgment in the contempt proceedings.

[6] The foregoing discussion practically disposes of the contention that the findings of the court were insufficient in that they failed to detail any specific act of lewdness, assignation, or prostitution permitted on the premises in question by the petitioner. The court did find as a fact that on May 18, 1918, the petitioner did, in violation of the decree of the court, conduct the premises in question for the purpose of lewdness, assignation, and prostitution. This was an amply sufficient finding of the ultimate fact in issue. Any finding as to particular acts of lewdness, assignation, or prostitution would have been out of place as being a recitation of purely evidentiary matter.

[7, 8] Considering the constitutional question, it appears that the court in the judgment here in question imposed penalties authorized by section 6 of the abatement act which are in excess of the penalties prescribed in the general Code provisions relating to contempts. It is urged that by reason of the fact that said section 6 provides a different and more severe penalty for a certain class of contempts, it is violative of section 11 of article 1 of the Constitution, which provides that all laws of a general nature shall have a uniform operation. This provision only requires a law to operate uniformly upon all persons in the same category. Wigmore v. Buell, 122 Cal. 144, 54 Pac. 600. It is satisfied if the statute applies alike to all persons or objects within a class founded upon some natural and intrinsic distinction. Vail v. San Diego County, 126 Cal. 35, 58 Pac. 392. Operation differently upon different classes is proper if there is a reasonable basis for the distinction. Kaiser Land & Fruit Co. v. Curry, 155 Cal. 638, 103 Pac. 341. The application of these principles to the particular legislation here involved has been correctly stated by Mr. Justice Hart as follows:

"We know of no constitutional limitation upon the right of the Legislature to fix reasonable penalties for contempts of the judgments, decrees, orders, or processes of courts of justice, and, in admeasuring such punishments, to assign, as it may do and has done in cases of public crime, to certain acts of contempt a greater or less penalty than is annexed to others, according to the nature of the contempt with respect to the subject-matter of the adjudication violated and the consequences of such violation to the public or to individual rights." People v. Barbieri, 33 Cal. App. 770, 780, 166 Pac. 812, 816.

See, also, People v. Casa, 35 Cal. App. 194, 169 Pac. 454.

It is objected that every contempt is against the majesty of the law and the dignity and authority of the court, and that therefore classification on the basis of other circumstances affecting the public welfare must be held improper. The answer to this is that there can be no doubt that the Legislature has power to classify with respect to the penalty to be imposed not only upon the basis of the inherent nature of the offense, but also upon the basis of the nature of the circumstances attending the commission of the offense considered in their relation to the public welfare. People v. Finley, 153 Cal. 59, 94 Pac. 248; People v. Carson, 155 Cal. 164, 99 Pac. 970.

The contempt contemplated and condemned by section 6 of the abatement act is the keeping of a house of lewdness, assignation, or prostitution. We think there is much in the nature of this contempt which differentiates it from other possible acts of contempt and justifies the imposition of a different and more severe penalty. The keeping of a house of prostitution is itself a crime. Pen. Code, § 315. It is a crime involving moral turpitude. It is subversive of the public morals and decency and affects injuriously the sexual life of the people in a manner and to an extent unparalleled by any other act. It is not to be forgotten that morals, decency, and sexual purity have been protected by elaborate penal legislation from the earliest times on the theory that the fate of a nation depends on the breed of men it produces. It follows that it was competent for the Legislature to provide for a distinctive and more severe penalty for the commission of those acts of contempt contemplated and controlled by the statute in question.

Ex parte Clancy, 90 Cal. 553, 27 Pac. 411, cannot be relied upon as an authority against the foregoing conclusion. While in that case the writer of the main opinion said that it was not competent for the Legislature to provide one mode of reviewing judgments in contempt proceedings in general and another mode of reviewing contempt proceedings arising in cases under the insolvent act, and while a majority of the court concurred in the result, still it will be noted that the conclusion reached by the writer of the

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main opinion concerning the constitutional question involved did not receive the concurrence of the majority of the court. But, aside from this, in that case no reasonable basis for any classification was suggested, and probably none could have been suggested. There is, therefore, nothing in that decision which conflicts with our holding here.

Nor can the statute be assailed on the theory that it conflicts with section 1218 of the Code of Civil Procedure. That section cannot be said to purport to fix the penalty for all contempts. Indeed, the next succeeding section provides a different punishment for certain classes of contempts, while a still different punishment is provided in the Penal Code for the contempts enumerated in section 166 thereof. People v. Barbieri, supra.

[9] There is no merit in the contention that the provisions of the statute in question fixing a penalty for the violation of the decrees provided for therein are not covered by the title of the act. The title reads:

"An act declaring all buildings and places nuisances wherein or upon which acts of lewdness, assignation or prostitution are held or occur or which are used for such purposes, and providing for the abatement and prevention of such nuisances by injunction and otherwise." Stats. 1913, p. 20.

This is sufficient to cover provisions for the punishment of the violation of injunctions provided for in the body of the statute.

"A title fairly expressing the general subject covers all proper means and instrumentalities which will or may facilitate the accomplishment or enforcement of the purpose expressed, such, for instance, as a provision prohibiting violations of the act or prescribing a penalty or other punishment for such violations." 26 Am. & Eng. Ency. of Law, 588.

[10] There is no merit in the contention that injunctive relief is not "expressly provided for" in the act in question. This contention is apparently based upon the theory that, because the court had authority to grant injunctive relief pursuant to the provisions of an earlier statute, the abatement act, in so far as it purports to confer authority to grant injunctive relief, is nugatory, since it assumes to give what the court already has. It is undoubtedly competent for the Legislature to provide two or more concurrent modes of obtaining a given end, no matter how similar they may be. Granting that the court already had a general power to enjoin nuisances pursuant to the provisions of the Code of Civil Procedure, it nevertheless appears that the abatement act does in terms authorize the entering of a permanent injunction, such as that entered in the original proceeding in this case on November 19, 1917. Since, therefore, section 6 of the act authorizes the penalty here imposed in case of the violation of any decree "expressly provided for" in the act, it follows that the contempt judgment herein complained of was in fact authorized by the act.

[11] It is suggested by the petitioner that there was in fact no proper judgment pursuant to the terms of the abatement act, because the judgment did not contain the order contemplated by section 7 of the act. That section, in words that are apparently mandatory, directs the entry of an order requiring the removal and sale of "all fixtures, musical instruments and movable property used in conducting, * * * the nuisance" and requiring the "effectual closing of the building * * * against its use for any purpose" and so keeping it closed for a year. In all respects, save that noted, the proceedings and judgment in the original action closely followed the words and provisions of the abatement act. Unless, therefore, the order of abatement is so inseparably connected with the injunctive relief provided for in sections 3 and 6 of the act that the intent of the Legislature is manifest that no injunction shall stand unless the abatement order is made part of the judgment, the petitioner's suggestion is entitled to no consideration. The injunctive relief may be had against any one maintaining the nuisance, whether owner or tenant. The abatement order is a remedy only against the owner. If the owner has been guilty of no contempts, he may, by filing a bond, stay the abatement order, which apparently runs out of itself in a year. The injunctive relief, on the other hand, can be made permanent. There may be cases where the owner is completely innocent, ignorant of the use of the property, and opposed to any immoral use thereof. In such case, the entire purpose of the statute would be accomplished by the injunction and an abatement order would not only serve no useful purpose but would work a positive injustice. Upon this analysis of the act, there is no doubt but that the court may enter a perpetual injunction pursuant to the abatement act without necessarily including in the judgment the order of abatement contemplated in section 7 of the act. Such an injunction was duly entered by the superior court of Napa county in the original proceeding in this case on November 19, 1917.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; MELVIN, J.; SHAW, J.; OLNEY, J.; LAWLOR, J.

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(180 Cal. 394)

Ex parte MORCK. (Cr. 2253.)

(Supreme Court of California. May 19, 1919.)

HABEAS CORPUS ⟸50 — TIME OF APPLICATION.

Any question of excess of sentence will not be considered until the expiration of the time for which the prisoner may be lawfully confined.

In Bank.

Application by Andrew Morck for writ of habeas corpus. Writ denied.

Geo. D. Collins, Jr., of San Francisco, for petitioner.

PER CURIAM. In view of the decisions of this court, we see no merit in any of the claims made in support of the petition for a writ of habeas corpus, with the possible exception of the claim that under the circumstances and in view of the provisions of section 220, Penal Code, the maximum penalty in petitioner's case was 14 years. As to this it is sufficient to say that, while the sentence imposed was one of 25 years, such judgment is not void in toto. It is a valid sentence for the term authorized by the law. The judgment was pronounced December 13, 1916. Obviously, therefore, the petitioner has not served the time for which he may be lawfully imprisoned. It is the established practice of this court not to consider any question of excess of sentence until the expiration of the time for which the prisoner may be lawfully confined. It is clear, therefore, that a writ should not be granted at this time. In what we have said we are not to be understood as definitely determining that the judgment in this case was not one authorized by law.

The application for a writ of habeas corpus is denied.

All concur, except LAWLOR, J., absent.

(180 Cal. 467)

HITCH v. SCHOLLE. (L. A. 4933.)

(Supreme Court of California. May 31, 1919.)

1. HIGHWAYS ⟸159(2) — OBSTRUCTIONS — PUBLIC NUISANCE — ACTION TO ABATE — AVERMENT OF SPECIAL INJURY.

Action to adjudge the existence of a public highway over defendant's land, and to enjoin defendant from obstructing such highway, is an action by a private person, to abate a public nuisance, and the complaint must allege special injury in order to state a good cause of action.

2. HIGHWAYS ⟸155 — OBSTRUCTION — REMEDIES OF PRIVATE PERSONS — ABATEMENT.

If an obstruction wrongfully maintained in a public highway constitutes a nuisance, which injures a private person in common with the public, such person cannot maintain a private action to abate such nuisance, unless the free use of his property is interfered with by such obstruction.

3. HIGHWAYS ⟸159(2) — OBSTRUCTION — ACTION BY PRIVATE PERSON — SUFFICIENCY OF ALLEGATIONS.

Where a complaint by a private person to abate a public nuisance alleges obstruction of a public highway, and that plaintiff must have ingress and egress, but fails to allege that such highway is the only mode of ingress and egress, it does not state a cause of action.

4. HIGHWAYS ⟸159(2) — OBSTRUCTION — ACTION BY PRIVATE PERSON — ALLEGATION OF IRREPARABLE INJURY.

An allegation of irreparable injury in the complaint, in an action by a private person to abate a public nuisance resulting from obstruction of a public highway, unsupported by any allegation showing the injury would differ in kind from an injury suffered by the general public, is not sufficient to support a judgment for plaintiff.

5. HIGHWAYS ⟸155 — OBSTRUCTION — ACTION BY PRIVATE PERSON.

A private person cannot maintain an action to abate a public nuisance resulting from an obstruction in a public highway merely on the ground that he is subjected to personal inconvenience by the obstruction and must use another more circuitous route as his means of ingress and egress.

Department 2.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Action by J. W. Hitch against Ignas Scholle. From a judgment for plaintiff, defendant appeals. Reversed.

Chas. F. Blackstock, of Oxnard, for appellant.

Bowker & Sheridan and W. E. Shepherd, all of Ventura, for respondent.

LENNON, J. [1] In this action the plaintiff sought and secured a judgment decreeing the existence of a public highway over the lands of the defendant, and as an incident of the judgment the defendant was perpetually enjoined from obstructing said highway. The action is, as the defendant contends, one to abate a public nuisance by a private person not alleged to have been specially injured thereby. The complaint therefore does not state facts sufficient to constitute a cause of action, and the defendant's demurrer upon that ground should have been sustained.

[2] It is well settled, that, if an obstruction which is wrongfully erected and maintained in a public highway constitutes a nuisance which injuriously affects a private person equally in common with the public at large, a private action may not be maintained to abate the nuisance. Blanc v. Klumpke, 29

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Cal. 156. It is only where the free use of the property of a private person is interfered with by such an obstruction that he may have his private action to abate the nuisance resulting therefrom. Civ. Code, §§ 3479, 3493; Yolo County v. City of Sacramento, 36 Cal. 193, 195; Grigsby v. Clear Lake Water Co., 40 Cal. 396, 406; Shirley v. Bishop, 67 Cal. 543, 546, 8 Pac. 82; Gardner v. Stroever, 89 Cal. 26, 29, 26 Pac. 618.

[3, 4] The complaint herein alleged, in substance, that the plaintiff was the owner of certain farming land in the county of Ventura, upon which he raised lima beans, hay, and other crops commonly grown and harvested in that particular vicinity; that ingress and egress to and from this land was necessary in order to take his crops to market and for other purposes; that the defendant owned certain land in the vicinity subject to an easement of way in the public; that the defendant had obstructed this public highway by building and maintaining a fence across it, and was threatening to plow up the said highway; and that the plaintiff would suffer great and irreparable injury if these acts were not enjoined. The allegations of one of the paragraphs of the complaint were stricken out upon the motion of the defendant upon the ground that they were redundant, irrelevant, and immaterial. These particular allegations did no more than declare that the plaintiff's land was devoted to farming purposes, and that for these purposes ingress and egress to and from the land was necessary. Neither these allegations nor any other allegations in the complaint averred that the highway in question affords the only mode of ingress and egress to and from the plaintiff's land.

The complaint cannot be considered as attempting to state anything more or less than a cause of action to abate a public nuisance. The allegation that the way in question is a public highway is necessarily inconsistent with the existence of any private right therein in the plaintiff. So considered, the complaint is vitally defective for the reason that it fails to allege that the highway in question constitutes the only mode of ingress and egress to and from the lands of the plaintiff. Houck v. Wachter, 34 Md. 265, 6 Am. Rep. 332; Scrutchfield v. Choctaw, etc., R. R. Co., 18 Okl. 308, 88 Pac. 1048, 9 L. R. A. (N. S.) 496. There is indeed an allegation of irreparable injury, but it is unsupported by the allegation of any fact showing wherein that injury would differ in kind from the injury which would be suffered by the public in general.

The defendant did, in his answer, deny that the plaintiff would suffer special injury, but that portion of the answer was stricken out upon motion before the trial. Nor can it be said that the issue of special injury was raised at the trial itself. There was no finding on the question of special injury, although a finding that the plaintiff would suffer such injury by reason of an obstruction of the highway was essential to support the judgment, inasmuch as it was found that the said highway was in fact a public highway.

[5] The evidence adduced on behalf of the plaintiff was to the effect that the highway in question constituted his only convenient mode of ingress and egress, but that there was another route available over other public highways which he sometimes used. This evidence would not, we think, be sufficient to support a finding of special injury. The weight of authority is to the effect that in actions of this character it should clearly appear from the pleadings and by the proof that the way in question constitutes the only means of ingress and egress to and from the land of the plaintiff. In short, there is no ground for an action by a private person to abate a public nuisance resulting from the obstruction of a public highway where it merely appears that the person would be subjected to personal inconvenience by the obstruction or placed under the necessity of traveling by a much more circuitous route to reach his destination. Houck v. Wachter, supra.

This view of the case makes it unnecessary to decide whether the evidence supports the finding that the way in controversy was in fact a public highway.

The judgment appealed from is reversed.

We concur: MELVIN, J.; WILBUR, J.

(180 Cal. 447)

CITY OF VENICE v. SHORT LINE BEACH LAND CO. (L. A. 4886.)

(Supreme Court of California. May 29, 1919.)

1. DEDICATION ⟸35(1, 3)—PUBLIC HIGHWAYS—ADVERSE POSSESSION — STATUTES—APPLICABILITY.

Under Pol. Code, § 2618, relating to the dedication, abandonment, and acceptance of land for public highways, neither improvement of the way by public authority nor payment of taxes by the public is necessary, and Code Civ. Proc. § 325, prescribing the conditions necessary to an adverse possession of land, is not applicable in a suit to determine whether land has been dedicated as a public highway.

2. DEDICATION ⟸17—PUBLIC HIGHWAYS—INTENT—EXPRESS DECLARATION.

To constitute a dedication or abandonment by the owner of land for a public highway under Pol. Code, § 2618, the necessary intent need not be manifested by any contract or express declaration of the owner, but may be implied from his conduct.

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3. DEDICATION ⟸37—ACCEPTANCE—USER.

Acceptance by the public of a dedication or abandonment of land for a public highway under Pol. Code, § 2618, need not be manifested by any direct action, ordinance, or declaration of the public authorities, but may be shown by mere user for a reasonable length of time, notwithstanding payment of taxes by the property owner.

4. DEDICATION ⟸44—HIGHWAYS—EVIDENCE—SUFFICIENCY.

In a suit to quiet title to land alleged to have been dedicated by the owner to the public as a highway, evidence *held* sufficient to show an intent that the land in question should be used as a public street.

5. CORPORATIONS ⟸425(4)—REPRESENTATION BY AGENT—ESTOPPEL TO DENY AUTHORITY.

Where a corporation having the exclusive sale of all the land within a subdivision gave its agents ostensible authority to make representations to purchasers that a certain strip of land was to be used as a public street, the corporation was estopped to deny the authority of its agents.

6. CORPORATIONS ⟸432(6) — EVIDENCE ⟸158(26)—AUTHORITY OF AGENT.

The authority of an agent to act for a corporation need not be proved by the minutes of its board of directors or by a contract in writing, but may be shown by evidence that the person did business for the corporation and on its behalf, as agent, with the knowledge and acquiescence of its directors or general manager or by their direction.

7. TRIAL ⟸90—RECEPTION OF EVIDENCE—FAILURE TO MOVE TO STRIKE—WAIVER.

Where evidence is apparently admissible and no motion is made to strike it out when the contrary is shown, the objection as to its admissibility is deemed to have been waived.

Department 1.

Appeal from Superior Court, Los Angeles County; H. T. Dewirst, Judge.

Action by the City of Venice against the Short Line Beach Land Company to condemn land for a public street, with cross-action to quiet title. From a judgment in favor of plaintiff on the cross-complaint, defendant appeals. Affirmed.

William H. Fuller, of Los Angeles, for appellant.

Rush M. Blodget, City Atty., of Venice, and Fredericks & Hanna, all of Los Angeles, for respondent.

SHAW, J. The Short Line Beach Land Company appeals from a judgment in favor of the city of Venice declaring that a certain strip of land claimed by said company is a public street or highway in the city of Venice.

The proceedings in the court below were initiated by a complaint filed by the city of Venice against said land company to condemn said land and other parcels for a public street. This complaint was filed on September 27, 1912. An answer was filed thereto, and the cause was continued from time to time until May, 1914, when the court, pursuant to a stipulation of the parties, made an order granting the land company leave to file a cross-complaint concerning the particular parcel now in question, on condition that the issues raised by the cross-complaint should be determined and disposed of before the issues raised upon the complaint in condemnation were determined. The cross-complaint was filed accordingly, and the city of Venice made answer thereto. The issues upon this cross-complaint came on for trial in 1915. In the meantime the city of Venice had dismissed its action for condemnation. The only questions for decision here are those arising upon the cross-complaint. The parcel of land is described as lot 38 of block 10 of the Short Line Beach subdivision No. 1, as recorded in Map Book 2, page 59, in the recorder's office of Los Angeles county.

The cross-complaint is in the form of an ordinary suit to quiet title. The answer thereto alleges that said parcel of land is a public street or alley in the city of Venice. The court found that it was such public street, and the only question presented for consideration is whether or not the evidence is sufficient to support this finding.

The contention of the respondent is that the owners of the tract in question dedicated it to public use as a street or alley, and that such dedication was accepted by the public. It is not claimed that there was any express dedication, or that the owners ever executed any contract, deed, or map showing their intention to make such dedication. In March, 1914, some two months before the filing of the cross-complaint, the city of Venice passed an ordinance reciting that said strip of land had been offered for use as a street, and formally accepting it as such street. The respondent does not rely wholly on this acceptance, but contends that there was also an acceptance by the common use of the land by the public as a street and by other acts showing acceptance of the property as a street.

[1] There is no merit in the appellant's contention that section 325 of the Code of Civil Procedure, prescribing the conditions necessary to an adverse possession of the land, is applicable to this question. Land used for a highway could not be inclosed or cultivated, and no improvement thereof by the public authorities is necessary to constitute it a highway. The law relating to highways is indicated by section 2618 of the Political Code, declaring that such highways are roads, streets, alleys, etc., "laid out or erected as such by the public, or if laid

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out or erected by others, dedicated or abandoned to the public." To accomplish such dedication or abandonment and acceptance by the public, neither improvement of the way by public authority nor payment of taxes by the public is necessary. All that is required is a dedication or abandonment by the owner and an acceptance thereof by the public.

[2, 3] In order to constitute such dedication, or such abandonment, by the owner, his intention to that effect must appear. Such intent need not be manifested by any contract, writing, or express declaration of the owner. It may be implied from his conduct. "If the donor's acts are such as indicate an intention to appropriate the land to the public use, then, upon acceptance by the public, the dedication becomes complete." People v. Marin County, 103 Cal. 228, 37 Pac. 203, 26 L. R. A. 659. In that case it is said that, in the case of an express dedication by words or acts, "the intention to appropriate the land to public use is manifested by some outward act of the owner manifesting his purpose," but that an implied dedication may be proved "by acts or conduct not directly manifesting the intention, but from which the law will imply the intent." As stated in Helm v. McClure, 107 Cal. 204, 40 Pac. 437, the question "whether a dedication of land for highway purposes has occurred in any instance is a conclusion of fact to be drawn from the circumstances of the particular case; that such circumstances must clearly show an unequivocal intention, manifested by appropriate words or conduct, or both, on the part of the owner, to devote his land to the wayfaring uses of that somewhat vague entity called 'the public.'" Sussman v. San Luis Obispo County, 126 Cal. 539, 59 Pac. 24; Smith v. San Luis Obispo, 95 Cal. 466, 30 Pac. 591; Harding v. Jasper, 14 Cal. 647. It is not necessary that the acceptance by the public be manifested by any direct action, ordinance, or declaration of the public authorities." Such acceptance may be shown by mere user without any formal action in relation thereto by the municipal authorities." Monterey v. Malarin, 99 Cal. 293, 33 Pac. 840. "The use of the street by the public for a reasonable length of time" is sufficient evidence of acceptance. Smith v. San Luis Obispo, supra, 95 Cal. 470, 30 Pac. 591. This case further holds that the payment of taxes on the property by the owner is not sufficient to rebut the proof of dedication, if such proof is otherwise sufficient. Upon applying these principles to the case, we find that there is sufficient evidence to sustain the findings of the court.

Block 10 is a parcel of land between Canal street, lying easterly, Pacific avenue, otherwise called Trolleyway, westerly, Center street, southerly, and Mildred avenue, northerly, in the subdivision mentioned in the description aforesaid. Its width from Pacific avenue to Canal street is 235 feet. The frontage on Canal street is about 500 feet; that on Pacific avenue about 644 feet. The difference between these sides is caused by the fact that Mildred avenue is not at right angles to the side lines of the block. It contains 38 lots. Seventeen of them are on the Canal street side. Twenty of them front on Pacific avenue. All of these are 100 feet in length, thus leaving a strip 35 feet wide in the center of the block, extending from Mildred avenue to Center street and lying between the respective tiers of lots. This strip is designated on the map as lot 38. The land was subdivided for sale by a syndicate composed of some six or more persons, and the subdivision and sale thereof was committed by the owners entirely to one member of the syndicate, a real estate firm known as Strong & Dickinson, and their subagents. Prior to the filing of the map, a tentative map had been made showing what is now called lot 38, not as a lot, but as an alley or street. At that time it was expected that a street car line would be built through the tract upon this strip of land, and it was intended to be used for that purpose. By some change of plan it was determined that the street car line would not be so located. Before it was filed, this strip was designated on the map as lot 38, and a similar strip through block 9, lying southerly of block 10, was designated as lot 42. The evidence showed that nearly all of the lots were thereafter sold by the owners through Strong & Dickinson and subagents authorized by them, and that in making sales of lots they stated, or authorized the statement, to several of the purchasers that this strip would be left open for a public street. The street car line which was built on Pacific avenue, or Trolleyway, was so constructed that there was no adequate room for the passage of teams along that street. Purchasers made objections to this frontage, and were told that they would have access to the lots over the strip of land in question. Houses were built upon the lots on each side of this strip; the lots fronting on Pacific avenue being almost entirely built upon. Several of the owners made sidewalks in front of their lots upon the alleyway, so called, designated on the plat as lot 38. Some of these sidewalks were made as early as the year 1906. From about the year 1905 until the time of the trial this strip was continuously used as a public way, and was commonly known as "Strong's Drive." It was the only means of access to the buildings situated on the westerly side of the strip that could be conveniently used by delivery wagons and other vehicles. There is evidence that the owners of the property, through their local agents in

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charge of the property, were fully aware of this use of the strip of land. The city of Venice improved Center street and Mildred avenue with sidewalks, and at the corners of this alley upon those streets insets in the sidewalk were made which plainly indicated that it was supposed to be a public way. At the time the map was filed the title to the property was held by the Union Trust & Realty Company in trust for the members of said syndicate. Shortly afterwards the members formed the appellant corporation, and the title was thereafter transferred to the corporation, but the agency for the making and control of the sales continued as before.

[4] This evidence sufficiently shows the intention of the owners that this strip of land should be used by the public as a public street or alley for the convenience and benefit of the public and of the owners of lots abutting thereon. The general use by the public was a manifestation of its acceptance thereof, and upon the rules laid down in the foregoing authorities the street was in this manner completely "dedicated and abandoned" to the public use.

It is true that the managers and agents of the syndicate above referred to, and some members of the syndicate, as well, testified that they made no such declarations concerning the use of the street, and that they never intended to dedicate the property for that purpose. But the testimony of other persons concerning declarations made by them was sufficient to create a conflict of the evidence, which was determined by the court below in favor of the respondent.

[5] It is also suggested by the appellant that there is evidence that the directors of the appellant corporation never in any manner authorized its agents to dedicate this land to the public use. It is apparent, however, that the corporation is estopped to deny the authority of its agents in the matter. The entire subject of making the sales was left to the control of its agents, and they had at least ostensible authority to make the declarations referred to. Southern Pacific Co. v. Pomona, 144 Cal. 347, 77 Pac. 929.

[6, 7] Appellant complains of the ruling of the court allowing testimony of the declarations made by Carroll Daly with regard to the use of this strip of land as a public street, claiming that he had no authority to make such statements. It appears that he was a member of the syndicate that subdivided the land, and that he has been a director of the appellant corporation ever since its organization; that he was also secretary and treasurer of the corporation; that he took an active part in its business and was a subagent under Strong & Dickinson for the sale of the lots; and that as such he negotiated several sales of the lots by the company. Having obtained the benefit of his solicitations and representations to induce purchases, the company denies his authority to make them. It is not the law that the authority of an agent to act for a corporation can only be proven by the minutes of its board of directors or by a contract in writing. It may be shown by evidence that the person does business for the corporation and on its behalf, as agent, with the knowledge and acquiescence of its directors or general manager, or by their direction. The company, in such a case, is bound by his acts and declarations within the scope of the business intrusted to him. Crowley v. Genesee M. Co., 55 Cal. 276. It may be that Daly's declarations to W. A. Rennie in negotiating a sale by Daly of his own lot to Rennie was not admissible against the company. But they were given before it was disclosed that the lot belonged to Daly at a time when it appeared that it was one of the lots of the company. It was then apparently admissible, and no motion was made to strike out the evidence when the contrary was shown. Hence the objection must be deemed to have been waived.

The judgment is affirmed.

We concur: OLNEY, J.; LAWLOR, J.

(180 Cal. 419)

In re NUTT'S ESTATE. (L. A. 6047.)

(Supreme Court of California. May 29, 1919.)

1. APPEAL AND ERROR ⟸345(1)—TIME FOR TAKING APPEAL—PENDENCY OF MOTION FOR NEW TRIAL—NOTICE OF INTENTION.

Provision of Code Civ. Proc. § 939, that if proceedings for new trial are pending, time for appeal shall not expire until 30 days after entry of order therein, is limited to cases where new trial proceeding is regularly initiated by the filing and service of notice of intention, as required by section 663.

2. APPEAL AND ERROR ⟸345(1)—TIME FOR TAKING APPEAL—MOTION FOR NEW TRIAL—FAILURE TO FILE NOTICE OF INTENTION—ADVERSE PARTIES.

Where one "B." contested for incompetency of testator, probate of two alleged wills and beneficiaries under earlier will contested second will for undue influence, and court tried contest of beneficiaries to first and postponed trial of other issue, an appeal from judgment for contestants is properly taken, under Code Civ. Proc. § 939 within 30 days after entry of order denying new trial, though "B." was not served with notice of intention; since, if "B." was an adverse party on whom notice must be served, failure of service did not deprive court of jurisdiction to hear the motion.

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In Bank.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

In the matter of the estate of Carolynn E. Nutt, deceased. Proceedings to probate two alleged wills, in which W. Ray Simpson was proponent of later will and Martha Nutt and another were proponents of earlier will, and contestants were Ann Nutt Baker, contesting both wills, and proponents of first will, contesting later will. From a judgment for contestants of later will, proponent appeals. On motion to dismiss appeal. Motion denied.

Hahn & Hahn, of Los Angeles, and Stephen G. Long, of Long Beach, for appellant.

M. B. Butler, of Pasadena, for respondent.

ANGELLOTTI, C. J. This is a motion to dismiss an appeal taken by W. Ray Simpson, the proponent of an alleged will of deceased, from a judgment sustaining the opposition of two heirs of deceased to the probate thereof. One of the grounds of the motion is that the appeal was not taken within 60 days after the entry of judgment. But it was taken within 30 days after the entry of an order denying proponent's attempted motion for a new trial, which was in time if such a proceeding was duly initiated. Section 939, Code Civ. Proc.

[1] Under section 663a, Code of Civil Procedure, the party desiring to initiate such a proceeding must serve on the adverse party and file with the clerk of the court a notice of intention within a time specified. We have held that, unless the notice of intention be both served and filed within the specified time, there is no initiation of a proceeding on motion for new trial, and no such "proceedings * * * are pending" within the meaning of section 939, Code of Civil Procedure (Whiting-Mead, etc., Co. v. Bayside Land Co., 172 Pac. 598), with the result that in such a case the right of appeal expires 60 days after the entry of judgment. This ruling was made in a case where there was no filing of any notice of intention within the specified time, with the result that there was no initiation of a proceeding on motion for new trial as to any adverse party.

[2] The situation here is different. The point in the case at bar is that no such proceeding was initiated for the reason that the notice of intention was never served on one Ann Nutt Baker, claimed to be an adverse party. The facts in this connection are as follows: There were two alleged wills of deceased, one dated August 17, 1917, and the other dated September 24, 1917. Both have been filed for probate and opposition to probate presented as to each, Ann Nutt Baker contesting both wills, and Martha Nutt and David Nutt, beneficiaries under the earlier will, contesting the will of September 24th. As to the will of September 24th, offered for probate by one W. Ray Simpson, the sole beneficiary thereunder, the contest of Martha Nutt and David Nutt was on the ground of fraud and undue influence, while that of Ann Nutt Baker was on a ground of incompetency to make a will. The question of the admission to probate of the alleged will of September 24th being before the court, and the two oppositions to such admission pending, for some reason the court proceeded with a trial of the issues presented by the opposition of Martha and David Nutt only; the opposition of Ann Nutt Baker being postponed to await the determination of the other opposition. This trial resulted in a verdict for the contestants, with a consequent judgment declaring the will of September 24th to be "null and void." This is the judgment attempted to be appealed from.

The notice of intention to move for a new trial was addressed only to Martha and David Nutt, and was served on them alone and filed within the specified time. This was upon the theory, doubtless, that under the circumstances Ann Nutt Baker was not an adverse party, and need not be made a party to the new trial proceeding. We may assume that this view was erroneous, but we are of the opinion that it does not follow that no new trial proceeding was duly initiated. To the contrary it is clear that by the service and filing of the notice on Martha and David Nutt within the specified time such a proceeding was duly initiated as to them at least, and that the trial court had jurisdiction to determine the motion.

If it be true that Ann Nutt Baker was an adverse party in the sense that unless by service she was made a party to the proceeding on motion for a new trial the trial court could not properly grant the motion, that fact would be a reason requiring the denial of the motion, but it would not deprive the trial court of jurisdiction to hear and determine the motion. This, we think, is the effect of the authorities. See Johnson v. Phenix Ins. Co., 146 Cal. 571, 80 Pac. 719, and cases there cited. So it may not be held that a new trial proceeding was not pending in this case. Its facts clearly distinguish it from Whiting-Mead, etc., Co. v. Bayside Land Co., supra, where there was no initiation of a new trial proceeding as to any adverse party. It follows from what we have said that the appeal taken within 30 days after the entry of the order denying a new trial was in time.

The other ground of the motion to dismiss was that no sufficient notice of appeal was ever filed. As to this ground we orally stated our views from the bench at the time of the hearing of the motion, to the effect that the notice should be held to be sufficient. No

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useful purpose would be subserved by further discussion of this point.

The motion to dismiss the appeal is denied.

We concur: SHAW, J.; WILBUR, J.; OLNEY, J.; LENNON, J.; LAWLOR, J.; MELVIN, J.

(180 Cal. 385)

PEOPLE v. RICO. (Cr. 2235.)

(Supreme Court of California. May 20, 1919.)

HOMICIDE ⟸230, 232—EVIDENCE—DELIBERATION AND PREMEDITATION—WEIGHT AND SUFFICIENCY.

In a murder trial, evidence that accused, who was boarding with deceased, upon being ordered to leave for failure to pay his board, left in the morning, but, returning in the evening, attacked deceased and killed her with a razor, was sufficient to warrant the jury's finding of a deliberate purpose and intent on his part to kill, although there was evidence that he had been drinking whisky that day.

In Bank.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Pedro Rico was convicted of murder in the first degree, and appeals. Affirmed.

Albert D. Trujillo, of San Bernardino, for appellant.

U. S. Webb, of San Francisco, and Joseph L. Lewinsohn, of Los Angeles, for respondent.

PER CURIAM. The defendant, Pedro Rico, charged by information with the crime of murder, was convicted of murder in the first degree, and appeals from the judgment pronounced on such conviction.

It is shown by the evidence that the defendant, who for some time immediately preceding the commission of the homicide was a boarder in the household of Mrs. Manuela P. de Ortiz and her husband, in the city of San Bernardino, was on the morning of October 29, 1918, ordered by both Mr. and Mrs. Ortiz to leave the premises, the reason apparently being that he had failed to pay for his board and lodging. He left, and shortly thereafter returned and obtained his clothes, which he took away. During the early evening of the same day, between 5 and 6 o'clock, he again returned to the house, and finding Mrs. Ortiz in the kitchen engaged in her work, he made an assault on her with a razor and cut her throat, inflicting a wound from which she instantly died. It appeared that he had been drinking whisky to some extent during the day, but the evidence in regard to this is such that it cannot be held that the jury was not warranted in concluding that he knew fully what he was doing, and was acting with a deliberate purpose and intent to kill the deceased. Upon the question of the effect of intoxicants the jury was correctly instructed. The principal point made in the appellant's brief is substantially that the evidence fails to show the premeditation which is an essential element of the first degree of the crime of murder. As said in People v. Machuca, 158 Cal. 62, 64, 109 Pac. 886, 887, "this court has repeatedly declared that the question of the degree of crime is exclusively for the jury, and that their determination will not be disturbed when there is any evidence to support it." In this case there was clearly sufficient evidence to sustain the conclusion of a deliberate purpose and intent on the part of the defendant to kill.

A few rulings of the trial court in the matter of admission of evidence are complained of. Counsel has not specified wherein the error as to any of these rulings exists, and, so far as we can see, each of the rulings was correct.

This being a capital case, we have carefully examined the whole record. To our minds it discloses no reason to doubt that the proceedings in the court below were entirely without error, and that the conclusion of the jury is fully sustained by the evidence.

The judgment is affirmed.

ANGELLOTTI, C. J., and SHAW, J.; WILBUR, J.; MELVIN, J.; LENNON, J.; OLNEY, J.; and LAWLOR, J.—concur.

(180 Cal. 471)

FOWLER GAS CO. v. WEBER et al. (S. F. 8040.)

(Supreme Court of California. June 1, 1919.)

1. BANKS AND BANKING ⟸154(7)—EVIDENCE—ADMISSIBILITY.

In action to recover amount of draft drawn on a partnership, but paid by defendant bank from funds of plaintiff corporation, excluding evidence that plaintiff had authorized this transaction in order to pay partnership for material purchased from it, *held* error.

2. EVIDENCE ⟸158(26) — ADMISSIBILITY — CORPORATE MINUTES.

Authority of corporation's officers to pay for material from its bank fund need not be shown exclusively by minutes of directors, but may be established by apparent authority of officers, and if minutes are not kept, proceedings at directors' meeting may be otherwise shown.

In Bank.

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by the Fowler Gas Company against A. A. Weber and the First National Bank of Fowler. Judgment for plaintiff, and the last-named defendant appeals. Reversed.

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L. L. Cory, of Fresno, for appellant.

Gallaher & Aten, of Fresno, for respondent.

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SHAW, J. Judgment was rendered in the court below in favor of the plaintiff against the First National Bank of Fowler and A. A. Weber, for $3,897.84. The defendant First National Bank of Fowler alone appeals.

The complaint alleges that the plaintiff had money on deposit in its name in said bank, and that, without authority from the plaintiff and against its will, and with intent to defraud the plaintiff, said bank, on December 5, 1913, paid out of the said deposit a certain sum of $3,897.84, in satisfaction of a draft for that sum, which draft said bank had previously received and honored and then held; that plaintiff was not then or at any time, indebted to said bank, or to any or either of the defendants; and that Weber received said money from the bank with knowledge of said facts and of said fraudulent intent.

The answer of the bank alleges that said draft "was honored and paid with the full knowledge and consent of said plaintiff and with its authority," and that it was not paid to Weber, but was paid to Smith-Booth-Usher Company, the drawers thereof. It further avers that on December 5, 1913, there was deposited in said bank in the name of the plaintiff, the sum of $14,000; that on said day the plaintiff authorized and directed the bank to pay from said deposit all drafts, orders, and vouchers bearing the O. K. of the defendant Weber; that said Weber had attached his O. K. to said draft; and that thereupon with said authority defendant paid the draft from said deposit.

The court below made findings sustaining the allegations of the complaint, except as to the alleged fraudulent intent. It is contended by the appellant that the finding to the effect that the payment of $3,897.84 by the bank out of the deposit account of the plaintiff therein was unauthorized, is contrary to the evidence, and also that by reason of the adverse rulings of the court the appellant was prevented from fully proving the facts which constituted its defense, and was thereby deprived of its right to a fair trial. Upon a careful examination of the record we are of the opinion that these points are well taken.

The draft which it is claimed was satisfied by the alleged payment reads as follows:

"Los Angeles, California, Nov. 25, 1913.

"At sight pay to the order of the First National Bank of Fowler ($3,897.84) three thousand eight hundred ninety-seven and 84/100 dollars. Value received and charge to the account of

To Mess. Weber & Wilson, Dinuba, Cal.

"Smith-Booth-Usher Co.

"E. H. Law."

The evidence shows that Weber & Wilson had purchased a lot of pipe suitable for gas mains from Smith-Booth-Usher Company for $4,097.84, of which $200 had been paid, that said pipe had been shipped to the town of Fowler, consigned to Weber & Wilson, and that this draft was drawn for the purpose of obtaining payment of the balance due therefor. It is to be noted that there is nothing on the face of the draft to indicate that the Fowler Gas Company was in any way concerned with its payment. The business of Weber & Wilson was done by Weber alone, and we will use his name in referring to it.

At the outset of the trial the court was of the opinion that the authority of the bank to pay the draft aforesaid out of said deposit could not be shown, except by proof of an acceptance thereof in writing by said company. Efforts of the appellant to show transactions between Weber and the gas company, tending to establish the liability of the gas company for the debt represented by the draft, were thwarted by rulings based on this ground. This, of course, was erroneous. The court was also of the opinion that no authority for the payment of the $3,897.84 out of the plaintiff's account could be shown except by orders to that effect entered on the minutes of its board of directors. Other evidence to prove the authority was excluded by rulings to that effect. Later, after the trial had been postponed for a period of six months, the appellant again endeavored to show the transaction which it contended warranted the charge of this sum against the account of the plaintiff, and offered evidence of the dealings between Weber and the gas company for that purpose. Weber testified, "I had a contract and erected the plant," but the court would not allow him to state what the contract was, nor with whom it was made. After much difficulty and over repeated interruptions and objections, some of the facts concerning the deal were elicited, the court stating in explanation that the evidence was admitted tentatively only, subject to a motion to strike out the same in case the matter was not connected by proper legal evidence of the authority from the gas company. In this way the appellant introduced such scraps of evidence as the record contains on the subject. From the remarks of the court in making its rulings it is reasonably certain that its final decision was made in entire disregard of this evidence. The plaintiff, however, was careful to make no motion to strike out any of it, and we have no express ruling of the court declaring it immaterial.

[1] From the uncontradicted evidence introduced, the following facts appear: About September 1, 1913, Weber began preparing for the construction of the gasworks and distributing system in Fowler, apparently with the expectation of interesting other persons

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therein before its completion. On November 18, 1913, the plaintiff corporation was organized for the purpose, among other things, of acquiring and operating gasworks and conducting its principal business in Fowler. At that time Weber had the gas plant partially constructed. About that time he ordered the pipe aforesaid, from Smith-Booth-Usher Company to be used in the laying of mains for the said gas plant. Negotiations ensued between the organizers and directors of the company and Weber, the nature of which was not allowed to be shown, for the purchase by said company of the said plant from Weber. The court refused to allow the complete terms of the contract finally made to be given in evidence, but by persistent effort the appellant finally succeeded in eliciting from Weber testimony to the effect that he sold the plant to the plaintiff and agreed to complete the same, in consideration of 15,000 shares of the capital stock of the gas company of the par value of $1 each, and $14,000 in money; that the money was all paid, and that the $3,897.84 paid by the bank in satisfaction of the aforesaid draft was a part of the said cash payment of $14,000; that he agreed to complete the plant for said price and turn it over to the company; that he did complete it and turned it over to the company on February 25, 1914. It also appeared that on December 5, 1913, the gas company deposited in the bank said sum of $14,000; that on the same day the bank officials entered a charge against said account for $10,565.02; that this charge consisted of $5,594 on account of a check made by the gas company to pay a note of Weber to the bank for money borrowed by him in September, 1913, the item of $3,897.84 on account of the draft in controversy, another item of $457.93 for freight paid by the bank at Weber's request, on the pipe above mentioned, and 24 other small items which had been paid on Weber's account by the bank, either on that day or previously, making the total amount above stated. All of these charges, except the note, were approved by Weber. None of them was objected to at the time, though known to Patton, the secretary of the plaintiff. The terms of the contract of sale by Weber to the company, of the gas plant, so far as they may have related to the purpose of the $14,000 deposit, were not given in evidence other than as above stated; the defendants apparently were deterred by the adverse rulings from pursuing the inquiry. But the evidence as a whole raised a strong inference that the $14,000 deposited in the bank by the gas company on December 5, 1913, represented the purchase price to be paid in cash to Weber for the sale and final completion of the plant, and that it was deposited in that manner in order to make sure that it should be applied and used as far as it would go, or as far as necessary if it were more than enough, in the payment of bills then already incurred by Weber in the construction of the plant, including the $10,565.02 aforesaid, and the balance to the further expenses of Weber in completing the plant. There was no contradiction of the facts above stated, nor of the facts which, as we have said, raised the aforesaid inference.

It may be that from these facts alone the inferences just mentioned would not of necessity follow. But there was other evidence, also undisputed, which establishes them as facts proven. The pipe for which the $3,897.84 was due was at Fowler, ready for laying in the distributing system of the plant at the time the deal was closed. The officers of the company knew this, and the company agreed to pay the bills for freight thereon, and did pay them by directing a charge therefor against the $14,000 deposit. They knew that the pipe was intended for use in the plant, and also that it was so used. In February, 1914, a settlement for the construction work was made by Weber with Patton, secretary of plaintiff, and also assistant cashier of the bank, and Avenall, a director of the plaintiff, and also cashier of the bank. The plant was accepted, and Weber paid plaintiff $322.01, ascertained to be due from him on said settlement. At that time the charge of $10,565.02 against the $14,000 deposit, which charge included the sum of $3,897.84 paid for the pipe, was standing on the books of the bank, uncontested. If it had not been credited to the plaintiff in the settlement, Weber would not have owed the $322.01, but plaintiff would have owed him $3,575.83. Weber's testimony that the entire $14,000 had been paid to him stands uncontradicted, and it is clear that it was not paid in any other manner than by the charges to the gas company against its deposit. Furthermore, in May, 1914, in an application to the Railroad Commission for leave to issue bonds, the gas company declared that the cost of the pipe laid for its mains was $4,097.84, and that it had paid for the same. This could be none other than the pipe bought by Weber from Smith-Booth-Usher Company, and the payment was obviously made in the manner above stated and not otherwise. The charge made on December 5, 1913, by the bank of this item of $3,897.84 against plaintiff was not objected to at all until April, 1914, on the occasion of a change in the position of manager of plaintiff. J. R. Lovely testified that he then became manager, that as such he got a statement from the bank, and found the draft of Smith-Booth-Usher Company returned by the bank as a voucher for $3,897.84, charged against the company and that he then investigated the bank account, as he said, "for the simple reason that I knew there was never no such stuff bought by the Fowler Gas

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Company." That the pipe was bought by the company when it bought the plant of Weber was a fact incontrovertibly established by the evidence. His reason merely showed his ignorance of previous transactions, and implies that, if he had known that the pipe had been bought of Smith-Booth-Usher Company by Weber, that the draft was for the price thereof, that the pipe had been used in the plant and had been paid for as a part of the price to Weber for the plant, he would not have made the objection.

From all this evidence there can be no other conclusion than that the cost of this pipe was included in the price paid to Weber by the deposit of the $14,000 in the bank, and its subsequent application to the bills due for construction and material, and that the charge and payment complained of was in that manner authorized by the plaintiff. The findings should have been against the plaintiff on this vital issue.

The rebuttal evidence of plaintiff was confined to an effort to show that at the meeting of December 5, 1913, the directors of plaintiff did not direct the bank to pay this draft out of plaintiff's account or to pay for any shipment of pipe out of said account. There was a sharp conflict of evidence on these points. But the pipe was then delivered at Fowler, the draft, so far as Smith-Booth-Usher Company was concerned, had been paid by the bank at Weber's request, and the matter was then in the shape of an item on the "Teller's Cash Ledger" of the bank. There was no occasion for any special discussion regarding that item. It was not denied by any one that Weber was to have the equivalent of $14,000 for the completed plant, including the pipe, nor that he got it only in the manner we have stated. It is suggested, rather than claimed, by the plaintiff that compensation to Weber for the pipe included in the transfer of the plant to the plaintiff was covered by the payment of the $5,500 note charged against the plaintiff's deposit. If there is evidence of this fact the plaintiff will be at liberty to produce it upon a new trial. There is none in the record before us.

It is unnecessary to consider in detail the many adverse rulings made by the court during the progress of the trial. The issues presented the question whether the charge of the amount of this draft against the account of the plaintiff was authorized. This opened a wide field of inquiry, and justified the introduction of evidence of any transactions between Weber and the gas company tending to show that the gas company assumed the payment of the debt and provided for its payment in the manner above stated. The action of the court in preventing the introduction of the evidence except in the limited manner above stated was erroneous.

[2] For the guidance of the court upon a new trial we will say further that it is not true that the minutes of the board of directors of the plaintiff constituted the only evidence admissible for the purpose of showing authority for the payment of this sum by the bank out of the plaintiff's funds. If a corporation allows its officers to conduct its business and third persons act upon the apparent authority thus shown, it cannot defeat the rights of such persons arising from transactions done and completed under such ostensible authority by failing to enter upon its minutes any order giving its officers authority to act. Fresno, etc., Co. v. S. P. Co., 135 Cal. 208, 67 Pac. 773; Blood v. La Serena L. Co., 134 Cal. 370, 66 Pac. 317; Crowley v. Genesee M. Co., 55 Cal. 276. If minutes are not kept, other parties have the right to prove what actually occurred at the meetings of the directors, if such proof tends to establish their rights. We are of the opinion that a new trial is necessary, at which the appellant may be allowed fully to present the evidence under the rules we have stated.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; LAWLOR, J.; OLNEY, J.; MELVIN, J.

(40 Cal. App. 628)

GREELY v. NOBLE. (Civ. 2769.)

(District Court of Appeal, First District, Division 2, California. April 11, 1919.)

MECHANICS' LIENS ⟸272, 279—FORECLOSING—PLEADING—NOTICE OF COMPLETION—BURDEN OF PROOF.

In view of Code Civ. Proc. § 1187, requiring contractor's liens to be filed within 60 days after completion of the work or within 90 days if the owner fails to file a notice of completion, a contractor bringing an action to foreclose an original lien under section 1191 for street improvements, who filed the lien 62 days after completion, must allege and prove the failure of the owner to file his notice of completion in order to estop such owner from pleading the 60-day limitation in defense.

Appeal from Superior Court, City and County of San Francisco; John T. Nourse, Judge.

Action by M. A. Greely against Gerard E. Noble. From a judgment for defendant, plaintiff appeals. Affirmed.

Samuel Knight and F. E. Boland, both of San Francisco, for appellant.

Frank W. Sawyer, of San Francisco, for respondent.

HAVEN, J. Plaintiff appeals upon the judgment roll alone in an action to foreclose

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an original contractor's lien for street improvements, claimed by plaintiff under the provisions of section 1191 of the Code of Civil Procedure. The plaintiff alleged, and the court found, that the work upon which the lien was based was fully completed and performed on June 4, 1917, and that plaintiff's claim of lien was filed in the office of the county recorder on August 6, 1917, more than 60 days after the completion of the work. From these facts the court reached the conclusion of law that the claim of lien was not filed within the time required by section 1187 of the Code of Civil Procedure, and was therefore invalid. There is neither allegation in the complaint nor finding as to the filing, or want of filing, by the owner of the notice of completion provided for in said section.

The appeal presents the single question as to whether or not it is incumbent upon the plaintiff, in order to obtain the benefit of the 90-day period for filing liens specified in the closing sentence of section 1187, Code of Civil Procedure, to allege and prove that the owner did not file the notice of completion therein provided for. Counsel for appellant state that this question has never been considered by the appellate courts of this state, and we have found no case in which the exact question is involved. In Meyer v. City Street Improvement Co., 164 Cal. 645, 130 Pac. 215, it was held that a claim of lien for street work under section 1191, Code of Civil Procedure, was in time if filed within 90 days after the completion of the work. That decision is based upon an interpretation of the Mechanic's Lien Law as it existed prior to the amendments of 1911, and expressly states that it does not determine the effect of the revised act. The present provisions of section 1187 apply to liens claimed under any section of the chapter on mechanics' liens. Boscus v. Waldmann, 31 Cal. App. 245, 254, 160 Pac. 180.

In order to maintain an action for the foreclosure of a lien under section 1187, Code of Civil Procedure, it was necessary for plaintiff to allege that his claim of lien was filed within the time therein specified. That time is limited to a period of 60 days after the completion of the work, with the proviso that, if the owner fails to file the notice of completion therein provided for, he—

"shall be estopped in any proceedings for the foreclosure of any lien provided for in this chapter from maintaining any defense therein based on the ground that said lien was not filed within the time provided in this chapter: Provided, that all claims of lien must be filed within ninety days after the completion of any building, improvement or structure, or the alteration, addition or repair thereto."

This is a statutory declaration of an estoppel against the owner, based on his failure to file the notice referred to. It is settled law in this state that:

"If the plaintiff relies on waiver or estoppel as to any defense which would otherwise be available to the defendant under the facts stated in the complaint, the facts constituting such waiver or estoppel must be pleaded in the first instance." Goorberg v. Western Assurance Co., 150 Cal. 510, 519, 89 Pac. 130, 133 (10 L. R. A. [N. S.] 876, 119 Am. St. Rep. 246, 11 Ann. Cas. 801); Newhall v. Hatch, 134 Cal. 269, 273, 66 Pac. 266, 55 L. R. A. 673.

The complaint alleges facts which show that plaintiff has no cause of action under the 60-day limitation contained in the first part of section 1187, Code of Civil Procedure, and fails to plead any facts showing that the 90-day limitation is applicable to his case. In other words, plaintiff pleads himself without the terms of one portion of the section, and does not plead himself within the other portion thereof. The 60-day limitation is a defense which is available to the defendant, unless he is estopped from relying upon it by reason of his failure to file the notice of completion. In order to prove the filing of his lien within the statutory period, plaintiff must rely upon this estoppel. If he so relies, he must plead and prove the facts constituting such estoppel. Having failed to do so, the trial court was correct in holding that his lien was too late, and for that reason invalid.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

(41 Cal. App. 19)

GROTHEER v. PANAMA-PACIFIC LAND CO. (Civ. 2625.)

(District Court of Appeal, First District, Division 1, California. April 30, 1919.)

1. VENDOR AND PURCHASER ⟸109—RESCISSION OF LAND SALE CONTRACT—"FAILURE OF CONSIDERATION."

Where a land sale contract bound defendant vendor to exercise diligence in carrying out its terms, which provided for certain street improvements which were not made within six years, during which time purchaser was paying purchase-price installments vendor's breach constituted a clear failure of consideration within the provisions of Civ. Code, § 1689, providing that a party may rescind a contract if the consideration "before it is rendered to him fails in a material respect from any cause."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Failure of Consideration.]

2. VENDOR AND PURCHASER ⟸114—RESCISSION—WAIVER.

Where a land sale contract provided that vendor should complete certain street improve-

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ments and because of vendor's delay purchaser objected to making further payments, and an agreement was made to delay payments until the work was performed, and plaintiff purchaser still urged that the neglected work be done, purchaser did not waive the right to rescind the contract.

3. VENDOR AND PURCHASER ⇐118—STREET IMPROVEMENTS — BREACH OF AGREEMENT—EXCUSE.

As regards vendee's right of rescission for vendor's failure to perform an agreement to improve streets, it is not a defense to vendor that he was unsuccessful in getting permission of city engineer and superintendent of streets to place culverts, where the conditions were known to vendor prior to contract, and particularly where much of the work left undone was of a character not requiring official permission.

Appeal from Superior Court, City and County of San Francisco; Geo. E. Crothers, Judge.

Action by F. R. Grotheer against the Panama-Pacific Land Company. Judgment for plaintiff, and defendant appeals. Judgment affirmed.

Jordan & Brann, of San Francisco, for appellant.

Myrick & Deering and James Walter Scott, all of San Francisco, for respondent.

RICHARDS, J. The plaintiff and defendant on October 10, 1910, entered into a contract by which the latter sold to the former and agreed to convey to her a lot of land situate within the municipality of Oakland, at the corner of Sunnyvale avenue and Stanley road. The price of the lot was $1,580, part of which was paid upon the execution of the agreement, and the balance thereof was payable in monthly installments.

The agreement contained the following provisions:

"Time is hereby expressly made of the essence of this agreement.

"The seller agrees as follows, viz.:

"(a) To construct concrete curbing and cement sidewalks.

"(b) To grade and macadamize and concrete gutter all streets.

"(c) To lay sewers and water mains.

"Improvements will be carried on with due diligence until completed, all at the expense of the seller."

The plaintiff made her payments regularly until May, 1914, at which time she paid on account of principal the sum of $1,005, together with $172.85 for interest and $17.55 for taxes. At that time she called upon the secretary of the defendant, and stated to him that the company was not living up to its agreement with reference to the construction of street improvements; that she did not wish to find herself in the position of having completed her payments before all the street work was done, but at the same time she did not wish to stop them and have interest accrue against her. The secretary of the company replied that the position assumed by the plaintiff was a reasonable one, and promised to take up the matter with his board of directors; and some months thereafter, on December 11, 1914, the company communicated to the plaintiff a resolution adopted by it relieving her of further payments until the street work in front of her lot had been completed. No further work having been done by the defendant in connection with the plaintiff's lot she, on November 16, 1915, rescinded the contract and demanded the return of the money paid thereunder by her, the refusal of the defendant to comply with this request resulting in the bringing of the present action.

Defendant answered, admitting that it had failed to construct cement sidewalks, concrete curbing, and concrete gutters in Stanley road, but alleged in this behalf that said work was not done by it because of the impossibility of securing from the city of Oakland the necessary permission for such improvement. It also set up as a separate defense that the plaintiff for a valuable consideration had waived the making of the omitted improvements.

The court found against these contentions of defendant and rendered judgment in favor of the plaintiff for the amount demanded.

[1] The defendant appeals, and urges as its first point that the record shows no ground entitling the plaintiff to the equitable relief of rescission. It argues that at most there is merely a breach of a simple contract, for which the only remedy is in damages, and that there is no damage shown.

Undoubtedly the rule in most jurisdictions is as stated by the appellant. This rule, however, has been changed in several states, including our own (Conlin v. Osborn, 161 Cal. 659, 120 Pac. 755). Section 1689 of the Civil Code provides under what conditions the remedy of rescission, formerly exclusively equitable, is available. The Legislature has there enacted that a party to a contract may rescind if the consideration, "before it is rendered to him, fails in a material respect, from any cause." We think the present case comes within this provision of the Code. The evidence disclosed that there existed throughout the length of Stanley road, including that part of said road in front of plaintiff's lot, a ditch several feet wide and deep, which served the purpose of carrying off storm waters from neighboring lands, and also, as we have seen, that certain street improvements agreed to had not been made, rendering the lot of little value for residence purposes, for which it had been sold. This situation still existed six years after the execution of the contract, which bound the defendant to the exercise of diligence in carrying out its terms, even to the making of time of the essence thereof. This long-continued failure to comply with essential provisions of its agreement constituted a clear failure of consideration (Conlin v. Osborn, supra; Sterling v. Gregory, 149 Cal. 117, 85

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Pac. 305; Richter v. Union Land, etc., Co., 129 Cal. 372, 62 Pac. 39; Brown v. National Electric Works, 168 Cal. 336, 143 Pac. 606) and, under the terms of subdivision 4 of the section of the Civil Code above referred to, entitled the plaintiff to rescind the contract.

[2] It is further contended by the appellant that the plaintiff waived her right (if any) to rescind by agreeing with it as to what the consequence of the delay in making the improvements should be, referring to the fact that, upon the objection of plaintiff to continuing her payments while appellant was behind in the prosecution of the work of street improvement, appellant in writing notified her that further payments could be deferred until the work was completed. We do not give to this incident the scope thus claimed for it. The plaintiff was still urging that the neglected work be done, and, although for some time she took advantage of the appellant's permission to defer further payments, this did not prevent her after a reasonable time from insisting that the terms of appellant's contract be lived up to. Woodard v. Glenwood Lumber Co., 171 Cal. 513, 153 Pac. 951. The plaintiff waited such reasonable time, for it was not until nearly a year after the extension of time impliedly given to the appellant for the completion of the work (during which time no further work was done) that the plaintiff formally rescinded the contract and commenced this action.

[3] It is also argued by the appellant, as negativing the court's finding that it did not diligently prosecute the work of street improvement, that the evidence shows that it was impossible for it to do so because it was unable to obtain the permission of the authorities of the city of Oakland for the doing of the work. The only support in the record for this contention is that the appellant on several occasions unsuccessfully sought the permission of the city engineer and of the superintendent of streets to place a culvert over the storm water ditch in Stanley road. As to this, it may be said that the ditch was in existence and known to the appellant at the time it entered into the contract; that if, in order to comply with its contract, it was necessary to provide for carrying off the storm waters by some other means and fill up the ditch, it had assumed the obligation to do so. Such an operation, of course, would entail considerable expense, but that consideration would not excuse performance of an obligation, and, so far as refusal of permission by the city engineer and the superintendent of streets is concerned, it was merely a refusal to allow the ditch to be covered by a culvert; nor does the record disclose any application to the proper municipal authorities for whatever permission was necessary. Finally, it may be said that much of the work that was left undone was of such a character as not to require any official permission. The record thus abundantly sustains the finding of the trial court as to the appellant's lack of diligence in carrying out its contract.

Judgment affirmed.

We concur: WASTE, P. J.; NOURSE, Judge pro tem.

(40 Cal. App. 689)

BOURGUIGNON et al v. PENINSULAR RY. CO. (Civ. 2673.)

(District Court of Appeal, First District, Division 1, California. April 17, 1919. On Motion for Rehearing in Supreme Court in Bank, June 17, 1919.)

1. CARRIERS ⟸321(23) — PASSENGER'S PERSONAL INJURY ACTION—INSTRUCTIONS.
In a passenger's action against carrier for personal injuries sustained in a derailment, instruction as to the burden of proof under the doctrine res ipsa loquitur *held* not erroneous where the complaint contained averment of general negligence and specific acts of negligence; the case being tried on theory that both general and specific negligence were alleged.

2. NEW TRIAL ⟸26—GROUNDS—VARIANCE—FAILURE TO RAISE QUESTION.
In a passenger's action for injuries in derailment, where the parties proceeded on theory that general and specific negligence were alleged, defendant could not insist on motion for new trial that plaintiff, having alleged special negligence, must prove it; defendant having made no objection to the sufficiency of plaintiff's showing in first instance.

3. TRIAL ⟸296(3)—INSTRUCTIONS—CURE OF ERROR.
In a passenger's action for injuries in a derailment, an instruction that defendant must show that the overturning of car was result of inevitable casualty which human foresight could not prevent, held not erroneous, in view of the other instructions given.

On Motion for Rehearing in Supreme Court in Bank.

4. NEGLIGENCE ⟸134(1) — DEFENSES—PRESUMPTIONS.
In negligence cases, where the accident raises a presumption of negligence, defendant will not be held blameless, except upon a showing either of a satisfactory explanation of the accident or of such care in all possible respects as necessarily to lead to the conclusion that the accident could not have happened from want of care, but must have been due to some unpreventable cause, although the exact cause is unknown.

5. CARRIERS ⟸318(6)—PASSENGER'S PERSONAL INJURY ACTION—EVIDENCE OF DUE CARE—SUFFICIENCY.
Where a passenger transported by a carrier is injured in a derailment, and the carrier attempts to give a satisfactory explanation of the accident, or to show such care in all respects as to exclude the conclusion of want of care, the explanation or care shown must be most satisfactory.

6. CARRIERS ⟸318(1) — PASSENGER'S PERSONAL INJURY ACTIONS—BURDEN OF PROOF.
Where the accident by which a passenger transported by a common carrier is injured raises the presumption of negligence, the carrier, to overcome such presumption, need not do so by a preponderance of evidence, but it is sufficient for him to give such proof of the truth of his explanation of the accident, or of his contention that he exercised due care in all particulars, as to offset the presumption in the minds of the jury, and produce a balance in their minds on the question of its truth; the burden always being on plaintiff to prove his case by a preponderance of evidence.

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Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Naomi Bourguignon and another against the Peninsular Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Louis Oneal, Wm. F. James, and James P. Sex, all of San Jose, for appellant.

E. M. Rea, of San Jose, for respondents.

RICHARDS, J. The plaintiffs in this action recovered judgment against the defendant for the sum of $18,001.35 as damages for personal injuries suffered by the plaintiff Naomi Bourguignon while a passenger upon one of the defendant's cars, through the alleged negligence of the defendant by reason of which said car was derailed and overturned while rounding a curve in the defendant's railroad.

The first and main contention of the appellant herein is that the trial court committed error in the giving and refusing of certain instructions having reference to the burden of proof in the case and the application of the doctrine of res ipsa loquitur to it in the light of the averments of the plaintiff's complaint with respect to the defendant's alleged negligence.

The averments of the complaint with respect to the defendant's negligence read as follows:

"That the said car left the said rails and track and turned over on its side, as herein alleged, through the negligence, carelessness, and wanton recklessness of the said defendant in the management and operation of its said car, and the maintenance of said roadbed or tracks, and without any fault or negligence on the part of the said Naomi Bourguignon, and that at the time of said derailing of said car the said plaintiff Naomi O. Bourguignon was occupying as a passenger a seat on the inside of said car, said seat being a seat provided for passengers by said defendant; that said car left said tracks on account of the sagging or giving way of one of the rails of said track, coupled with the negligent operation of said car, which consisted in going over said curve at a high rate of speed."

No demurrer was filed to the sufficiency of the complaint, but the defendant answered, denying this averment, and the cause proceeded to trial. Upon the trial the plaintiff proved the fact of derailment and overturning of the car while she was a passenger upon it and the consequent injuries, and rested her case. No motion for nonsuit nor other objection to the sufficiency of the plaintiff's showing was made by the defendant, but it proceeded to introduce evidence tending to show an entire absence of negligence on its part and to support its claim that the injuries to the said plaintiff were the result of an unavoidable accident. Upon producing such evidence the defendant rested its case. Whereupon the plaintiff offered proof to rebut the evidence which the defendant had presented; and, the cause having been submitted, the court proceeded to instruct the jury. In so doing it gave certain instructions, one of which was the following:

"Plaintiff has established a prima facie case against defendant if she shows that she was injured by the overturning of the car while being carried as a passenger by defendant without fault on her part; in such case there is a presumption that the accident was caused by the negligence of defendant, and the duty is then upon the defendant to show that the accident happened from inevitable accident or from some cause beyond the power of human care or foresight to prevent."

The court also gave certain other instructions which substantially restated the rule expressed in the foregoing instruction. The appellant now urges that the giving of these instructions was error, basing its insistence in that regard upon the proposition that, the plaintiff having alleged specific negligence on the defendant's part, the rule of res ipsa loquitur as above stated does not apply, and hence that the plaintiffs were bound in the first instance to prove that the accident was caused by specific acts of negligence alleged in their complaint.

[1] There are several answers to this contention. In the first place, the averment of the plaintiffs' complaint above quoted is, we think, fairly open to the construction that both general negligence on the part of the defendant in the management and operation of its car, and also specific acts of negligence on its part in maintaining a defective track and in rounding the curve at a dangerous rate of speed, are mingled in the same averment. In this respect the case strongly resembles the case of Roberts v. Sierra Ry. Co., 14 Cal. App. 180, 111 Pac. 519, 527, in which the precise question presented here arose, in dealing with which the court used the following words:

"Plaintiff, however, not only alleged specific acts of negligence, but he also alleged general negligence. It is true that he did not set up his alleged specific and general negligence in separate counts, as was done in Green v. Pacific Lumber Co., 130 Cal. 435, 62 Pac. 747, but there was no demurrer addressed to this feature of the complaint; the averments of the complaint were specifically denied, the evidence went in without objection touching the issues as thus presented, and defendant makes no pretense of being surprised. Inasmuch as there was an issue of general negligence presented, a presumption of negligence arose upon proof made of plaintiff's injury while a passenger on defendant's cars. And the case was tried upon the theory that both specific and general negligence were alleged."

[2] The closing passage of the above quotation furnishes an added reason why the point urged by the appellant cannot be held to be well taken. This case, like the Roberts Case, was tried apparently upon the theory that the allegations of the plaintiffs' complaint were such that upon proof of the accident and of the resulting injury a presumption of negligence upon the part of the defendant arose; for when upon proof of the occurrence of the accident and of the resultant injuries the plaintiffs rested their case no motion for nonsuit or other objection to the sufficiency of the plaintiffs' showing in the first instance was made, but the defendant at once assumed the burden of proving the absence of any negligence on its part, and, having tendered such

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proofs as it possessed upon this subject proffered no objection to the plaintiffs' counter-showing upon the ground that it should have been made in the first instance. This court, in the case of Roberts v. Sierra Ry. Co., supra, dealing with that precise condition, and quoting from 6 Thompson on Negligence, § 7473, said:

"Where parties, without adhering closely to the written pleadings, proceed without objection and make a particular case by the evidence, and the court allows that case without objection to go to the jury, it is a violation of all correct rules of law then to assail the case thus made for the first time by the motion for a new trial on the assignment of error in the appellate court on the ground of failure of proof."

[3] The appellant further contends that the trial court, in giving one of its instructions, wherein the foregoing rule with regard to the burden of proof is stated in a somewhat different form, erred in instructing the jury that the defendant must show:

"That the overturning of the car was the result of inevitable casualty which human foresight and care could not prevent, for the law holds it responsible for the slightest negligence, and will not hold it blameless except upon the most satisfactory proofs."

The instruction from which the foregoing excerpt is taken was adopted by the trial court from the case of Bonneau v. North Shore R. R. Co., 152 Cal. 406, 93 Pac. 106, 125 Am. St. Rep. 68, in which the precise instruction was approved by the Supreme Court. Aside from these considerations, however, we find from an examination of the record that the trial court not only gave the foregoing instructions, but it then proceeded to give some 30 or more instructions covering every phase of this immediate subject, a large number of which instructions were prepared by the defendant and given at its request. In the light of these very full and very fair instructions, it is impossible to perceive how the jury could have been mislead to the defendant's injury in its deliberation upon the case. The appellant's objection that the trial court refused to give certain of its instructions is sufficiently answered by the liberality with which the court gave almost every one of the instructions requested and which fairly covered every phase of its defense.

We are further satisfied from a careful reading of the voluminous record herein that the evidence was amply sufficient to justify the verdict, not only as to the defendant's negligence, but as to the nature and extent of the injuries suffered by the said plaintiff.

Finding no error in the record, the judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

On Motion for Rehearing in Supreme Court in Bank. (S. F. 8499.)

PER CURIAM. The petition for rehearing is denied. Such denial, however, is not to be taken as a complete approval of the instruction that the defendant must show "that the overturning of the car was the result of inevitable casualty, which human foresight and care could not prevent, for the law holds it responsible for the slightest negligence, and will not hold it blameless, except upon the most satisfactory proofs."

[4] The true rule is that, where the accident is of such a character that it speaks for itself, as it did in this case, and raises a presumption of negligence, the defendant will not be held blameless, except upon a showing either (1) of a satisfactory explanation of the accident; that is, an affirmative showing of a definite cause for the accident in which cause no element of negligence on the part of the defendant inheres; or (2) of such care in all possible respects as necessarily to lead to the conclusion that the accident could not have happened from want of care, but must have been due to some unpreventable cause, although the exact cause is unknown.

[5] In the latter case, inasmuch as the process of reasoning is one of exclusion, the care shown must be satisfactory, in the sense that it covers all causes which due care on the part of the defendant might have prevented. In the case of an accident to a passenger in the course of transportation by a railway company, the explanation or care shown, as the case may be, must be most satisfactory, in the sense that the carrier is held to a very high degree of care.

[6] But the proof which is required of such explanation or care is a different matter from the explanation or care itself. The explanation or the care shown, if true, may be perfectly satisfactory. The proof of its truth may or may not be satisfactory. On this point the rule is the same as in the case of any other presumption which a defendant must meet; that is, he is not obliged to overcome the presumption by a preponderance of evidence, but it is sufficient for him to give such proof of the truth of his explanation, or of his contention that he exercised due care in all particulars, as to offset the presumption in the minds of the jury, and produce a balance in their minds on the question of its truth. Throughout the plaintiff must prove his case by a preponderance of evidence. See Haun v. Tally, 181 Pac. 81.

The instruction in question was taken verbatim from Bonneau v. North Pacific R. R. Co., 152 Cal. 406, 93 Pac. 106, 125 Am. St. Rep. 68, where it was approved. An examination of that decision, however, shows that the criticism which the appellant there made of that particular instruction was not directed to the point that it required most satisfactory proof, as distinguished from a satisfactory explanation, or a showing of satisfactory care. The rule in regard to proof is discussed with reference to another instruction, and is stated to be as above.

In the present case the instruction, while open to criticism in the particular indicated, could not have misled the jury, when considered in connection with the other instructions given as to the effect of a presumption and the requirement that the plaintiff prove his case by a preponderance of evidence.

All concur, except LENNON, J., absent.

(40 Cal. App. 748)

MARR v. CITY OF GLENDALE et al.

(Civ. 2560.)

(District Court of Appeal, Second District, Division 1, California. April 22, 1919. Rehearing Denied by Supreme Court June 19, 1919.)

WATERS AND WATER COURSES ⇐201—PUBLIC WATER SUPPLY—DUTY OF MUNICIPALITY TO FURNISH WATER.

A municipality, engaging in the business of supplying its inhabitants with water, cannot be compelled to extend its system to make

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available its supply of water to a remote and isolated inhabitant, where the cost of such extension would be great, particularly where such inhabitant already has available, from a private corporation, water in sufficient quantity and of reasonably good quality.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Winifred F. Marr against the City of Glendale and others. Judgment for defendants and plaintiff appeals. Affirmed.

Winifred F. Marr, in pro. per.

Evans, Abbott & Pearce and W. E. Evans, all of Los Angeles, for respondents.

JAMES, J. Appeal from a judgment denying to the plaintiff a writ of mandate. Plaintiff brought this action for the purpose of compelling the city of Glendale and its officers to furnish her water for domestic and other uses. Her complaint contained three causes of action, the first and third of which only were relied upon at the trial. Under the first alleged cause of action the right claimed was that of a property owner who, having been regularly served with water by the vendor thereof, is arbitrarily cut off from the supply. The right claimed under the third alleged cause of action was different, and depended mainly upon the question as to whether an inhabitant of a city, which city is engaged in furnishing water for the use of such inhabitants, can in every case compel the municipality to connect the property of such inhabitant with its supply pipes. In the first alleged cause of action plaintiff set forth that a number of years prior to the date of the commencement of the action her property had been connected to a 4-inch water main owned by the Glendale Consolidated Water Company, which main was in turn supplied from a certain stream flowing in Verdugo canyon; that this pipe was disconnected from the stream several years prior to the commencement of the action, and that subsequent to its being so disconnected the city of Glendale acquired all the water rights and the distributing system of said Consolidated Water Company; and that subsequent thereto plaintiff's property had been without water, except such as was brought upon it by use of a pail. In the third cause of action facts were set forth showing that the city of Glendale had engaged in the business of supplying water to its inhabitants and had acquired a water system for that purpose.

The answer denied that plaintiff's property was not provided with a water service, although it was admitted that this service was not being given by the city of Glendale. The preliminary facts, as stated by the complaint, were admitted, and an affirmative defense was made, which was available in answer to both the first and third causes of action. In this defense it was alleged as follows:

"The defendants allege that the property mentioned in plaintiff's petition is located in the Verdugo canyon more than one mile north and east of any of the distributing lines used in connection with the water system of the city of Glendale; that said property is located at an elevation of more than 200 feet above any reservoir owned by said city from which water could be furnished to her from its present distribution system; that in order to furnish the plaintiff with water for domestic use the city of Glendale would be compelled to construct a reservoir somewhere in the vicinity of plaintiff's property at such an elevation as is necessary to furnish proper pressure, and would then have to lay and conduct pipes from such reservoir to plaintiff's said property, all of which would amount to a large expenditure on the part of the defendant city of Glendale, such as would not be justified from any income that could be derived from such construction; that at this time and for many years prior thereto the Forest Grove Land & Water Company and its predecessors in interest, who are the original owners and subdividers of the tract of land on which plaintiff is located, owns, operates, and conducts a distributing system in said tract, and that plaintiff's said property is bounded on the east and south by the distributing line laid in the street abutting plaintiff's said property, from which line the plaintiff could receive adequate water service; that said Forest Grove Land & Water Company's system was constructed for the express purpose of furnishing this plaintiff and other residents of this vicinity with water for domestic uses; and defendants are informed, and upon said information and belief allege, that the reason why plaintiff is not now receiving water from said Forest Grove Land & Water Company is that she has been disconnected by said company by reason of nonpayment of her water bills. Defendants allege, furthermore, that they could not furnish the plaintiff water service on her said property without paralleling the lines of said private water company, and in event this defendant should be required to so parallel the lines of said water company, it would be necessary for this defendant city of Glendale to charge much more for such service than she would be required to pay to said private water company for similar service; that the defendant city of Glendale has never furnished any water to any residents of the city of Glendale located in said Verdugo canyon for the reasons hereinabove set forth."

The court found the facts in accordance with this special defense, which showed that appellant's property had available to it adequate water supply and service pipes, and showed, contrary to plaintiff's allegations, that when the 4-inch pipe had been disconnected from the stream, it was supplied with water from another source, and that that supply had subsequent thereto been continuous and adequate, and that the pipes carrying the same immediately abutted plaintiff's property. It showed that for the city to be compelled to extend its system to the property of appellant would cause the municipality great expense. It further showed that plaintiff could receive all the water she needed by merely complying with the rules and regulations of the company owning the supply pipe abutting her property, which rules and regulations we must assume were reasonable.

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Plaintiff makes no contention that she had any right to the use of the waters of the particular stream from which the 4-inch pipe passing her property originally received its supply; in other words, she had no right in any part of the water at any time. With that admission, and with the facts as pleaded in the answer and found by the court before us, we can see little reason to give any extended consideration to the claim made under the first alleged cause of action. Appellant, having no interest in the water, would have no right at all to complain because the company furnishing her might have sold all or any part of the water from which it supplied her at any particular time, so long as it kept in its pipes other water of fair quality and reasonable in quantity and pressure; and this is exactly what the company did, under the facts as they were alleged and determined to be. Without any right of use in the water itself, even though the company had abandoned its business of supplying property owners with water and thus left its supply pipes empty, plaintiff could not have complained.

"We do not mean to say that a corporation engaged in the distribution of water to public uses may not abandon its property and quit the business, without being subject to mandatory proceedings to compel it to continue to carry it on. It may find it impossible to go on. Its supply may become exhausted, or be insufficient for paramount needs; the rates fixed by law may be too small to enable it to operate at a profit, or without substantial loss; or it may conclude, without reason which the law would consider sufficient, that it will not continue. In case of a natural person, it might become physically impossible. We do not intend to declare that in any such case mandatory process would be issued to compel the personal performance of the duty." Fellows v. City of Los Angeles, 151 Cal. 52, 90 Pac. 137.

This case does not reach that far in its facts; plaintiff has never been deprived of the right to take water from the pipes abutting her property, and her supply from that source would be adequate and sufficient.

Under the third alleged cause of action, we think, also, the facts as found by the court are such as to conclusively bar the plaintiff from any right to the relief herein sought. From the fact that the municipality may engage in the business of supplying its inhabitants with water, it does not follow that every property owner or taxpayer, however remote his land may be situated from the distributing system, can by mandate compel such extension of the system as will make available to him that supply. It would be most unreasonable to hold that a municipality must establish an expensive system of distributing lines to reach isolated inhabitants or to supply one or two persons living in places remote from well-settled districts; and more particularly is this true where the person asking for such service already has at his door water in sufficient quantity and of reasonably good quality. In our opinion, the appellant failed to show facts which would justify the court in extending to her the relief demanded in her complaint.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

(40 Cal. App. 676)

PEOPLE v. MEDAINI. (Cr. 467.)

(District Court of Appeal, Third District, California. April 16, 1919.)

CRIMINAL LAW ⟸1130(4) — APPEAL — ABSENCE OF BRIEF FOR ACCUSED.

Where on appeal no appearance by brief or otherwise has been made for accused, it is not the duty of the appellate court to scrutinizingly examine the record to search for possible errors which might be found, upon mature reflection, to have been detrimental to accused's rights; but a general or cursory examination of the record suffices.

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Fortunato Medaini was convicted of murder in the second degree, and appeals from the judgment and order denying new trial. Judgment and order affirmed.

E. S. Bell, of Napa, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. Early of the evening of July 7, 1918, at St. Helena, Napa county, the defendant shot and killed his wife, Mary Medaini. The homicide appears to have been the result of jealousy or a suspicion on the part of the defendant that the deceased had been unduly intimate with an employé of the defendant. The defendant was arrested and in due time charged with and tried in the superior court of Napa county for the crime of murder. He interposed at the trial the defense of insanity. The jury found him guilty of murder of the second degree, and he was thereupon sentenced by the court to imprisonment in the state prison at Folsom He appeals from the judgment and the order denying his motion for a new trial.

The transcript on appeal was filed in this court on the 31st day of January, 1919. The case was placed on the calendar of the late (April, 1919) term of this court for hearing, and the attorney for the defendant and the Attorney General regularly and duly notified of the day upon which it would be called for argument. No brief has ever been filed on behalf of the defendant in support of the appeals, nor was there any appearance by or for him when the cause was, in its regular order, called for hearing and argument. There was, therefore, no other course open to the Attorney General but to submit the case upon the record, or, per-

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haps, to move for a dismissal of the appeals. That officer chose the former course.

While it is perhaps the duty of a reviewing court, where a criminal case, in which no appearance by brief or otherwise has been made for the accused, has been submitted upon the record, to give the record such an examination as will enable such court to determine whether obvious errors, likewise prejudicial to the accused, have been made, still, in such cases so submitted, the law does not cast upon the appellate courts the duty of scrutinizingly examining the record for the purpose of searching for possible errors which might be found, upon mature reflection, to have been detrimental to the rights of the accused. If the record, upon its face, shows that error prejudicial to the accused has been committed—if, for instance, it plainly appears that the information states no public offense—then, no less in a case where no brief has been filed or oral argument made on behalf of the defendant than in a case wherein briefs have been filed and oral arguments presented, should a reviewing court hesitate to order a reversal. But, as stated, we do not regard it necessary, where a criminal case is submitted under such circumstances as this case has been submitted, that a reviewing court should enter into a minute examination of the facts. A general, or cursory, examination of the record is all that is required. This we have given this record. Indeed, in view of the fact that the defendant was tried for and convicted of the crime of murdering his own wife and of the further fact that he set up insanity as a legal excuse for his act, we have gone further and examined with painstaking care both the evidence and the charge of the court. The defense, as the plea of insanity implies, admitted at the trial that Medaini shot and killed his wife, and the evidence clearly discloses that, unless the accused was at the time he fired the fatal shot bereft of all sense and reason, or, in other words, was insane, the killing amounted to a deliberate, legally unprovoked, and cruel murder. As to the instructions, it is to be remarked that in its charge the court, with singular clearness, stated to the jury every principle or rule of law applicable and pertinent to the case as it was made by the information and the proofs. Nor, in our examination of the record, have we encountered any rulings touching the question of the legal propriety of any of the evidence which, even where strictly not correct, could have resulted in injury to the defendant. In a word, the cause appears to have been in all particulars well and fairly tried, and the defendant therefore accorded a fair and impartial trial.

The judgment and the order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(41 Cal. App. 45)

HOWELL et al. v. PEDERSEN et al.
(Civ. 2780.)

(District Court of Appeal, First District, Division 2, California. May 2, 1919.)

1. APPEAL AND ERROR ⟸956(2)—REVIEW—DISCRETION — SETTLING BILL OF EXCEPTIONS.

The court on appeal will not review the trial court's discretion in refusing relief from failure to present a bill of exceptions in time, except in a case of clear abuse of such discretion.

2. EXCEPTIONS, BILL OF ⟸40(4)—COMPLIANCE WITH REQUIREMENTS—TIME OF FILING.

Under Code Civ. Proc. § 1054, authorizing the trial court to extend the time for the preparation of bill of exceptions, such extension must be obtained within the 10 days allowed by law for the preparation and service of the bill.

3. APPEAL AND ERROR ⟸117—EXCEPTIONS, BILL OF ⟸53(3)—DECISIONS REVIEWABLE—SETTLEMENT OF BILL OF EXCEPTIONS.

An order refusing to settle a bill of exceptions is not appealable, the only remedy being by mandamus.

4. EXCEPTIONS, BILL OF ⟸43(1)—TIME OF FILING—DEFAULT—MOTION TO RELIEVE DEFAULT—ABUSE OF DISCRETION.

Denial of plaintiffs' motion for relief from their default in failing to prepare and serve their proposed bill of exceptions within the time allowed by law was not an abuse of the court's discretion; no showing of mistake, inadvertence, surprise, or excusable neglect having been made.

5. EXCEPTIONS, BILL OF ⟸42—TIME OF FILING—OBJECTIONS TO DELAY—WAIVER—INTENT.

No intention of defendants to waive their objections to plaintiffs' failure to prepare and serve their bill of exceptions within the time allowed was shown, where upon admission of service of the bill and the stipulation setting the matter down for hearing defendants added words expressly preserving objections on account of the proposed bill not being prepared and served on time.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Suit by Elizabeth F. Howell and others against J. C. Pedersen and another. From an order refusing to settle plaintiffs' bill of exceptions and an order denying plaintiffs' motion to be relieved from their default, plaintiffs appeal. Appeal from order refusing to settle the bill of exceptions dismissed, and order denying motion for relief affirmed.

Fred S. Howell, of Petaluma, for appellants.

Kellogg & Kyle, of Santa Rosa, for respondents.

LANGDON, P. J. [1] This is an appeal from an order of the trial court refusing to

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settle and allow plaintiffs' bill of exceptions on appeal from the main judgment in the case, and denying plaintiffs' motion for relief from their default in failing to prepare and serve their proposed bill of exceptions within the time allowed by law therefor. The discretionary power of a trial court in proceedings of this character is not to be interfered with, except upon a clear abuse of discretion. The trial court has decided that the plaintiffs did not make a showing of excusable neglect, and it would seem that such a conclusion was warranted. The only excuse offered by plaintiffs for their failure to prepare and serve this bill of exceptions in time was that the transcript could not be secured from the reporter in time. But upon plaintiffs' own showing, the facts appear to be that on January 31, 1918, judgment was entered in the case and notice of entry of judgment was served upon plaintiffs on February 18, 1918.

[2, 3] Appellants did not apply to the court for an extension of time within the 10 days allowed by law for the preparation and service of the bill. It has been repeatedly held that an extension of time, permitted under section 1054, Code of Civil Procedure, must be obtained within the period during which the original right is still alive. Clarke v. Crane, 57 Cal. 629; Oppenheimer v. Radke & Co., 165 Cal. 220, 131 Pac. 365; Union Collection Co. v. Oliver, 162 Cal. 755, 124 Pac. 435; Curtis v. Superior Court, 70 Cal. 390, 11 Pac. 652. The time within which the court might extend plaintiffs' time had expired at the date when the court made the order upon the ex parte application of the plaintiffs extending their time for 30 days, and such order could give the plaintiffs no rights in place of those which had been lost by their delay. Plaintiffs therefore were in default, and the court was justified in refusing to settle their bill of exceptions. The order refusing to settle said bill is not appealable, and the remedy is by mandamus. Potter v. Pigg, 35 Cal. App. 707, 170 Pac. 1066; Brode v. Goslin, 158 Cal. 699, 112 Pac. 280.

[4] We have discussed the question upon its merits, because it is linked with the question properly presented for our consideration upon this appeal, which is whether or not there has been an abuse of discretion by the trial court in refusing to grant plaintiffs' motion to be relieved from their default. We think this motion was properly denied, as the plaintiffs made no showing of mistake, inadvertence, surprise, or excusable neglect. As heretofore stated, the notice of entry of judgment was served upon February 18, 1918. Plaintiffs then had 10 days within which to prepare their bill of exceptions, or within which to ask for an extension of time for that purpose. Had they been diligent in guarding their rights, they might have had 40 days from February 18th, which would have allowed them until March 30th. It appears, also, that plaintiffs were not diligent in ordering the transcript from the reporter. It was not ordered until March 8th—18 days after notice of entry of judgment. But irrespective of this fact, and despite this delay in ordering the transcript, plaintiffs, if they had secured a proper extension of time, would yet have had the transcript in their hands 10 days before their time expired for serving their proposed bill of exceptions, for it appears by their own showing that the transcript was delivered to them 12 days after it was ordered, or on March 20th. Under such circumstances, this court cannot say that there was an abuse of discretion on the part of the trial court. It is only in exceptional cases that orders of this kind will be reversed. An appellate court is very loth to substitute its own opinion and thereby divest the trial court of the discretionary power reposed in it. Smith v. Riverside, etc., Co., 19 Cal. App. 165, 124 Pac. 870; Utah-Nevada Co. v. De Lamar, 9 Cal. App. 759, 100 Pac. 884.

[5] Appellants next contend that the defendants waived their objections to the delay of the plaintiffs in serving their proposed bill of exceptions by requesting and receiving from plaintiffs additional time within which to propose amendments to such bill. It is asserted by appellants that the stipulation requested by defendants extending such time reserved no objection to the time within which the proposed bill of exceptions was served, and that therefore that objection was waived. An examination of the stipulation relied upon discloses that the stipulation provided that the defendants and respondents should have until the 30th day of April, 1918, within which to propose any amendments or make any objections to the proposed bill of exceptions. If this language is not sufficiently broad to reserve the right now asserted by defendants and respondents, it is nevertheless true that an intention to waive is an essential element to effect a waiver. Los Angeles First National Bank v. Maxwell, 123 Cal. 360, 368, 55 Pac. 980, 69 Am. St. Rep. 64. The defendants, clearly, never intended to waive their objections, and plaintiffs had no reason to believe that they did, for upon the admission of service of the bill the defendants added the words:

"But objections on account of not being prepared and served on time are preserved for presentation when the bill of exceptions is presented for settlement."

And the stipulation setting the matter down for hearing, which is signed by the attorneys for both parties, concludes with the words:

"This stipulation is made with the understanding that said defendant does not waive, and does hereby expressly reserve, any and all objections that he may have on account of plaintiffs' proposed bill of exceptions in the above-entitled action not having been prepared and served within the time allowed by law."

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Under these facts, it is manifest that there was never any intention to waive this objection, and such objection was not waived either in terms or by implication.

The appeal from the order refusing to settle the bill of exceptions is dismissed, and the order denying plaintiffs' motion to be relieved from their default is affirmed.

We concur: HAVEN, J.; BRITTAIN, J.

(41 Cal. App. 34)

SNOW v. HARRIS. (Civ. 2660.)

(District Court of Appeal, First District, Division 1, California. May 1, 1919. Rehearing Denied by Supreme Court June 30, 1919.)

1. MASTER AND SERVANT ⟸278(1)—PERSONAL INJURY—EVIDENCE—SUFFICIENCY.

In a machinist's action for injuries by the explosion of babbit metal, *held* that the evidence did not show negligence on the part of the employer.

2. MASTER AND SERVANT ⟸265(5)—INJURIES TO SERVANT—PRESUMPTIONS AND BURDEN OF PROOF.

A presumption of negligence on the part of the master does not arise where a servant is injured by an explosion while babbitting the bearings of a machine.

3. EVIDENCE ⟸553(4) — EXPERT TESTIMONY.

In a servant's action for personal injuries, offered expert evidence to explain how the accident might have happened was rightfully rejected, where there was no evidence of facts upon which the questions could be predicated.

4. EVIDENCE ⟸553(3, 4) — HYPOTHETICAL QUESTIONS—OPINION OF EXPERT—NECESSITY OF FACT BASIS.

While hypothetical questions on which the opinion of an expert is to be based may include any stated facts which the evidence tends to prove, they must nevertheless be based on facts which are in evidence, and not upon mere surmise.

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by Charles H. Snow against Joseph R. Harris, for personal injuries. From a judgment of nonsuit, the plaintiff appeals. Judgment affirmed.

Clarence N. Riggins, of Napa, for appellant.

Myrick & Deering and James Walter Scott, all of San Francisco, and Wallace Rutherford, of Napa, for respondent.

KERRIGAN, J. This is an appeal from a judgment of nonsuit in an action for personal injuries.

The case has already been before the Supreme Court, where it was held that the plaintiff was a casual employé, and therefore not entitled to compensation under the Workmen's Compensation Act. Maryland Casualty Co. v. Pillsbury, 172 Cal. 748, 156 Pac. 1031. Plaintiff thus being relegated to an action for damages, he seeks judgment against defendant, by whom he was employed at the time of the injury complained of, alleging that defendant was negligent in two particulars: First, in that he supplied an improper helper, whose negligence contributed to the injury; second, that he failed to supply proper tools with which to do the work. To avoid the common-law defenses on the part of the defendant of assumption of risk and act of fellow servant, plaintiff contends that the provisions of section 1 of the Roseberry Act (Stats. 1911, p. 796), abolishing these defenses and modifying the defense of contributory negligence, were not repealed by the Boynton Act (Stats. 1913, p. 279), and that they govern this action.

[1] Whether this be true or not, a discussion of the question becomes unnecessary, for, in the absence of proof of negligence, defendant cannot be held liable for the injuries complained of, and we are of the opinion that the record fails to show any negligence whatever on the part of the defendant. The trial court in granting a nonsuit so declared, and from a careful reading of the record we are of like opinion.

From the evidence, which is without conflict, it appears that the defendant was a farmer, and among other machinery which he used in cultivating his land was a caterpillar tractor. Plaintiff was employed by defendant to repair this machine, and while in the act of babbitting one of its bearings an explosion occurred, and plaintiff lost the sight of both his eyes. Plaintiff was an experienced machinist, and had agreed to do the work at a stipulated price per day, using his own tools together with those owned by defendant. On the day of the accident plaintiff had removed the boxing of the rear axle of the machine, which was separated into two halves. After babbitting the lower half he cleaned the upper part with tools and heat, placed the axle in position, and then made a mold of cardboard and clay to hold the molten metal, and caused the box to be heated by a flare torch operated by his helper. He then with the assistance of this helper poured the babbitt metal into a pour hole, and returned the pans which had contained the alloy to the side of the forge close by. After waiting for a time sufficient in his opinion to allow the metal to solidify he removed a portion of the dam he had constructed to hold the metal, and looked into the pour hole to inspect the result of his work, when of a sudden an explosion occurred, which threw the molten metal upward, causing the injury complained of. At the time of the accident, plaintiff was alone at the bearing, defendant not having been present at any time during the day; in fact, defendant had nothing to do with the work either in assisting or in the giving of instructions as

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to the manner in which it should be done, and nowhere in the evidence is there anything which shows that the tools used by the plaintiff contributed in any degree to the accident. Plaintiff had complete charge of the work, was experienced in babbitting bearings, and he testified that he did not know of anything that the helper did or failed to do that in any way contributed to his injury. The evidence further discloses the fact that babbitt metal explodes when brought in contact with moisture, and it is conceded that moisture in some form, either direct or indirect, was the cause of the accident. There is, however, no evidence showing how the moisture was produced. Plaintiff's theory of the accident is that the helper, while holding the blow torch on the bearing for the purpose of heating it, negligently knocked a portion of the damp clay forming the dam into the hole. There is no evidence, however, to support this contention. On the other hand, defendant suggests causes for the presence of the moisture, among which is that the plaintiff himself might have knocked the clay into the hole, or that he might have left moist clay in the box before the pouring of the molten metal commenced. Varied as are these different theories of the parties, there is no evidence as to the real cause of the presence of moisture which produced the explosion, nor is there any evidence that the accident occurred through any negligent conduct of the defendant.

[2, 3] No presumption of negligence exists in favor of plaintiff by reason of the mere happening of the accident; and he having produced no proof of any negligence on the part of defendant, and the burden being upon him so to do, it was the duty of the trial court to grant the motion complained of.

Appellant assigns as error justifying a reversal certain rulings of the trial court rejecting expert evidence to explain how the accident might have happened. The offered evidence was rightfully rejected, for the reason that there was no evidence upon which the questions could be predicated.

Where, as here, the evidence leaves the cause of the accident uncertain, and shows that any one of several causes may have produced it, it is not for the jury to guess, when there is no satisfactory foundation in the testimony for a verdict; and sympathy for the unfortunate victim of the accident does not justify a departure from the rule that the burden rests upon the plaintiff to establish negligence. It is not sufficient for an employé to show that the employer may have been negligent. The evidence must show the fact that he was. If he is unable to do this he fails in his action. Patton v. Tex. Ry. Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361.

[4] While hypothetical questions on which the opinion of an expert is to be based may include any state of facts which the evidence tends to prove, they must, nevertheless, be based only on facts which are in evidence. Graves v. Union Oil Co., 173 Pac. 618. Here the hypothetical questions, the rejection of which is complained of, were based upon mere surmise, and not upon inferences from established facts. Inferences must be reasonable, and not possible conjectures, surmise, or speculation.

Other questions do not require consideration.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

(107 Wash. 249)

HILLMAN et ux. v. GORDON et al.
(No. 15361.)

(Supreme Court of Washington. May 29, 1919.)

1. APPEAL AND ERROR ⟸480—APPELLATE JURISDICTION—SUPERSEDEAS BOND—POWER OF SUPREME COURT.

Under Const. art. 4, § 4, providing that the Supreme Court shall have power to issue all writs necessary and proper to the complete exercise of its appellate or revisory jurisdiction, the court may, in a proper case, fix the amount of a supersedeas bond in an action pending on appeal.

2. APPEAL AND ERROR ⟸480—SUPERSEDEAS BOND—ISSUANCE.

Where, after judgment debtors had made considerable payments on the judgment, they petitioned to vacate the same on the ground that it had been obtained through fraud, mistake, etc., and appealed from the order denying the petition, *held* under the circumstances that the judgment debtors should be allowed to supersede the judgment by giving a bond.

3. APPEAL AND ERROR ⟸480—SUPERSEDEAS BOND—AMOUNT.

Where judgment debtors after paying a portion of the judgment petitioned to vacate it on the ground that it was obtained through fraud, etc., *held* that, as if an appeal had been taken from the judgment originally, the statute would have required a supersedeas bond in double the amount of the judgment, the judgment debtors, in order to supersede the judgment on appeal from the order denying their petition to vacate, must give a bond in double the amount which was unpaid.

Department 1.

Original application by C. D. Hillman and wife against E. M. Gordon and the Superior Court of the State of Washington in and for King County, and J. T. Ronald, Judge, to have the Supreme Court fix the amount of a supersedeas bond, and in the alternative for a writ allowing the Superior Court to allow and fix the amount of the supersedeas. Application granted.

Carroll B. Graves, of Seattle, for petitioners.

Byers & Byers and Aust & Terhune, all of Seattle, for respondents.

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MAIN, J. This is an application to this court to fix the amount of a supersedeas bond on an appeal from a judgment or order of the superior court, and in the alternative for a writ directing the superior court to allow and fix the amount of the supersedeas. The application is based upon the following facts: On the 5th day of January, 1918, in the superior court of King county, in an action in which E. M. Gordon and Eva P. Gordon, his wife, were plaintiffs and C. D. Hillman and Bessie Olive Hillman, his wife, were defendants, a judgment was entered in favor of the plaintiffs and against the defendants in the sum of $44,500, together with interest at the legal rate. Since the entry of this judgment the same has been reduced by credits in the amount of $17,139.98, leaving a balance due thereon, aside from the interest, of $27,360.02.

After the entry of this judgment and on the ——— day of May, 1918, the defendants therein petitioned the superior court to vacate the same on the ground that it had been taken against them through mistake, inadvertence, surprise, and excusable neglect and for fraud practiced by the plaintiffs in obtaining the judgment and because of the death of one of the parties, to wit, Eva P. Gordon, before the judgment had been rendered. Upon this petition the matter came on for hearing in the superior court, and on the 26th day of April, 1919, an order was entered which denied and dismissed the petition. From this order the petitioners, the defendants in the original action, have appealed.

They applied to the superior court to fix the amount of the supersedeas bond and to stay the proceedings under the judgment sought to be vacated, pending the appeal, but this the trial judge declined to do, being of the opinion that he was without jurisdiction to make such an order.

Prior to the entry of the judgment, on January 5, 1918, one of the plaintiffs, Eva P. Gordon, died intestate, leaving two minor heirs, and at the time of the rendition of the judgment neither her personal representatives nor minor heirs were substituted as parties in the action.

Under the judgment the plaintiffs have taken certain proceedings to collect the same in this state and in the state of California. The trial judge having declined to fix the amount of the supersedeas, the defendants in the original action, the petitioners to vacate, applied to this court, as above stated, to fix the amount of a supersedeas bond, and in the alternative for an order directing the superior court to allow and fix the amount of such bond.

[1] The first question to be determined is whether this court has the power to fix such a bond. The Constitution of the state (section 4 of article 4), among other things, provides that this court shall have power to issue all writs necessary and proper to the complete exercise of its appellate or revisory jurisdiction. Under this constitutional authority the court may, in the exercise of its discretionary power, in a proper case, fix the amount of a supersedeas bond in an action pending on appeal. Campbell Lumber Co., Respondent, v. Deep River Logging Co., et al., Appellants, 68 Wash. 431, 123 Pac. 596.

[2] The court having the power in a proper case to fix the amount of a supersedeas bond, the question arises whether the facts presented make such a case. In determining this question we must take into consideration the effect upon the petitioners if no bond should be permitted, and the order dismissing the petition in the superior court should be reversed on appeal. We must also take into consideration the effect upon the opposing parties if the bond should be authorized and the judgment affirmed on appeal. If no bond should be required and the order should be reversed, any proceedings under the original judgment would be of no avail. If property had been taken and sold on execution, its restoration would be necessary, or damage for such taking would accrue. This would lead, in view of the facts presented by the record, to litigation in which it probably would not be possible to put the parties in statu quo, and the remedy by damages would not be certain and sure. On the other hand, if the supersedeas bond is allowed and the judgment is affirmed, the plaintiffs in the original action will be amply protected, and their recovery upon the judgment is made certain. The delay would be compensated by the legal rate of interest upon the amount of the judgment still unpaid.

[3] It therefore appears to us that in the interests of justice the situation calls for the granting of a supersedeas order which will, as near as possible, preserve the status quo of the parties until the appeal from the order denying the petition to vacate can be determined. As to the amount of the bond, we think this should be in the sum of $54,720.04, which is double the amount of the balance due on the judgment exclusive of interest.

The effect of allowing the supersedeas is to stay any proceedings looking to the collection of the judgment, which was for the recovery of money. Had an appeal been taken from the original judgment the statute would require a bond in double the amount thereof. The defendants, having petitioned for the vacation of the judgment and appealed from the order denying the relief there sought, it does not seem, should be placed in a more advantageous position with reference to the amount of the bond than they would have been had they taken a direct appeal. If the

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petitioners were only asking to be relieved of the judgment to the extent of the value of the property upon which execution had been levied, a different question as to the amount of the bond would be presented.

In view of the disposition here made of the matter, it is unnecessary to consider or determine the other questions presented upon the argument.

It is therefore ordered that the petitioners shall have the right to stay the judgment by filing in the office of the clerk of the superior court, within five days after receiving notice of this order, a bond in the penal sum of $54,720.04, properly conditioned, as a supersedeas and stay bond.

CHADWICK, C. J., and MITCHELL, FULLERTON, and TOLMAN, JJ., concur.

(105 Wash. 215)

KAVAFIAN v. SEATTLE BASEBALL CLUB ASS'N. (No. 14867.)

(Supreme Court of Washington. May 31, 1919.)

THEATERS AND SHOWS ⟸6—INJURY TO BASEBALL SPECTATORS.

Where a patron of a ball park, when he could have chosen among a number of vacant seats in the screened portion of the grand stand, back of the home plate, took a seat without a screen before it, and was injured by a ball, he cannot recover, having been negligent or having assumed the risk.

Mitchell, Tolman, and Main, JJ., dissenting.

En Banc.

Appeal from Superior Court, King County; A. W. Frater, Judge.

On rehearing. Former opinion overruled, and judgment below reversed, and cause dismissed.

For former opinion, see 177 Pac. 776.

J. Y. C. Kellogg and Robert L. Blewett, both of Seattle, for appellant.

Reynolds & Harroun, J. Speed Smith, and Will H. Merritt, all of Seattle, for respondent.

PER CURIAM. Upon a rehearing of this case a majority of the court is of the opinion that the conclusion arrived at in the departmental opinion is incorrect. 177 Pac. 776. The facts in the case show that the respondent entered the grand stand owned and operated by appellant during the progress of a baseball game; that he was familiar with the manner in which baseball games are conducted, having been a frequent spectator thereof; that the grand stand had a screen in front of a portion of it, back of the home plate, and that in this screened portion there were a great number of vacant seats, any of which he was entitled to take under his admission ticket; that he voluntarily took a seat outside of the screened area, and that, having gone there to see a baseball game, it must be true that before many minutes had elapsed he became conscious of the fact that between him and the balls no screen existed, if he was not aware of that fact at the very moment of taking his seat. Conscious of the fact that balls are very often hit "foul" and that wild throws sometimes result in the ball falling among the spectators, and conscious of the fact that there was no protection between the balls and himself, he continued to occupy a seat in that unscreened portion until he received his injury.

It matters not whether one designates his act in this regard contributory negligence or views it as in the nature of assumption of risk, the result is the same. The place in which he could have taken a seat would have fully protected him against the ordinary and usual hazards incident to witnessing the game in question, but he chose to sit elsewhere and substitute for that safety the compensating facility of vision. If there was a chance of danger the respondent voluntarily took it. Having purchased a ticket which offered him a choice of two positions, he with full knowledge of the risk of injury, chose the more dangerous position. The view here expressed would seem to be supported by the following cases: Blakeley v. White Star Line, 154 Mich. 635, 118 N. W. 482, 19 L. R. A. (N. S.) 772, 129 Am. St. Rep. 496; Crane v. Kansas City Baseball & Exh. Co., 168 Mo. App. 301, 153 S. W. 1076; Wells v. Minneapolis Baseball & Athletic Ass'n, 122 Minn. 327, 142 N. W. 706, 46 L. R. A. (N. S.) 606. Ann. Cas. 1914D, 922.

The judgment of the lower court is reversed and the cause dismissed.

MITCHELL, J. I adhere to the views expressed in the former opinion in this case, and therefore dissent.

TOLMAN and MAIN, JJ., concur.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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(107 Wash. 206)

PRINS v. HOLLAND-NORTH AMERICA MORTGAGE CO. (No. 14869.)

(Supreme Court of Washington. May 28, 1919.)

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LIBEL AND SLANDER ⟹25—PUBLICATION—LETTER MAILED FROM ONE BRANCH OFFICE OF CORPORATION TO ANOTHER.

For a corporation, acting through one of its agents or representatives, to send a libelous communication to another of its agents or representatives, as when it writes a libelous letter at one of its branch offices and mails it to another, cannot be a publication of the libel by the corporation, since it is but communicating with itself.

Department 1.

Appeal from Superior Court, King County; A. W. Frater, Judge.

Action by R. Prins against the Holland-North America Mortgage Company. From judgment of dismissal with prejudice, plaintiff appeals. Affirmed.

Fred W. Catlett, of Seattle, for appellant.

Ballinger, Battle, Hulbert & Shorts, of Seattle, for respondent.

FULLERTON, J. The action is for libel. The defendant is a corporation organized under the laws of the kingdom of the Netherlands, having its principal office at Gorinchem therein. It is engaged in the business of loaning money on first mortgage security. It has a branch office at Seattle, in this state, of which the plaintiff was formerly sole manager, and at the time of the publication claimed to be libelous was co-manager with one Wabeke. The publication complained of is a letter written by the defendant at its main office and sent to its branch office at Seattle. The letter was written in the Dutch language, and, as translated in the complaint, reads as follows:

"Gorinchem, Oct. 17, 1916.

"Holland-North America Mortgage Co., Seattle—Gentlemen: No. 65. The accountant has finished the profit and loss account over the first half year. The result is very regrettable, as you can see from inclosed copy. The profit only amounts to Fl. 895.10. This bad result must be ascribed wholly and totally to the little activity in the investing of the moneys in America during the first half year.

"If a considerable amount is not very soon placed on first mortgage, the loss by Dec. 31 next will be considerable. Nearly the total amount of the issue is yet to be loaned out; *this* causes us loss of interest of nearly 4% per annum, and *this* is the cause of the big loss we now have to expect. It looks to us that, although there are many good deals that could have been made, we have failed to have a good organization. De Noord Amerikaasche Hyp. Bank at Leeuwarden, which has placed this year a considerable greater amount of bonds than we have, is now again advertising that it is selling 5½% bonds. This it certainly would not do, if it still had considerable sums for investment.

"We trust, however, that our business is now being conducted with a firm hand in the right path, and we soon shall receive reports about investments. With very great interest we are looking forward to this.

"Respectfully,

"Holland-Noord Amerika Hypotheekbank,

"(Copy.) F. Fernhout—B. Cool."

The letter was received at the branch office at Seattle in due course, and was read by Wabeke and a bookkeeper in the office, both of whom understood the Dutch language. No other publication of the libel is set forth in the complaint.

In his complaint the plaintiff set forth his relation with the defendant, his sole management of the business in America during the period spoken of in the letter, averred that the letter was written with malice, that it was false and defamatory, and by innuendo sought to show that it charged him with neglect of duty, want of capacity, and breach of trust, and hence was per se libelous.

To the complaint the defendant interposed a demurrer, which the trial court sustained. The appellant elected to stand upon the complaint, whereupon the court entered a judgment of dismissal with prejudice. The plaintiff has appealed.

The ground upon which the trial court rested its judgment does not appear in the record. It would seem, however, that the judgment can be justified on any one of several grounds. Since we have concluded there was no publication of the libel, within the meaning of the rule relating to such publications, this is the only question we shall discuss.

Publication of a libel is the communication of the defamatory matter to some third person or persons. Here the communication was sent from the main office of the company to its branch office. Until the appellant himself spread the letter broadcast to the world, it does not appear from the complaint that it was exhibited to any one other than the officers and employés of the respondent company, whose very duties, in the conduct of the ordinary business of the company, brought them in contact with it. Agents and employés of this character are not third persons in their relations to the corporation, within the meaning of the laws pertaining to the publication of libels. For the time being, they are a part and parcel of the corporation itself, so much so, indeed, that their acts within the limits of their employment are the acts of the corporation. For a corporation, therefore, acting through one of its agents or representatives, to send a libelous communication to another of its agents or

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representatives, cannot be a publication of the libel on the part of the corporation. It is but communicating with itself. The corporation can act only through officers and agents, and the officers and agents authorized to act for it are as much a part of the corporation at one place as at another, and the receipt or perusal of the letter by the corporation officers and agents at Seattle was as much the act of the corporation as was the writing of the letter by an officer or agent at the place of origin of the letter. It is not the publication of a libel for a person to write and mail a libelous letter to the person libeled, if he gives it no further publication, and for a much stronger reason it is not a publication of a libel for one person to write a libelous letter to himself, which he exhibits to no other person. It must follow that a corporation, although it can act only through officers and agents, is not guilty of publishing a libel, when it writes a libelous letter at one of its branch offices and mails it to another.

We are aware that the foregoing principle has not met with uniform approval. It is the rule announced, as we read the case, in Owen v. Ogilvie Pub. Co., 32 App. Div. 465, 53 N. Y. Supp. 1033. There it was said:

"The law is elementary that there can be no libel without a publication of the libelous matter. We may assume that this letter was libelous. Was there a publication of it by the corporation, within the meaning of the law? Ordinarily, when a letter is written and delivered to a third person, with the intent and expectation that it shall be read by such person, and it is actually read, the publication is complete. Youmans v. Smith, 153 N. Y. 214, 47 N. E. 265. Has such rule application to the facts of this case? The letter was dictated to a stenographer, and was by her copied out, was signed by the manager, was then inclosed in an envelope, and sent by mail to the address of the plaintiff. It may be that the dictation to the stenographer and her reading of the letter would constitute a publication of the same by the person dictating it, if the relation existing between the manager and the copyist was that of master and servant, and the letter be held not to be privileged. Such, however, was not the relation of these persons. They were both employed by a common master, and were engaged in the performance of duties which their respective employments required. Under such circumstances, we do not think that the stenographer is to be regarded as a third person, in the sense that either the dictation or the subsequent reading can be regarded as a publication by the corporation. It was a part of the manager's duty to write letters for the corporation, and it was the duty of the stenographer to take such letter in shorthand, copy it out, and read it for the purpose of correction. The manager could not write and publish a libel alone, and we think he could not charge the corporation with the consequences of this act, where the corporation, in the ordinary conduct of its business, required the action of the manager and the stenographer in the usual course of conducting its correspondence. The act of both was joint, for the corporation cannot be said to have completed the act which it required by the single act of the manager, as the act of both servants was necessary to make the thing complete. The writing and the copying were but parts of one act; i. e., the production of the letter. Under such conditions we think the dictation, copying, and mailing are to be treated as only one act of the corporation; and, as the two servants were required to participate in it, there was no publication of the letter, in the sense in which that term is understood, by delivery to and reading by a third person. There was, in fact, but one act by the corporation, and those engaged in the performance of it are not to be regarded as third parties, but as common servants engaged in the act."

In Gambrill v. Schooley, 93 Md. 48, 48 Atl. 730, 52 L. R. A. 87, 86 Am. St. Rep. 414, the case is commented upon and the doctrine disapproved. The precise question, however, was not before the court; the question there being whether the dictation of a libelous letter by an individual defendant to a stenographer in his employ was a publication of the letter by the person who dictated it. If the court adheres to this doctrine when the question is squarely before it, seemingly it must also hold that the very act of writing the letter is a publication, since the writer of necessity must act as the agent of the corporation, and clearly he is no more or no less an agent of the corporation than is a stenographer employed by it. The powers of certain officers and agents of a corporation with reference to its business, it is true, may be more extended than are the powers of others; but, when each acts in his line of duty to the common employer, plainly the acts of the one are to be accorded the same legal effect as the acts of the other.

The cases cited from this court we need not review. None of them touch upon the question here for determination; much less do they require a contrary conclusion.

The judgment is affirmed.

HOLCOMB, MAIN, MOUNT, and PARKER, JJ., concur.

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(105 Wash. 128)

BRANDT v. NORTHERN PAC. RY. CO. (No. 14957.)

(Supreme Court of Washington. May 31, 1919.)

En Banc.

On rehearing. Affirmed.

For former opinion, see 177 Pac. 806.

PER CURIAM. Upon a rehearing en banc a majority of the court still adheres to the opinion heretofore filed herein as reported in 177 Pac. 806, and for the reasons there stated, the judgment is affirmed.

(107 Wash. 279)

DAVIS v. PENDRASS. (No. 15215.)

(Supreme Court of Washington. May 31, 1919.)

LANDLORD AND TENANT ⟸290(1) — UNLAWFUL DETAINER — DEFAULT IN PAYMENT OF RENT.

A lessor could prosecute and maintain an action of unlawful detainer against his lessee in default in the payment of the monthly rental.

Department 1.

Appeal from Superior Court, Pierce County; C. M. Easterday, Judge.

Action by W. E. Davis against P. P. Pendrass. From judgment for plaintiff, defendant appeals. Affirmed.

E. W. Eisenhower and Henry Conger, both of Tacoma, for appellant.

J. H. Gordon, of Tacoma, for respondent.

MACKINTOSH, J. Respondent is seeking to recover possession of a 20-acre tract of land in this action of unlawful detainer, and is asking judgment for rent which it is alleged is in arrears. The complaint states that the respondent is the owner of the land in question, and that in April, 1917, he rented the land to appellant at a monthly rental, in the payment of which the defendant has defaulted. The appellant in his answer affirmatively alleges that he is in possession of the tract in question, not as tenant of the respondent, but by virtue of a contract of purchase made by the respondent's predecessor in interest.

As stated by the appellant, this question resolves itself into one of fact, namely: Did the relationship of landlord and tenant exist between the parties to this action? Thus the appellant contends that at all times he was in possession of the land under the original contract of purchase, which had never been canceled by either of the original contractors, or by the respondent, and that therefore the appellant had never become respondent's tenant.

It is unnecessary to review the testimony upon this issue, which testimony is in sharp conflict, the reading of which, however, has convinced us that the trial court was correct in arriving at the conclusion that the appellant was in possession of the land as respondent's tenant, and therefore the respondent was entitled to prosecute his action, and the judgment in his favor was correct, and is hereby affirmed.

CHADWICK, C. J., and MAIN, TOLMAN, and MITCHELL, JJ., concur.

(107 Wash. 363)

SWAFFORD v. LEVINE et ux. (No. 15269.)

(Supreme Court of Washington. May 31, 1919.)

APPEAL AND ERROR ⟸1002—REVIEW—FINDINGS OF JURY—DISPUTED FACTS.

Findings of jury as to disputed facts will not be disturbed on appeal.

Department 2.

Appeal from Superior Court, King County; Calvin S. Hall, Judge.

Action by L. B. Swafford against Harry Levine and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

Cassius E. Gates, of Seattle, for appellants.

Flick & Paul, of Seattle, for respondent.

HOLCOMB, J. Respondent, Swafford, was employed, as he alleges, from January 15 to May 15, 1916, in performing certain services for appellant Levine. For these services, he alleges, it was agreed that he was to receive $200 a month, and for the failure of appellant to pay such sum he brought this action on account of balance of wages and expenses due him. Appellant defended in the court below on the ground of payment and release, and in support of that contention presented the following purported receipt:

"Agreement.

"For and in consideration of $153 to me in hand paid this day by the Carnation Lumber & Shingle Company, L. H. Burnett and Harry Levin, I, the undersigned do hereby release and discharge the said Carnation Lumber and Shingle Company, a corporation, L. H. Burnett and Harry Levin from any and all claims of any and every kind whatsoever, whether for money or otherwise which I have or might have against said company and individuals.

"Signed at Seattle, Washington, this 6th day of March, 1917. [Signed] L. B. Swafford.

"Witnessed."

The case was tried to the court with a jury and resulted in a verdict for the plaintiff in the sum of $670.

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The gist of the respondent's claim in the court below was that he was employed to look up mill sites, to cruise lands, and to select machinery for a proposed shingle mill, location of which had not then been determined upon. It is admitted that after going over various tracts, appellant Levine took an option on a mill and certain timber adjacent, on the recommendation of Swafford, which option was superseded by a lease of the mill by a corporation in which Levine was virtually a half owner.

Save for this general outline the evidence is in direct conflict. As to the receipt above mentioned, Swafford made two assertions: (1) That it was fraudulently obtained; and (2) that the instrument had been pleaded in another suit between the same parties, and the amount therein deducted from the judgment awarded Swafford, and hence could not be properly used as an offset in this cause. The jury apparently found as to the fact, and, as we have seen, rendered verdict for Swafford with knowledge of this instrument and the diverse evidence regarding same on behalf of the parties.

There is nothing before us but disputed facts, and we shall not presume to disturb the findings of a jury which heard and saw the witnesses. The position of this court has been very definitely stated upon the question of reviewing the findings of a jury in a conflict of fact, and we shall not depart from that position in this case. McKenzie v. North Coast Colliery Co., 55 Wash. 495, 104 Pac. 801, 28 L. R. A. (N. S.) 1244; Merrill v. John B. Stevens & Co., 61 Wash. 28, 112 Pac. 353, Ann. Cas. 1912B, 1011; Auwarter v. Kroll, 89 Wash. 347, 154 Pac. 438; Willett v. Seattle, 96 Wash. 632, 165 Pac. 876; Gray v. Hickey, 97 Wash. 278, 166 Pac. 625.

Judgment on the verdict will be affirmed.

CHADWICK, C. J., and MOUNT, FULLERTON, and PARKER, JJ., concur.

(107 Wash. 216)

DELBOSCO v. NORTHERN PAC. RY. CO.
(No. 15125.)

(Supreme Court of Washington. May 28, 1919.)

1. RAILROADS ⟸276(3) — INJURY TO TRESPASSING BOY RIDING ON CARS.

Where a boy attempted to board a car and was injured when train was started by trainmen, who did not see him, the railroad company, was not liable, although it knew that boys had the habit of trespassing on its unfenced tracks.

2. RAILROADS ⟸282(2) — INJURY TO TRESPASSING BOY—COMPLAINT—ISSUES.

Under a complaint for injuries to a boy alleging that defendant railroad permitted children upon its right of way, and that its employés, seeing the boy attempting to ride on a car, started train without notice, evidence of an ordinance requiring right of way to be fenced is inadmissible, especially where it is doubtful whether ordinance was in force.

Department 1.

Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by Louise Delbosco, as guardian ad litem of John Lievore, a minor, against the Northern Pacific Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Pruyn & Hoeffler, of Ellensburg, and Grinstead & Laube, of Seattle, for appellant.

C. H. Winder, of Seattle, for respondent.

MACKINTOSH, J. The main line of the Northern Pacific Railway passes in a general easterly and westerly direction through the corporate limits of the city of Cle Elum, in this state. The company also maintains yards within the same corporate limits approximately 1½ miles in length. For a space of practically a mile there is a large amount of trackage paralleling the main track—16 parallel tracks to be exact. These tracks are numbered; the 2 northernmost tracks being Nos. 15 and 16. In this entire area there is but one public crossing. Contiguous to the yard trackage are dwellings and a schoolhouse, and adjacent to certain parts thereof is dense undergrowth. It appears that the public have for years crossed the tracks at any point suited to individual convenience; there being no fence or other obstruction to such passage. Paths had been worn leading to the railway grade, but there were no defined paths across the grade and the tracks themselves.

On June 23, 1917, in the afternoon, John Lievore, a boy nine years of age, came upon a path from the north of the tracks, with a companion of about the same age while cars to which an engine was attached were standing on track No. 15. He walked along track 16 for a short distance, and then, leaving his companion, crossed to track 15 and proceeded to get upon one of the cars there standing, grasping the handirons on the side of the car, and was attempting to place his feet in the iron stirrup when the train started. The jerk threw him from the car, whereby he sustained injuries, the subject of this suit.

At the trial in the superior court for King county the appellant predicated his case upon the theory that, conceding the boy to be a trespasser, nevertheless the company was so negligent as to render it liable in damages. The negligence consisted, it was there urged and is here argued, of two phases: First, that the trainmen in charge of the train from which the boy was thrown were not or should not have been ignorant of

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the boy's attempt to board the car; and, second, the failure of the company to maintain a fence on that portion of its right of way. To this the respondent replies that it was not the duty of the trainmen, in these circumstances, to keep watch for trespassing children, and that the absence of a fence upon the right of way was at the order of the city authorities of Cle Elum, averring that it is, and has always been, ready and willing to erect an adequate fence thereon.

[1] There is considerable evidence in the record as to the trespassing of children on the company's tracks. It will be conceded that the gist of this evidence is that it was well known to the authorities of the city of Cle Elum and of the railroad company, and that efforts were made from time to time, by way of warning and some arrests, to deter this form of trespassing. The appellant contends that this situation presented a question as to how much the duty of a railroad crew towards trespassing children was qualified by such situation, arguing that it placed upon the crews the burden of determining, before starting their trains, whether or not any children were boarding them or had boarded them. There is no testimony that the crew saw the boy; the obligation sought to be enjoined upon the respondent being that its crew should have seen him. In other words, there was no wanton injury. The company was not obliged to employ men to keep boys from trying to ride on the cars:

"As wide a range as the decisions of courts have taken on this interesting subject, no court, to my knowledge, has gone so far as to hold that railroad companies are the absolute insurers of the life and limbs of boys who, against their express commands, insist upon trespassing upon their property; and to sustain this case would, in my opinion, go that far. The only way the company could prevent this would be to keep a sufficient number of guards to detect boys in their attempts to board the cars or engines. If the presence of the boy on the engine or cars had been brought to the knowledge of the operators of the engine, it is plain that their duty would have been to have protected him from harm, no matter how great his negligence might have been. The testimony shows that they did not see the boy on the engine, and did not know that he was there; for, by reason of his location on the footboard of the engine, the engineer, in the performance of his ordinary duties, could not have seen him." O. R. & N. Co. v. Egley, 2 Wash. 409, 26 Pac. 973, 26 Am. St. Rep. 860; Clark v. N. P. Ry., 29 Wash. 139, 69 Pac. 636, 59 L. R. A. 508; Johnson v. Great Northern Ry., 49 Wash. 98, 94 Pac. 895; Kroeger v. Grays Harbor Construction Co., 83 Wash. 68, 145 Pac. 63; Shafer v. Tacoma Eastern Ry. Co., 91 Wash. 164, 157 Pac. 485, L. R. A. 1916F, 114; Thompson, Negligence, vol. 2, § 1825; White, Personal Injury on Railroads, vol. 2, § 1102.

The crew was performing its duty and in proper positions where its members could not see the boy coming upon the right of way, and had therefore no opportunity to anticipate that he was about to attempt to climb onto the cars. The train was being properly handled, and the respondent cannot be held to the duty of operating it for the convenience of the boy, who was there only for the purpose of trespassing upon the cars. On this phase of the case the respondent was clearly not liable.

[2] In 1906 the city of Cle Elum passed an ordinance providing for the fencing by the respondent of its right of way, and the appellant calls attention to the general rule that the violation of such an ordinance is in itself negligence. Without passing upon the question presented by the respondent's evidence tending to show that the operation of the ordinance had been suspended at the order of the city, we are of the opinion that the receiving of the ordinance in evidence and permitting the introduction of testimony in regard to the nonfencing of the right of way was erroneous. Where facts constituting the alleged negligence are specially set forth in the complaint, it is error to allow on the trial evidence of other acts of negligence when the admission of such evidence has been properly objected to. The complaint in this case charged the railroad company with failing to warn or object to children playing and loitering upon its right of way, and that the employés of the company, seeing the boy standing on the siding track and seeing him take hold of the car for the purpose of boarding it, started the train suddenly without notice. These grounds of negligence, as alleged, do not present the question of the fencing of the right of way, and lay no foundation for the introduction of evidence of the ordinance providing for the fencing. The necessity of alleging the grounds upon which recovery is to be obtained is well illustrated in this case. The action was tried in a county different from that in which is the city whose ordinance is in question, and presents an issue which, on that account, was difficult to meet, and which might have been met had notice been given the opposing party of the tender of the issue by its being pleaded in the complaint. In this case the record shows that there was a serious question whether the ordinance was in effect at the time of the injury. In view of those facts it was certainly prejudicial to the respondent to have introduced over its objection issues which were not pleaded.

There being no evidence in the case sufficient to go to the jury upon the first question discussed, and the evidence in regard to the fencing of the track having been improperly admitted, the appellant was not entitled to recover, and the judgment of the lower court will be affirmed.

CHADWICK, C. J., and MITCHELL, MAIN, and TOLMAN, JJ., concur.

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(107 Wash. 294)

STATE ex rel. BAEDER v. BLAKE, Judge of Superior Court. (No. 15279.)

(Supreme Court of Washington. May 31, 1919.)

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ABATEMENT AND REVIVAL ⟸58(1)—SURVIVAL OF ACTION FOR DECEIT—STATUTES.

Despite Rem. Code 1915, §§ 191, 967, an action of tort for unliquidated damages from fraud and deceit against defendants, one of whom subscribed for shares in a company, agreeing to pay par, but by arrangement with the promoters paid less, does not survive the death of such defendant to permit substitution of his administratrix as a party defendant after his death.

Department 1.

Writ of review by the State of Washington, on the relation of J. J. Baeder, against the Honorable Bruce Blake, Judge of the Superior Court of the State of Washington for Spokane County, to review an order abating action as against the estate of a deceased defendant. Order or judgment affirmed.

F. W. Girand and Fred M. Williams, both of Spokane, for relator.

Burcham & Blair, of Spokane, for respondent.

MAIN, J. The purpose of this action was to recover damages for fraud and deceit. After the issues were framed, one of the defendants, John F. Green died. Upon application of the plaintiff, the administratrix of the deceased's estate was substituted as a party defendant. Thereafter the administratrix moved the court to vacate the order of substitution and enter an order abating the action as against the estate of the intestate. After a hearing upon the matter, the court entered the order of abatement as prayed for. The cause is here to review this order or judgment.

A brief statement of the facts is sufficient to an understanding of the question presented. The complaint charges a conspiracy to defraud arising out of these facts: Certain of the defendants, not including the intestate, caused a corporation, known as the Spokane-Stanford Land Company, to be organized under the laws of the state of Washington. After this corporation was organized, there was assigned to it an option for the purchase of a large tract of land in Santa Clara county, Cal. The parties promoting the corporation contemplated platting the property referred to into smaller tracts and marketing the same, hoping thereby to make a profit on the transaction. The capital stock of the company was of the par value of $100 per share. John F. Green, during his lifetime, subscribed for a certain number of shares, agreeing to pay, according to the subscription contract, the par value thereof, but by arrangement with the promoters of the corporation paid only $60 per share. This was his part of the alleged fraudulent transaction, and by reason of this fact it is now sought to hold his estate liable at the suit of a stockholder who paid par value for his stock. The venture was unsuccessful, and the parties investing in the stock did not realize anything upon the enterprise, but sustained a loss.

The question presented for determination is whether the action against Green would survive against his estate.

Consideration will first be given to the statutes of this state upon which reliance seems to be placed. Section 193, Rem. Code, provides, among other things, that no action shall abate by the death of a party if the cause of action survive or continue. This statute does nothing more than provide that, if the cause of action survive, then an action which may be pending does not abate by the death of the party. It does define, or attempt to define, what causes of action survive. Section 967, Rem. Code, provides:

"All other causes of action (than those enumerated in section 183, supra) by one person against another, whether arising on contract or otherwise, survive to the personal representatives of the former and against the personal representatives of the latter. Where the cause of action survives, as herein provided, the executors or administrators may maintain an action at law thereon against the party against whom the cause of action accrued, or after his death, against his personal representatives."

This statute has been construed as referring only to causes of action which had already survived, and that it did not attempt to announce what causes of action would survive. Slauson v. Schwabacher Bros. & Co., 4 Wash. 783, 31 Pac. 329, 31 Am. St. Rep. 948; Jones v. Miller, 35 Wash. 499, 77 Pac. 811.

In the case last cited it was said, referring to a previous decision (the Slauson Case):

"There we said that the Legislature, when it enacted this section, was legislating with reference to causes of action which had already survived, and was not attempting to announce what causes of action should survive: and, further, that if the contrary contention were correct, there was no limit whatever to causes which would survive the death of the person injured; 'for causes of action for assault, slander, and for other purely personal causes would survive; and this would be so wide a departure from the established rule that the Legislature would hardly be deemed to have intended it without plainly expressing such intention.' That this is the correct construction of the statute is made clear by reading it in connection with the act of which it formed a part when originally enacted, and, being so, it does

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not warrant the holding that causes of action such as the one at bar survive to heirs and personal representatives."

Section 191, Rem. Code, provides that "any assignee or assignees of any judgment bond, specialty, book account, or other chose in action, for the payment of money," by assignment in writing, signed by the person authorized to make the same, may, by virtue of such assignment, maintain an action in his own name against the "obligor or obligors, debtor or debtors," therein named.

This statute is not applicable for two reasons: First, it does not purport to define what causes of action are assignable, but refers to causes of action which were assignable by other provisions of the law, either common or statute. The statute is less susceptible to the construction that it provides what causes of action may be assignable than was section 967 to the construction that it provided what causes of action were survivable. The latter statute has been construed as above indicated. Second, the statute is not applicable, because it does not refer, and does not purport to refer, to the survival of causes of action, but only to assignment. It may be true that at common law the conditions which would make an action assignable would likewise make it survivable; but it would not follow from this that a statute which deals only with assignment of causes of action could be broadened so as to include survival of causes of action. It thus appears that this action does not survive by virtue of any statutory provision enacted by the Legislature of this state.

The question then arises whether it survives by virtue of the common law. It may be admitted, for the purposes of this opinion, that the common law of this state includes the Statutes of 4 Edward III and 3 and 4 William IV, which modified the old common law of England. The statute first mentioned has no application here. The second statute provided that an action could be maintained against the executors or administrators of a person deceased for any wrong committed by him in his lifetime to another in respect to his property, real or personal. Statutes alike in terms or substance have been enacted in a number of states in this country. The courts of England and the courts of the various states where like or similar statutes exist have uniformly construed them as applying only to damages done to some specific real or personal estate of which one may be the owner, and that they do not apply to a mere fraud or cheat by which one sustains a pecuniary loss, as this is not damage done to a personal estate. Phillips v. Homfray, 24 Law Reports (1883) Chancery Division, 439; Peek v. Gurney et al., 6 Law Reports (1873) English and Irish Appeals, 377; Leggate v. Moulton, 115 Mass. 552; John V. Farwell Co. v. Wolf et al., 96 Wis. 10, 70 N. W. 289, 71 N. W. 109, 37 L. R. A. 138, 65 Am. St. Rep. 22; Stebbins v. Dean et al., 82 Mich. 385, 46 N. W. 778.

Without assembling the cases, it may be said the decisions in a number of other states are of like import. No case has been cited where a different construction of the statute has been adopted. Our attention has been called to a number of decisions from this court, as well as from others, where it has been held that a cause of action survived and could be prosecuted against the administrator or executor of the deceased. An examination of the opinion in each of these cases discloses that in none of them was the action a pure action in tort for unliquidated damages, as here. Each of the cases cited and relied on falls within one of the well-recognized classes of survivorship, such as where a tort may be waived and the suit brought in quasi contract, where a right of rescission exists, where the existence of specific property passed to the deceased upon a trust, where the action is one of recognized equity jurisdiction, or where the estate of the deceased has been directly enriched by the fraud complained of. The present action falls within none of the classes where survival exists.

The judgment will be affirmed.

CHADWICK, C. J., and MITCHELL, MACKINTOSH, and TOLMAN, JJ., concur.

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(107 Wash. 353)

OREGON-WASHINGTON LUMBER & MFG. CO. v. BAY CITY LUMBER CO. (No. 15257.)

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(Supreme Court of Washington. May 31, 1919.)

APPEAL AND ERROR ⟸1012(1) — REVIEW — FINDINGS OF TRIAL COURT — PREPONDERANCE OF EVIDENCE.

In action involving only issues of fact, where major part of the evidence and that which was most vital and controlling was given by witness who testified in person, and where evidence does not preponderate against finding of trial court, judgment will be affirmed.

Department 1.

Appeal from Superior Court, Gray Harbor County; Ben Sheeks, Judge.

Action by the Oregon-Washington Lumber & Manufacturing Company against the Bay City Lumber Company. From judgment rendered, defendant appeals, and plaintiff cross-appeals. Affirmed.

John C. Hogan, of Aberdeen, for appellant.
W. H. Abel, of Montesano, for respondent.

TOLMAN, J. Both parties have appealed from the judgment below, and they will be referred to herein as plaintiff and defendant. The plaintiff, a wholesale dealer in lumber, brought this action, alleging that in January, 1916, it entered into a written contract with the defendant by which the defendant agreed to sell and the plaintiff agreed to buy 200,000 feet of select and better tent stock, worked to pattern, of certain specified sizes and dimensions, at $25 per thousand.

"Terms: 90 per cent. advance on net invoice with bill of lading; final settlement on receipt of consignee's report and expense bill, less usual 2% discount. Rate 55¢ less 5% on the net to us. Prices f. o. b. 55¢ rate."

It was further provided in the order:

"You may commence shipping any time within the next two or three weeks, and let a car go forward at the rate of one every two weeks or every week."

It is further alleged that shortly thereafter the defendant shipped two carloads of the lumber under and in accordance with the terms of the contract, aggregating 54,180 feet and no more, all of which was duly paid for, but that the defendant has ever since failed and refused to ship the remaining 145,820 feet called for by the contract; that the value of such lumber had increased from $25 per thousand at the time of the execution of the contract to $40 per thousand at the time of the breach, and plaintiff had been damaged to the extent of $15 per thousand by the failure to deliver; and the prayer of the complaint is for judgment for the aggregate of such damages, with interest. The answer admitted only the corporate existence of the parties, denied that the contract was one of purchase and sale, and alleged that plaintiff is and was a lumber broker and sales agent for lumber, and for a long time before the making of this contract had been employed to a greater or less extent by the defendant as a sales agent, selling its output upon a commission of 5 per cent.; that plaintiff represented at and before the making of this contract that it had sold the lumber described in the contract to a customer in St. Louis at the prices named in the contract, and that its only profit upon the transaction was to be a 5 per cent. commission on the net amount realized, whereas in fact the plaintiff had not sold such lumber, or any part thereof, and that, after two cars had been shipped, the plaintiff was wholly unable to handle the remainder of said lumber, directed shipments to be withheld, and thereafter failed and refused to give any shipping instructions; that defendant was, and for a long time remained, ready, able, and willing to ship the remainder of the lumber, but finally, because of the misrepresentations as to the sale, which it then discovered, and the failure to give shipping instructions, defendant elected to and did abrogate and terminate the contract. Counterclaims were also pleaded, the first to the effect that as such selling agent the plaintiff had wrongfully increased the price to the consumer of four carloads of lumber manufactured by defendant and shipped through plaintiff under this or similar orders, thereby obtaining a secret profit of $238.28 in excess of the purchase price as reported to defendant, which it wrongfully retained, and the second to the effect that by the same course of dealing with an allied concern, known as the Anderson & Middleton Lumber Company, plaintiff had secured and wrongfully retained $1,689.82 belonging to that company, whose claim therefor had been duly assigned to the defendant. All of the affirmative matter in the answer and counterclaims was denied by the reply. The case was tried to the court without a jury, resulting in findings to the effect that the transaction set out in the complaint was one of purchase and sale; that the relation of principal and agent did not at any time exist between the defendant or its assignor and the plaintiff; that defendant had breached the contract which is described in the complaint; and that plaintiff was damaged by such breach in the sum of 70 cents per thousand upon 145,820 feet of lumber not delivered, or a total of $92.70, for which sum judgment was entered.

[1] By appeal and cross-appeal each party is presenting here the claims which it presented in the trial court. But the issues are issues of fact only. Thus we have been

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called upon to make a careful study of the evidence in the case, and, after having done so, we cannot say from the cold record which alone is before us that the findings of the trial court are not sustainable, under the familiar rule which we have so long followed and so often announced. Miller v. Reeves, 101 Wash. 642, 172 Pac. 815. While some of the testimony in this case was by deposition, the major part of it, and that which was most vital and controlling, was given by witnesses who testified in person upon the trial below. The testimony on behalf of each party followed closely the lines of their respective pleadings; and since to attempt to set out and analyze the whole would be impossible within the confines of an ordinary opinion, and as anything less than the whole might be unfair, we must content ourselves by saying that it does not clearly appear that the evidence preponderates against the findings of the trial court, and therefore the judgment appealed from must be affirmed. Neither party will recover costs in this court.

MAIN, FULLERTON, MITCHELL, and MACKINTOSH, JJ., concur.

(107 Wash. 288)

STATE ex rel. BEST v. SUPERIOR COURT FOR OKANOGAN COUNTY.
(No. 15281.)

(Supreme Court of Washington. May 28, 1919.)

INDIANS ⇐38(2)—OFFENSES—TRIAL IN STATE COURTS.

An Indian of the quarter blood, who under Act Feb. 8, 1887, and acts amendatory thereof, known as the Dawes Act, was allowed a parcel of land in an Indian reservation, the title to which was held by the government in trust for him, may be tried by the state courts upon a charge of grand larceny committed within the state, but without the limits of the allotted land or other Indian country; the federal statutes providing no scheme for trying such offenses, and the state, after admisson, having all powers not delegated to the federal government.

Department 1.

Original application by the State of Washington, on the relation of Arthur Best, for a writ of prohibition to be directed to the Superior Court for Okanogan County. Writ denied.

P. D. Smith, of Okanogan, for plaintiff.

W. C. Gresham, of Okanogan, for respondent.

TOLMAN, J. This is an original application for a writ of prohibition to be directed to the superior court for Okanogan county, prohibiting and restraining that court from proceeding to try the relator upon two separate charges of grand larceny as presented by information filed by the prosecuting attorney of that county.

Relator is an Indian of the quarter blood, a member of the Colville tribe of Indians, and has never severed his tribal relations. He was allotted a tract of land by the United States government in 1914, upon the south half of the diminished Colville Indian reservation in Okanogan county, and has ever since held and occupied the same; but the title thereto is held in trust for him by the United States government, and will continue to be so held until the expiration of the trust period of 25 years. It is alleged that the crimes with which the relator is charged were committed, if committed at all, within the limits of the south half of the diminished Colville Indian reservation; but it is not claimed that they or either of them were committed upon allotted land or lands within the exclusive jurisdiction of the United States.

The sole question here presented is whether or not the state courts have jurisdiction to try an Indian, who has not severed his tribal relations, and who is an allottee and ward of the government, upon a charge of grand larceny, committed within the state, but without the limits of an Indian allotment or other Indian country. Relator obtained his allotment under and by virtue of Act Feb. 8, 1887, c. 119, 24 Stat. 388, 3 Fed. Stat. Ann. (2d Ed.) 821, and acts supplementary thereto and amendatory thereof, known as the "Dawes Act," the title of which reads:

"An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the territories over the Indians, and for other purposes."

It is contended that by section 6 of the Dawes Act (U. S. Comp. St. § 4203) Congress intended that such allottee Indians should not become subject to state laws until the expiration of the trust period and the conveyance of the allotted land by patent in fee, and that when the Supreme Court of the United States held that under this section an allottee Indian became a citizen upon receiving his allotment (In re Heff, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848), Congress proceeded by its amendment (Act May 8, 1906, c. 2348, 34 Stat. 182 [U. S. Comp. St. § 4203]), to make certain its meaning, and to overcome the rule of the Heff Case by providing thereby:

"That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 5 of this act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside." 3 Fed.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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Stat. Ann. (2d Ed.) p. 880 (U. S. Comp. St. § 4203).

But, though Congress may have intended to overcome the ruling in the Heff Case by this subsequent legislation, it does not follow that it intended thereby that the state or territory in which the Indian might reside should be deprived of jurisdiction to proceed against such Indian allottee not yet a citizen for a violation of its criminal laws. By the Enabling Act, Washington was authorized to adopt a Constitution, establish a state government, and was admitted into the Union upon equal footing with the original states, which carried with it the full power of enacting laws against crime and punishing all those within her borders who might transgress such laws, be they citizens or not. This must be so, since the state became sovereign, with full power, except only those powers which had been delegated to the national government; and relator has not contended and cannot contend that any power was ever delegated to the national government to enact or enforce criminal laws applicable within the territorial limits of any state, except only those portions thereof which were exclusively within the jurisdiction of the federal government, such as Indian reservations and the like. What is still known as the south half of the diminished Colville Indian reservation is no longer an Indian reservation. By virtue of the act of Congress of March 22, 1906 (34 Stat. 80, c. 1126), the President of the United States, by his proclamation of May 3, 1916 (39 Stat. 1778), restored all of the south half of the diminished Colville Indian reservation to the public domain, subject only to the reservations and allotments of land in severalty to the individual Indians. Moreover Congress has never attempted to enact any criminal statute dealing with any act committed by an Indian outside of the territorial jurisdiction of the United States. And the only legislation by Congress concerning crimes committed by Indians, to which our attention is called, is section 2145 of the Revised Statutes (U. S. Comp. St. § 4148), which in part provides:

"The general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country."

Where Congress has attempted to exercise no jurisdiction, it requires something more than ingenious and pleasing argument to convince us that the state is powerless to maintain her dignity and enforce her laws as against any individual within her boundaries, no matter what his status may be as to citizenship or lack of it. Without prolonging this opinion, or quoting from the many decisions which, in our judgment, are applicable, we regard the case of Ward v. Racehorse, 163 U. S. 504, 16 Sup. Ct. 1076, 41 L. Ed. 244, as directly in point, and the learned opinion of the present Chief Justice of the Supreme Court of the United States there given, we think, answers every contention raised by relator. That this decision was rendered prior to the amendment of May 8, 1906, to the Dawes Act, cannot be urged as a reason why it is not now applicable, because, after the admission of this state to the Union, Congress had no power to take away or abridge any of its sovereign rights, and, if the amendment referred to be construed as an attempt to do so, it must be held to have failed of its purpose.

Writ denied.

CHADWICK, C. J., and MOUNT, MITCHELL, and HOLCOMB, JJ., concur.

(107 Wash. 228)

STATE ex rel. CARLSON et al. v. SUPERIOR COURT FOR KITSAP COUNTY.

(No. 15254.)

(Supreme Court of Washington. May 28, 1919.)

1. EASEMENTS ⟸18(1)—WAY OF NECESSITY BY IMPLICATION.

Grantee to whom grantor has conveyed part of his land has an implied easement or way of necessity over grantor's land at common law.

2. EASEMENTS ⟸18(4)—WAY OF NECESSITY —LAND OF STRANGER.

At common law and in Washington there is no such thing as a way of necessity over the lands of a stranger; for a way of necessity arises out of contract and is grounded in the doctrine of estoppel.

3. EMINENT DOMAIN ⟸56—WAY OF NECESSITY.

Laws 1913, p. 412, § 1, giving landlocked owner right to a way of necessity over the lands of stranger, being in derogation of common law, is not a favored statute, and the taking will not be tolerated unless the necessity is paramount in the sense that there is no other way out or that the cost is prohibitive, in view of Const. art. 1, § 16.

4. EMINENT DOMAIN ⟸196 — WAY OF NECESSITY—BURDEN OF PROOF.

Petitioner for way of necessity over land of stranger under Laws 1913, p. 412, § 1, has burden of showing a reasonable necessity.

5. EMINENT DOMAIN ⟸196—PRIVATE WAY OF NECESSITY—SUFFICIENCY OF EVIDENCE.

In proceedings to condemn way of necessity under Laws 1913, p. 412, § 1, evidence *held* insufficient to show a reasonable necessity for way sought to be condemned.

6. EMINENT DOMAIN ⟸56 — PRIVATE WAY OF NECESSITY.

That the private way sought over adjoining owner's land is the most practical way of egress

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and ingress from and to the lands of petitioner does not warrant condemnation thereof under Laws 1913, p. 412, § 1, giving owner right over land of adjoining owner for private way necessary for the proper use and enjoyment of his land.

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7. EMINENT DOMAIN ⟸56—WAY OF NECESSITY—RULE AS TO STRANGER IN TITLE.

The rule requiring necessity for the condemnation of a way of necessity over adjoining owner's land should be more strict between private owners who are strangers in title than between public service corporations who are in law representing a necessity common to the whole public.

Department 2.

Original proceeding by the State of Washington, on the relation of John P. Carlson and others, against the Superior Court of the State of Washington for Kitsap County; Hon. Walter M. French, Judge thereof. Reversed.

Geo. H. Rummens and Walter Schaffner, both of Seattle, for relators.

Jas. W. Bryan, of Seattle, for respondent.

CHADWICK, C. J. C. H. Davis, whom we shall refer to as the petitioner, brought a proceeding in the court below to condemn a private way of necessity over and across the lands of the relators. Some seven years ago Davis bought a tract of ten acres from his father, D. J. Davis. The tract was landlocked. A county road ran along the north boundary of the D. J. Davis land and along the west boundary of the land of the relators. Petitioner has improved his land, and for the seven years of his ownership has maintained a way over the lands of his father. Conceiving the way over his father's land to be less convenient and less practicable, as it is a little longer and more circuitous than a way over relators' land would be, petitioner brought a proceeding to condemn a private way of necessity along the north line of relators' property. After a full hearing and a view by the court, an order of necessity was made, and the court proceeded forthwith to call a jury and took an assessment of damages.

The testimony is in a sense conflicting, but, when measured by the history of the case and the privileges and demands of the statute, we find no difficulty in reaching a conclusion. We shall refer briefly to the testimony of the witnesses.

D. J. Davis, petitioner's grantor, testified that the only feasible or practical way for C. H. Davis to get out from his property to a public road is over the Carlson property; that to go any other way it would cost more to build a road than the Davis tract is worth.

C. H. Davis, the petitioner, testified that there was no other practicable or feasible way for him to get from his land to a public road; that the present trail over his father's tract was during the greater part of the year impassable and could not be made passable; that children could not go to school over it; and that merchants had refused to deliver goods to his family unless a road was established.

Other witnesses testified that the road was impassable for the greater part of the year as it now exists; that the way was over high and difficult hills and low boggy ground. Others testified that there was no reasonable way out of the tract unless it be over the Carlson land.

Relator testified that as good grade could be made across the Davis land as across his land and for an equal amount of money; that he could at a reasonable cost build a good road across the D. J. Davis land at a grade not exceeding 5 per cent. at any place; that it would be necessary to make a steep grade down a hill and a bridge at least 160 feet long to go over his land; that he has cleared and seeded to grass the boggy ground on the north line of his place; that a road over it would have to be filled or planked so as to make a passable roadway in the winter time; that he had worked for a road contractor for several years, and knew the cost of road construction; and that a road could be built as cheaply and conveniently over the one way as the other. He further testified that he had dammed the creek and excavated a large fish pond on the line of the proposed way at a cost of over $300, and that the establishment of a way of necessity would ruin it.

A. P. McDonald testified that he had 18 years' experience in road building, had worked for lumbering companies, laid out roads for them, and knew in a general way all that anybody does in regard to laying out roads. He further testified:

"I was one of the viewers appointed by the court in the first case brought by the plaintiff against the Carlsons, which case was dismissed. I looked over this matter very carefully, and came to the conclusion that I could not determine whether it would be more feasible to build a road across the D. J. Davis land or across the Carlson land. I could not do this unless I made an accurate survey of it, and I was not employed to do that. I came to the conclusion, as best I could without an actual survey, that it was about an even break between the two; that is, one road would be about as good as the other, and would cost about as much. It is not possible for anybody to tell accurately about one of these roads without a survey. There would be some grading to do on both roads. There would be more grading on the Davis land than on the Carlson, but there would not be as many fills or as long a bridge on the Davis land."

A brother of relator testified that there would be no material difference in cost; that

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a road over the Davis land would be better because it would not have a steep grade on it; that there would be a very steep grade to go from the petitioner's land to the relators' land; that the grade would land on a bridge; and that a road 15 feet wide could not be built without making a deep cutaway back on the petitioner's land.

Mr. Anderson, county assessor, testified that, in order to get off the Davis land on to the Carlson land, a bridge at least 60 feet long would have to be built.

In rebuttal, D. J. Davis testified that, if a road was put over his land, it would require a bridge 40 or 50 feet long.

It is argued that the way over the Davis land is impassable and impractical, and out of these things a necessity arises.

The court found that the establishment of a private way of necessity over relators' land was necessary, and that the petitioner had no means of ingress or egress from his premises, and that the most practical route for the roadway was over and upon the land of the relators. From these findings the court concluded that there was a necessity for the establishment of a roadway from the lands of the petitioner, and that the most practicable route for said road is along the north line of relators' property.

We are called upon to review the order of necessity.

[1] When D. J. Davis sold a part of his land to the petitioner, an easement or way of necessity was implied in the grant. This was the rule of the common law. It has been followed almost, if not quite, universally in other states, and has never been questioned in this state. Schulenbarger v. Johnstone, 64 Wash. 202, 116 Pac. 843, 35 L. R. A. (N. S.) 941, and cases there cited. So that the question of law is whether one having a legal right to pass over the lands of his grantor may reject the way that the law gives him and which his grantor cannot deny him, and compel a way of necessity over the lands of a stranger where upon a mere admeasurement of convenience and expense it is held that the way over the land of the stranger is the more practicable than the way over the land of the grantor.

[2] At common law, and with us, there is no such thing as a way of necessity over the lands of a stranger, for a way of necessity arises out of contract and is grounded in the doctrine of estoppel. Schulenbarger v. Johnstone, supra.

[3] So it may be said that, notwithstanding a statute gives a landlocked owner the right to condemn a way of necessity over the lands of a stranger, it is not a favored statute, and the taking will not be tolerated unless the necessity is paramount in the sense that there is no other way out or that the cost is prohibitive, for it must be borne in mind that, after all, this is a condemnation proceeding. We are taking the property of one man and giving it to another. Const. art. 1, § 16. There is a constitutional right involved, and such rights should not be so lightly regarded that they may be swept away to serve convenience and advantage merely. The statute provides:

"An owner * * * of land which is so situate with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity * * * on, across, over or through the land of such other, for agricultural, domestic or sanitary purposes, may condemn and take lands of such other sufficient in area for the construction and maintenance of such private way of necessity." Section 1, p. 412, Laws 1913.

[4-6] The burden of proof is on the petitioner to show a reasonable necessity. We are of opinion that the petitioner did not maintain this burden, and further that the legal conclusion of necessity does not follow a finding that the way over relators' lands was the most practicable way of egress and ingress from and to the petitioner's lands.

The testimony shows no more than this: That the way over the grantor's land would be over a hill that must be graded, over a small stream that must be bridged, and boggy ground that must be planked or filled; that to go over relators' land a deep cut would have to be made in the hill or bench ground to allow the road to descend to the low ground; that a stream—probably the same stream—would have to be bridged; that the boggy ground would have to be planked or filled. While it may be said that neither way is practical and convenient as it is, it does not follow that either way may not be made so. There is a difference between necessity and mere convenience. A man having a present right of way may find a more convenient way over the land of another, but he may not take it under a claim that it is necessary to the proper use and enjoyment of his land or to save expense, unless there is no other passable way or the expense would be prohibitive. It is true that Davis, the grantor, has testified that a road over his land would cost more than the petitioner's land is worth, but he is not borne out by the history of the case.

On this phase of the case we are most impressed with, and, as against the testimony of interested witnesses, are inclined to follow, the testimony of the witness McDonald. That he is a man of standing and judgment we infer from the fact that he was one of the commissioners appointed by the court upon a previous hearing of this same matter. The only difference that we can measure is that of the two routes the one over the Davis land would be longer, slightly circuitous, and would possibly cost more to improve, while the way over the land of the relators would be shorter and follow a straight line.

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We give no heed to the testimony that the way over the Davis land is impassable; for it is plain that the witnesses had in mind the winter season and the present condition of the land. The same may be said of the relators' land. Both ways are impassable and impracticable in the winter season without improvement, and when petitioner bought his land with the implied right to go and come over the land of his grantor he took upon himself the burden of improving the way, and that burden will not be measured by relative cost. To illustrate: Say an owner had cleared his land out of the big timber and had seeded it to grass or crops, and an enjoining owner of uncleared land had sold a tract within his own inclosure to a stranger; could it be said that the landlocked owner, having an implied way of necessity over his grantor's land, could condemn a way over the cleared land of the stranger because it was more convenient and would be less expensive than it would be to cut down the trees and grub out the stumps on his grantor's land?

The general subject of necessity is treated in 21 R. C. L. p. 1214 et seq. While the text and the cases there cited deal generally with ways of necessity in the strict sense, as distinguished from the condemnation of a private way of necessity, we apprehend that the same rule would apply; for assuredly a greater interest could not be condemned than would arise under the implications of a grant. It will be noticed that there is a division of authority, some cases holding that the necessity requisite to create a right of way (or, as we may say, to give a right of condemnation) must be absolute and indispensable, and others that no more is required than a showing of reasonable necessity; that it is sufficient if it be shown that no other way can be made without unreasonable labor and expense, and that the reasonableness of the labor and expense is determined by the cost of creating the way as compared with the value of the property. But, however this may be, it is said that mere inconvenience, no matter how great, will not sustain the right to insist upon a way of necessity. In this state we have perhaps adopted the rule of reasonable necessity. Samish River Boom Co. v. Union Boom Co., 32 Wash. 586, 73 Pac. 670; State ex rel. Mountain Timber Co. v. Sup'r Ct., 77 Wash. 585, 137 Pac. 994; State ex rel. Washington Boom Co. v. Chehalis Boom Co., 82 Wash. 509, 144 Pac. 719.

In the Samish River Boom Case it is said:

"But the word 'necessity,' as used in the statute, 'does not mean an absolute and unconditional necessity, as determined by physical causes, but a reasonable necessity, under the circumstances of the particular case, dependent upon the practicability of another route (here another location), considered in connection with the relative cost to one and probable injury to the other.'"

The word "necessity" cannot be defined in such a way as to meet every case; its meaning must be found in the facts and circumstances disclosed in the instant case, and while the words used by the court in the Samish River Boom Case might seem to apply to the case at bar, considering the facts in this case and the facts in the cases cited, we are not inclined to follow them without qualification. In this case, as we have shown, it is a mere matter of inconvenience and added expense, but yet within bounds, to an individual owner. In the cases cited it was a necessity arising out of the needs of a public service corporation where either the line of a railroad over a general route or the windings and physical features of a stream were to be considered.

[7] But certain it is that the rule should be more strict between private owners who are strangers in title than between public service corporations who are in law representing a necessity common to the whole public. In law the land of D. J. Davis is the land of the petitioner. A way of necessity "never exists where a man can get to his property through his own land. That a road through his neighbors would be a better road, more convenient, or less expensive, is not to the purpose. * * * It is only where there is no way through his own land that the right of way over the land of another can exist." McDonald v. Lindall, 3 Rawle (Pa.) 492. See Hyde v. Jamaica, 27 Vt. 443; Alley v. Carleton, 29 Tex. 74, 94 Am. Dec. 260; Carey v. Rae, 58 Cal. 159.

A few of the states have constitutional provisions with reference to the taking of ways of necessity in eminent domain similar to our own. Georgia is one of these. In Gaines v. Lunsford, 120 Ga. 370, 47 S. E. 967, 102 Am. St. Rep. 109, it was shown that the plaintiff's farm was touched by two "settlement" roads, and that he could have reached either over his own land without crossing the plantation of Gaines. It was claimed, however, that a farm road from plaintiff's dwelling would have to cut across a deep cut or obstruction in his field, that it would have been expensive to have constructed the route over the same, and that a way thus laid out would lead to "settlement" roads which were steep, hilly, and in such bad condition that it was impossible to haul more than half a load. The court held that the Constitution provides for ways of necessity, but not for those of convenience, and upon the authority of Chattanooga R. Co. v. Philpot, 112 Ga. 154, 37 S. E. 182, that, "if there is a way by which the applicant can lawfully reach his farm or place of residence, a case of necessity does not exist," and that, if the land could be reached, although by a distant or difficult road, the one claiming a way of necessity is not entitled thereto.

The principle is well stated in Lawton v. Rivers, 2 McCord (S. C.) 445, 13 Am. Dec. 741:

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"But there must be an actual necessity, and not a mere inconvenience, to entitle a person to such right. One man is not required to subject himself to an inconvenience, and much less to an actual loss, for the accommodation of another. I do not mean to say that there must be an absolute and irresistible necessity; an inconvenience may be so great as to amount to that kind of a necessity which the law requires, and it is difficult and perhaps impossible to lay down with exact precision the degree of inconvenience which will be required to constitute a legal necessity. It is apparent, however, that no such necessity existed in this case. The plaintiff has a navigable water course from his door to the public road or highway, by which the distance is not greater than by land; and, although there may be some inconvenience in being obliged always to go by water when he visits his plantation, yet it is not greater than necessarily attends every insular situation, and perhaps not so great to him as it would be to his neighbor to keep up a lane through his plantation for his accommodation; and, even if it were greater, it was one of which he was aware when he purchased (or those under whom he claimed), and may therefore be considered of his own creation."

We hold that petitioner has not maintained the burden of proof, and that, although the finding of the court be sustained that the way over relators' land is more practicable than a way over the land of petitioner's grantor would be, this in itself is insufficient to sustain a legal conclusion of necessity.

Reversed.

MITCHELL, TOLMAN, and MOUNT, JJ., concur.

(107 Wash. 389)

JOHNSON et ux. v. WESTERN EXPRESS CO. (No. 15147.)

(Supreme Court of Washington. May 31, 1919.)

1. CARRIERS ⟹185(1)—CARRIAGE OF GOODS—CONTENTS OF TRUNK—PRESUMPTIONS.

Proof of the contents of a trunk and their value at the time of delivery of trunk to hotel keeper without proof thereof at time of delivery by hotel keeper to initial carrier does not create presumption as to such contents and their value at time of delivery by initial carrier to final carrier, since such presumption would be based upon the presumption that trunk at time of delivery to initial carrier contained same articles as at time of delivery to hotel keeper.

2. EVIDENCE ⟹54—PRESUMPTIONS.

A presumption resting upon another presumption will not be permitted.

3. PLEADING ⟹127(2)—ADMISSIONS—EXPRESS COMPANY'S CONVERSION OF TRUNK.

In action against express company for conversion of trunk, express company's answer admitting delivery to it of trunk consigned to plaintiffs, and cross-complaint alleging the receipt of trunk from initial express company, "being the trunk referred to in plaintiff's complaint," did not admit plaintiffs' allegations as to contents of trunk and their value, having reference merely to the trunk itself.

4. CARRIERS ⟹136—LOSS OF GOODS—NONSUIT—EVIDENCE.

In action against express company for conversion of trunk, where express company admitted the receipt of the trunk consigned to plaintiffs, court properly rendered judgment of nonsuit upon plaintiffs' failure to prove contents of trunk and value thereof, instead of giving plaintiffs judgment for value of the trunk itself, where there was no evidence as to value of trunk.

Department 1.

Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by C. F. Johnson and wife against the Western Express Company. Judgment of nonsuit, and plaintiffs appeal. Affirmed.

Christofer Jacobsen, of Seattle, for appellants.

C. H. Winders and Joseph C. Sherman, both of Seattle, for respondent.

MITCHELL, J. C. F. Johnson and wife by this action seek to recover damages for the loss of a trunk and its contents of the alleged value of $1,498, which they claim respondent wrongfully converted by a sale thereof, thereby placing the same beyond recovery. At the trial to a jury, upon the conclusion of plaintiffs' proof, defendant challenged the sufficiency thereof, on the ground there was no evidence that the property mentioned in the complaint, and referred to in the testimony, was ever delivered to the defendant. The motion was granted, and the cause dismissed. From the judgment of dismissal plaintiffs appeal.

There is a large number of assignments of error, all of which, as appellants confess in their brief, go to the same point, namely, the ruling of the trial court rejecting all testimony offered as to the value of the trunk and its contents. In the latter part of October or the first of November, 1913, appellants packed their trunk at Regina, Saskatchewan, Canada, and took it with them to Winnipeg, Canada, where they remained about three weeks, having the trunk sent to their room at the hotel. The trunk was not opened at Winnipeg, from which place they went to Calgary, Alberta Province, Canada, taking the trunk with them, about December 1, 1913. Mrs. Johnson testified that on arriving at Calgary the trunk was delivered as they reached their hotel, and that she saw it placed in the public storeroom of the hotel, at which time she claims it was in the same condition it was after being packed and when they left Regina. No one who testified at the trial had

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seen the trunk since it was placed in the storage room of the hotel at Calgary. It was described by appellants as "roped with two or three strands of heavy rope around it both ways and locked." After staying in Calgary about a week, appellants came indirectly to Seattle, arriving there about January 21, 1914, the trunk having been left in the storage room of the hotel at Calgary. Mr. Johnson testified he wrote to Calgary early in March, 1914, for the shipment of the trunk by express to Seattle, and that thereafter, expecting shipment, he called at the offices of all the express companies in Seattle, including respondent, first on March 20, 1914, again on April 8, 1914, and a number of times thereafter within the next two years, at each of which calls he was informed there was no shipment for him. In reply to a letter from Mr. Johnson, the Dominion Express Company at Calgary, by letter dated July 11, 1916, advised him of the shipment to him of a trunk on March 23, 1914, and to inquire concerning it at this respondent's office in Seattle. Upon taking up the matter with respondent, records of its office were examined, and it was then found that a trunk consigned by the Queens Hotel at Calgary to C. F. Johnson, 2619 First avenue, Seattle, had arrived in Seattle on March 26, 1914, in bond, and was delivered to the United States customs appraiser's storeroom, and that on that date respondent gave notice to appellant by postal card, addressed 2619 First avenue; that, after it passed the custom house, where it was appraised at $5, respondent mailed a second notice to appellant on May 1, 1914, and a third notice on June 1, 1914, and that no reply was received to either notice, nor either card returned as unclaimed; that respondent sent the trunk out for delivery after receiving it from the customs appraiser and it was returned to respondent's "on hand" room with the notation that the consignee was not located at the address given on the shipment; that on May 22, 1914, respondent notified the shipper at Calgary of its receipt of the shipment, that it could not be delivered, was not called for, and that, if not accepted or instructions given within 30 days, it would be sold for charges; that the trunk had been disposed of at an "on hand" sale in April, 1915, on account of being unclaimed, at the price of $2; and that there was no record of the purchaser, and it could not be recovered. Appellants were advised by respondent, in June and August, 1916, of such records in its office. At the trial appellants testified they never received either of the postal card notices, and that no attempt at delivery of the trunk was made to their knowledge. On September 16, 1916, appellants presented to respondent a written claim and demand for payment in the sum of $1,498 for the trunk and its contents, which being refused, this action was brought.

At the trial it was proposed to have each of the appellants testify concerning the contents of the trunk and their value. This was objected to unless it was followed by proof that the trunk and contents were delivered to the initial carrier at Calgary. Appellants not offering to comply, the objection was sustained. It is on this ruling and the consequent judgment of nonsuit appellants have argued the case here. They call attention to the rule in 16 Cyc. 1052, as follows:

"Proof of the existence at a particular time of a fact of a continuous nature gives rise to an inference, within logical limits, that it exists at a subsequent time."

Or, as stated in Ellis v. State, 138 Wis. 513, 119 N. W. 1110, 20 L. R. A. (N. S.) 444, 131 Am. St. Rep. 1022:

"When the existence of a person, a personal relation, or state of things is once established by proof, the law presumes that the person, personal relation, or state of things continues to exist as before, until the contrary is shown, or until a different presumption is raised from the nature of the subject in question."

[1, 2] With this general rule in mind, it is argued that, having shown the condition and delivery of the trunk, and that it contained their wearing apparel at the time they arrived at the Queens Hotel in Calgary; that respondent received a trunk with contents consigned about four months later by the Queens Hotel in Calgary to appellant, C. F. Johnson, at Seattle, and that a trunk and contents thus shipped had been sold later by respondent, therefore they were entitled to testify as to the contents of the trunk and their value. The trouble is the applicability of the rule invoked. There is here a lack of evidence, not only as to the contents of the trunk, but of the appearance and condition of the trunk delivered to the initial carrier at Calgary, and thence to respondent. Had some one connected with the hotel at Calgary testified that the trunk delivered to the initial carrier at that place was the same trunk received by the hotel for appellants about December 1, 1913, "roped with two or three strands of heavy rope around it both ways and locked," or if the records of respondent showed that the trunk referred to by its records was "roped with two or three strands of heavy rope around it both ways and locked," there would be force in appellants' contention. But such is not the case. Here we are not considering a case involving the rule of the transmission of goods by several connecting common carriers upon proof showing the condition of the goods at the time of delivery to the initial common carrier or its agent, with the resultant presumption in favor of

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the owner declared by the policy of the law generally, but one in which the proof shows only the condition the goods were in and what they consisted of at the time of delivery to one, not a carrier or its agent, but an agent of the owner some four months prior to delivery by such owner's agent to the initial carrier. It is not a case simply of the presumption that the final carrier received goods or goods in the same condition as those delivered to the initial carrier, but one which carries another presumption that the goods delivered to the owner's agent, not a carrier, were after considerable time delivered by that agent to the initial carrier in the same condition he had received them. It amounts to a presumption resting on a presumption, which is not permitted in the law, and is inconsistent with the presumption of continuity of condition spoken of in the rule relied on by appellants.

In 10 R. C. L. p. 870, § 13, under the subject of Evidence, it is said:

"It is a well-established rule that a presumption can be legally indulged only when the facts from which the presumption arises are proved by direct evidence, and that one presumption cannot be deduced from another. To hold that a fact inferred or presumed at once becomes an established fact, for the purpose of serving as a base for a further inference or presumption, would be to spin out the chain of presumptions into the regions of the barest conjecture."

And, by way of illustration, the same authority, citing Manning v. John Hancock Mut. L. Ins. Co., 100 U. S. 693, 25 L. Ed. 761, says:

"Accordingly a presumption that insurance premiums have been paid over by insurance agents to the company cannot be based on a presumption that the premiums were paid to the agents; nor can the latter presumption be based on a presumption that certain policies did not lapse or that they were renewed."

Such was the condition of the proof that the trial court was right in the ruling complained of.

[3] Appellants claim, however, the situation was relieved and the ruling erroneous, considering the pleadings. They contend respondent by its answer and cross-complaint in effect admits the receipt of the trunk and its contents as described in the complaint. But we do not so understand the pleadings. Without setting them out, it is sufficient to say that, after specifically admitting the Queens Hotel delivered to the Dominion Express Company at Calgary one trunk consigned to C. F. Johnson, 2619 First avenue, Seattle, which was transported by that express company and thence by respondent to Seattle, the respondent denied all the other allegations of the complaint describing the trunk and its contents, and also denied the alleged negligence of respondent in its failure to deliver the trunk. The general issue was presented as to the contents of the trunk, which was the principal cause of the controversy; for the value of the trunk itself was stated in the complaint to be $5. It is true that respondent, mindful of its obligation to the government as a common carrier to collect all transportation charges, further answered by way of cross-complaint to recover a balance of $5.70 due by appellants over what it had received for the trunk and its contents at the "on hand" sale, and therein alleged it had received from the initial carrier, as the agent of appellants, one trunk forwarded by the Queens Hotel at Calgary and assumed transportation charges already accrued thereon, "being the trunk referred to in plaintiffs' complaint," but this allegation, construed with all other parts of the answer, clearly refers to the trunk itself that was shipped, and not its contents or the condition of the contents. Appellants were suing to recover for a trunk, among other things, consigned to them from Calgary, as to which respondent claimed it was entitled to $5.70 more for transportation charges, thus falling far short of any admission that it had ever received that trunk or its contents claimed by appellants to have been packed by them at Regina with $1,498 worth of personal effects and later left by them at the Queens Hotel, Calgary.

[4] Lastly, it is claimed a nonsuit should not have been granted because, respondent having admitted it received a trunk shipped to appellants from Calgary, they were entitled to recovery for its value; but there is no evidence in the record to show its value, nor was any offer made to show its value except in connection with its contents.

Finding no error in the record, the judgment is affirmed.

CHADWICK, C. J., and MAIN, MACKINTOSH, and TOLMAN, JJ., concur.

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(107 Wash. 336)

STATE v. ANDERSON. (No. 15146.)

(Supreme Court of Washington. May 31, 1919.)

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1. CRIMINAL LAW ⟸1186(4)—INFORMATION —TECHNICAL ERROR—NEGATIVE PREGNANT.

Where an information, charging that defendant committed the crime of grand larceny by false and fraudulent representations, set out false representations as to the value of property as well as false representations that plaintiff was a contractor, etc., conviction will not be reversed though the information was defective in pleading the representations as negative pregnants; this being a purely technical objection.

2. CRIMINAL LAW ⟸371(2), 372(8) — EVIDENCE—OTHER OFFENSES.

In a prosecution for larceny by false pretenses and representations, where the information alleged that defendant made false representations as to the value of property as well as to the fact that he was a contractor, evidence that he had disposed of property to others by means of similar misrepresentations was not admissible to show intent, but is admissible to show the falsity of his representation that he was a contractor when in fact he was engaged in a general scheme to defraud.

Department 1.

Appeal from Superior Court, King County; Everett Smith, Judge.

Arnt Anderson was convicted of the crime of grand larceny, and he appeals. Affirmed.

Carl J. Smith and Christofer Jacobsen, both of Seattle, for appellant.

Fred C. Brown, John A. Frater, and Frank P. Helsell, all of Seattle, for the State.

MACKINTOSH, J. [1] Appellant has been found guilty of the crime of grand larceny, committed by false and fraudulent pretenses and representations. The information set out these false pretenses as consisting: First, of the representation that certain property in Oregon was worth "then and there the sum of $1,500 and that there was a house then and there upon said lots which was worth the sum of $3,400"; the second false representation being that the appellant was "then and there a contractor and builder"; and, third, that appellant had at that time two or three houses which were being built by subcontractors and one house which he was then and there building himself. The information in alleging the falsity of these representations says the property in Oregon "was not then and there worth the sum of $1,500, and there was not then and there a house upon said lots which was worth the sum of $3,400"; alleges that the appellant was not a contractor and builder, and that the appellant "did not have two or three houses which were being built by subcontractors or a house which he, the said Arnt Anderson, was then and there building."

The appellant attacks the information for the reason that the allegations as to the falsity of the representations as to the value of the property and the building of the houses above quoted are negatives pregnant, and therefore the information is rendered insufficient to charge a crime. Granting that the pleading of the falsity of the representations made is as claimed by appellant, the sustaining of an attack upon an information or the setting aside of conviction upon such purely technical objections is no longer indulged in by courts anxious to assist in the full administration of justice. A negative pregnant is not as serious a condition, nor nearly as fatal in its effects as it was at one time in the history of pleading. As far back as the case of O'Brien v. Seattle Ice Co., 43 Wash. 217, 86 Pac. 399, this view met the sanction of this court.

Appellant also protests that the evidence was not sufficient to sustain this conviction. We are rather inclined to the view that the evidence could hardly be made to sustain any other conclusion.

[2] The last and most serious objection to the record is that witnesses were allowed to testify to other instances of larceny claimed to have been committed by the appellant against various witnesses who testified that they had parted with sums of money upon similar false pretenses and representations as those by which the prosecuting witness was intrapped. Appellant strenuously argues that the proof of these independent crimes was not proper, it being unnecessary to prove criminal intent. We are prepared to concede that this class of testimony in a case of this character is inadmissible if offered solely for the purpose of establishing criminal intent. We feel that under the case of State v. Smith, 103 Wash. 267, 174 Pac. 9, this testimony was improper for that purpose. It was properly admissible, however, upon another ground, namely, to establish the falsity of the pretense that the appellant was a contractor and builder, the testimony of these various witnesses going to the establishment of the fact that instead of being engaged in the contracting and building business he was engaged in a plan and scheme of selling interests in a fraudulent venture. The state having alleged that the appellant had represented himself as being a contractor and builder, and being called upon to prove the falsity of that representation, was entitled to put upon the stand those persons who had had dealings with the appellant, and who, as a matter of fact, had purchased partnership interests from him to testify as to the character of the business in which he was engaged.

The other objections to the introduction of testimony and to the instructions do not seem

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to present questions which are necessary to be discussed in detail. The trial seems to have been without error, and the judgment of conviction must be, and is, affirmed.

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CHADWICK, C. J., and MITCHELL and TOLMAN, JJ., concur.

MAIN, J., concurs in the result.

(107 Wash. 369)

HOWELL v. DUNNING. (No. 15362.)

(Supreme Court of Washington. May 31, 1919.)

1. APPEAL AND ERROR ⟸564(5)—LEAVE TO FILE STATEMENT OF FACTS—TIME OF AND EXCUSE FOR LATE OFFER—STATUTE.

Appellant's motion, pursuant to Rem. Code 1915, § 1730—8, for leave to file a statement of facts in the case and have it returned to the superior court for certification, will be granted, as her motion to the trial court for extension of time should have been granted, where the statement of facts was offered for filing to the trial court within the 90-day period to which an extension of time might have been granted, and the excuse for failure to file within 30 days was that appellant's counsel was quarantined in his home until after expiration of that time on account of the outbreak in his family of a disease then epidemic in the city.

2. APPEAL AND ERROR ⟸571 — LEAVE TO FILE STATEMENT OF FACTS—DENIAL—REMEDY—STATUTE.

Though certiorari to review the order of the trial court refusing appellant leave to file late a statement of facts is a proper remedy under Rem. Code 1915, § 1730—8, the remedy by motion in the Supreme Court is also proper, and, if not, the application in the Supreme Court will be treated as an application for review, though the trial court is not made a party.

Action by Nettie Howell against L. A. Dunning. From judgment for defendant, plaintiff appeals. On appellant's motion for leave to file a statement of facts and have the statement returned to the superior court for certification. Motion granted.

Moye Wicks and Crandell, Williams & Crandell, all of Spokane, for appellant.

R. M. Dye, of Davenport, and W. H. Smiley, of Spokane, for respondent.

MOUNT, J. This is an application by motion in this court for leave to file a statement of facts in this case, now on appeal, and have the statement returned to the superior court for certification.

The facts are as follows: A judgment was rendered in the superior court on the 18th day of October, 1918. A motion for new trial was filed on the 19th day of October, 1918. This motion was overruled on the 4th day of February, 1919. No proposed statement of facts was filed within the 30 days. Notice of appeal, dated April 29, 1919, was filed on April 30, 1919, and served on May 1, 1919; and on May 1st the appeal bond was filed. On the 3d day of April, 1919, counsel for appellant filed a motion in the superior court for an extension of time within which to file a statement of facts. At that time a showing was made to the court to the effect that the family of counsel for the appellant was attacked by influenza, an epidemic which was then raging in the city of Spokane, where counsel lived; that he was, by reason thereof, quarantined in his home until after the expiration of the 30-day period within which the statement of facts might be filed; and for that reason the statement of facts was not filed within the 30 days, but was served and offered for filing, and was actually filed, on the 1st day of May, 1919.

[1] These facts are all shown by the record on appeal in this court. It will be noticed that the motion for an extension of time to file a statement of facts was served and filed within 60 days after the motion for new trial had been denied, and within the time when an appeal could be taken; and that a proposed statement of facts was served, and actually filed, within 90 days. The trial court denied the motion for an extension of time, and the appellant has now moved the court to be permitted to file the statement of facts and to have the same certified under the provisions of section 1730—8, Rem. Code. We think it is evident that the appellant's counsel had a good excuse for not filing the statement of facts within the 30 days, as he was in quarantine and not permitted to leave his house. Afterwards, well within the 90-day period, he offered for filing, and actually filed and served, his proposed statement of facts. We are satisfied that the trial court, under these circumstances should have permitted the appellant to file her statement of facts, and should have certified the same, because no amendments were offered thereto. In the case of Universal Motor Co. v. McGeorge, 176 Pac. 331, this court refused to permit a statement of facts to be filed under the procedure adopted here, because the statement of facts was not filed, or offered to be filed, within the 90-day period to which an extension of time might have been granted; but we think it is plain that, where the statement of facts is offered for filing and a good excuse is given for not filing the same within the 30-day period, the trial court in fairness should extend the time to the extent of 90 days from the final judgment.

[2] Counsel for the respondent insists that the court here has no jurisdiction to grant this order upon motion, and cites cases to the effect that the remedy is by writ of certiorari to review the order of the lower court. We

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have held that certiorari is a proper remedy; but we are of the opinion that, under section 1730—8, Rem. Code, the remedy by motion in this court is also a proper remedy, and, if not, that the application here will be treated as an application for review. It is true the trial court is not made a party to this proceeding, but the respondent is the only party interested in the matter, and is here represented and heard as fully as though the trial court was made a party respondent.

The motion for an order permitting the appellant to file her statement of facts in the case, and to have the same certified, is therefore granted; and the clerk of this court is instructed to return the statement of facts to the superior court for proper certification.

CHADWICK, C. J., and MITCHELL, MAIN, and HOLCOMB, JJ., concur.

(107 Wash. 326)

STATE ex rel. CITY OF CLE ELUM v. KITTITAS COUNTY. (No. 14821.)

(Supreme Court of Washington. May 31, 1919.)

1. EMINENT DOMAIN ⟸1—POWER OF PUBLIC CORPORATIONS—PROPERTY OF MUNICIPALITY.

The power of a quasi public corporation or a public corporation to condemn property owned by a municipality does not exist unless clearly created by statute.

2. EMINENT DOMAIN ⟸46—CONDEMNATION OF CITY PROPERTY—RIGHT OF COUNTY.

Despite Laws 1911, p. 118, and Rem. Code 1915, § 5879—18, a county has no right to take for county road purposes by eminent domain a city's property, whether owned in its proprietary or governmental capacity, and whether or not within the corporate limits of the city; such a right cannot exist by implication, but must be given expressly.

3. EMINENT DOMAIN ⟸196 — CONDEMNATION OF CITY PROPERTY—DEVOTION TO PUBLIC USE AS RESERVOIR—EVIDENCE.

In proceedings by a county to condemn for county road purposes part of a tract of 39 acres used for reservoir and water supply purposes outside the limits of the city which owned it, evidence *held* not to show that the property was not being devoted to a public use by the city, though it was not all actually inundated.

Condemnation proceedings by the County of Kittitas against the City of Cle Elum. To review judgment of condemnation, the State, on the relation of the City, brings certiorari. Judgment reversed.

Pruyn & Hoeffler, of Ellensburg, for plaintiff.

Arthur McGuire, of Ellensburg, for defendant.

MACKINTOSH, J. Kittitas county is attempting to exercise its right of eminent domain for the purpose of acquiring a right of way for a county road over land owned by Cle Elum, a city of the third class. Judgment of condemnation was entered by the trial court, and the action is here on the city's application to review that judgment.

Cle Elum in 1910 acquired a tract of land approximately 39 acres in area situated about 4 miles outside of its corporate limits. The city created upon the property a reservoir for the storing of water to be used as an auxiliary supply for the city and its inhabitants. The public road over which traffic passes from the city of Easton to Cle Elum is located near the western boundary of the reservoir site and within two hundred and twenty-five feet of the reservoir. It crosses near the northwest corner of the tract, and then extends in an easterly direction some distance beyond the north line of the tract. This road contains a heavy grade, and the county, desiring to reduce this grade, in this proceeding seeks to condemn a right of way from a point near the northwest corner of the tract and extending in an easterly direction across it. This proposed new road would be a much easier grade than that of the old road, with which it again connects after it leaves the property here referred to.

The question for consideration is whether the county has a right to maintain the condemnation proceeding.

[1] As we view it, it is unnecessary to determine whether the city owns the land over which it is proposed to construct the public road, in either its proprietary or governmental capacity. The elementary rule is that the power of a quasi public corporation or a public corporation to condemn property owned by a municipality does not exist unless clearly created by statute. This rule was early recognized by this court in the case of Seattle & M. Ry. Co. v. State, 7 Wash. 150, 34 Pac. 551, 22 L. R. A. 217, 38 Am. St. Rep. 866. In that case it was held that a public service corporation could not take tidelands belonging to the state in a condemnation proceeding, for the reason that the act giving the corporation the right to condemn related only to the taking of private property; there being "no express or clearly implied authority to extend" the right further. Property acquired by a municipality which is necessary or may reasonably be considered necessary in the future for the use of the municipality in the performance of either its public or private functions, is not subject to condemnation unless that power has been expressly created. There must be left to the judgment and discretion of the municipal authorities the determination of the public necessity of

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acquiring and holding lands to be used for and in connection with public activities, and the courts will not interfere with the reasonable exercise of that discretion. The Legislature, having conferred statutory power upon counties to condemn for county road purposes, has not gone to the extent of expressly allowing a condemnation for such purposes of the property of municipalities. In 1911 the Legislature defined and provided for the construction of what are known as permanent highways (Laws 1911, c. 35), and in 1913 gave the counties the power to construct such permanent highways through the corporate limits of cities of the third and fourth classes (Rem. Code, § 5879—18). We held in the case of State ex rel. Floyd v. Superior Court, 86 Wash. 410, 150 Pac. 618, that this act of 1913 was intended to be an addition to the act of 1911 and gave the counties the right to condemn property situated within cities of the third and fourth classes for the construction of permanent highways. This legislation would seem to indicate that the Legislature recognized that no authority existed in the counties to condemn for either county roads or permanent highways, and have chosen to expressly provide for such condemnation of the latter.

In the case we have here we are not dealing with a permanent highway. The petition describes a county road, the language being:

"The plaintiff by this petition seems to acquire and appropriate the lands last above described for the purpose of constructing and maintaining thereon a public county road of Kittitas county," etc.

The fact that the property here sought to be condemned is outside of the corporate limits of the city is also outside of the issues of this case. Whether property is outside or inside the city's boundary is immaterial, for the reason that the city was given the power to own such property for the purpose for which this property was acquired and held. The fact that it may not have been all used for the storage of water does not warrant us in saying that it is not necessary for the purpose of a reservoir. As we understand it, a reservoir site may comprise more land than is actually necessary at the time of its acquisition, and more land than is ever actually used or is ever covered by water. The city has a right to acquire such an amount of land as it may reasonably be expected to eventually need for the purpose, which will include such an amount as is necessary to protect the stored water from contamination and pollution.

From all the facts of the case the court cannot say that the property sought to be condemned is not now devoted to a public use, nor that it is not necessary to satisfy the needs of the city which may be reasonably anticipated. It may well be, and probably is, true that the principal source of contamination and pollution of water stored some distance from a city's limits is that contamination and pollution which would come from the near presence of a public road, and it certainly seems that an area of 39 acres is not too much to protect against such effects.

[2, 3] The action should have been dismissed for two reasons: First, that the law does not give the county the right to take a city's property for county road purposes by implication. Such right must, if it exist, be given expressly. Samish, etc., v. Union, etc., 32 Wash. 586, 73 Pac. 670; State ex rel. Atty. Gen. v. Supreme Court, 36 Wash. 385, 78 Pac. 1011; Tacoma v. Nisqually Power Co., 57 Wash. 420, 107 Pac. 199; State ex rel. Wau. Invest. Co. v. Supreme Court, 68 Wash. 661, 124 Pac. 127, Ann. Cas. 1913E, 1076; City of Bridgeport v. New York, etc., Ry., 36 Conn. 255, 4 Am. Rep. 69; Little Nestucca Road Co. v. Tillamook County, 31 Or. 1, 48 Pac. 465, 65 Am. St. Rep. 803; Chi. R. R. Co. v. Starkweather, 97 Iowa, 159, 66 N. W. 87, 31 L. R. A. 183, 59 Am. St. Rep. 405; City of Moline v. Greene, 252 Ill. 475, 96 N. E. 912, 37 L. R. A. (N. S.) 104; Evergreen Cemetery Co. v. Green Haven, 43 Conn. 234, 21 Am. Rep. 643; City of St. Louis v. Moore, 269 Mo. 430, 190 S. W. 867. Second, as a matter of fact, conceding that the county has the right to condemn municipally owned property, the evidence does not disclose that this property is not now being devoted to a public use. The mere fact that it is not all being actually inundated does not deprive it of its protection from condemnation. The case of State ex rel. v. Chehalis Boom Co., 82 Wash. 509, 144 Pac. 722, is in no wise inconsistent with the view here expressed. In that case a second public service corporation was allowed to condemn the property of the first, for the reason that the first was merely owning the property, and, as the opinion indicates, if the first owner had any present or prospective use for the property, the condemnation would not have been allowed.

The judgment of the lower court will be reversed.

CHADWICK, C. J., and MOUNT, MITCHELL, TOLMAN, and FULLERTON, JJ., concur.

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(105 Wash. 54)

WESTERN HARDWARE & METAL CO. v. MARYLAND CASUALTY CO.
(No. 14798.)

(Supreme Court of Washington. May 31, 1919.)

En Banc.

Appeal from Superior Court, King County; Everett Smith, Judge.

On rehearing. Opinion of department affirmed, and judgment of lower court affirmed.

For departmental opinion, see 177 Pac. 708.

Grinstead & Laube, of Seattle, for appellant.

F. C. Kapp, of Seattle, for respondent.

PER CURIAM. Upon a rehearing en banc a majority of the court still adhere to the opinion heretofore filed herein as reported in 177 Pac. 703, and for the reasons there stated the judgment is affirmed.

(105 Wash. 132)

GOLAY v. NORTHERN PAC. RY. CO.
(No. 14964.)

(Supreme Court of Washington. May 31, 1919.)

En Banc.

Appeal from Superior Court, Pierce County; E. M. Card, Judge.

On rehearing. Opinion of department affirmed, and judgment below reversed.

For departmental opinion, see 177 Pac. 804.

Geo. T. Reid, J. W. Quick, and L. B. Da Ponte, all of Tacoma, for appellant.

Govnor Teats, Leo Teats, and Ralph Teats, all of Tacoma, for respondent.

PER CURIAM. Upon a rehearing en banc a majority of the court still adhere to the opinion heretofore filed herein as reported in 177 Pac. 804, and for the reasons there stated, the judgment is reversed.

(32 Idaho, 304)

THORNTON v. HAMILTON et al.

(Supreme Court of Idaho. June 20, 1919.)

1. ANIMALS ⟸27 — LEASE — CONSTRUCTION—INSURANCE.

A provision in a contract of lease of personal property *held* to constitute the lessees insurers of horses therein described while in their possession.

2. ANIMALS ⟸27—LEASE—BREACH OF WARRANTY—EVIDENCE.

Evidence found to be insufficient to establish a breach of the implied warranty that one of the horses leased was, at the time he was delivered to the lessees, reasonably fit and suitable for the work he was hired to perform.

Appeal from District Court, Kootenai County; R. N. Dunn, Judge.

Action on contract by J. A. Thornton against J. A. Hamilton and E. L. Vowels, doing business under the firm name and style of Hamilton & Vowels. Judgment for plaintiff, and defendants appeal. Affirmed.

McFarland & McFarland, of Cœur d'Alene, for appellants.

Ezra R. Whitla, of Cœur d'Alene, for respondent.

MORGAN, C. J. Respondent and appellants entered into a contract whereby the former leased to the latter certain personal property, including six head of horses, among which was a black gelding of the agreed value of $325. The contract contained the following provision:

"If any of said horses shall die or be injured, so that it becomes necessary to kill the same, while in the possession of said lessee, the lessee will pay to the lessor the full value thereof as specified above."

It appears that the property was sent by respondent, in charge of James Long, from Cœur d'Alene to appellant's logging camp at Hauser Lake; that the horse in question was sick a part of the time while making the trip; that Long took with him the contract of lease, which had been signed by respondent; and that he delivered the property to appellants and procured the contract to be executed by them—it being signed with the partnership name by Mr. Hamilton. The delivery of the property took place on Wednesday evening, and the horse died on Monday following. This action was commenced to recover his value as fixed by the contract.

The trial resulted in a verdict for plaintiff, which was rendered pursuant to an instruction to the effect that the defense was insufficient. Judgment was entered accordingly, from which this appeal was taken.

[1] The contract contains a provision that the lessees will, at the expiration or termination of the lease, "restore the said personal property to the said lessor in like good condition in which it now is, wear and diminution resulting from reasonable use thereof excepted." Appellants contend that the two provisions of the contract above quoted are inconsistent; that the intention of the parties cannot be clearly ascertained therefrom, and therefore parol testimony is admissible to show what their intention was; and that the court erred in rejecting evidence

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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offered for that purpose. The provisions of the contract are not inconsistent, and the intention of the parties that appellants should be insurers of the horses while in their possession is entirely clear from the language employed.

Appellants assign as error the action of the court rejecting a letter offered in evidence, which was delivered to them at the time they received the property. It is as follows:

"Cœur d'Alene, Idaho, July 25, 1917.

"Hamilton & Vowels, Hauser Lake. Mr. Hamilton—Dear Sir: Inclosed find two forms of lease of personal property, which you will sign one and give to our man, so that he can mail to me.

"This will introduce Mr. Jas. Long, who has been with me for the past ten years, and you will find him strictly reliable. He will do the feeding of my horses just as we talked.

"Very truly yours, J. A. Thornton."

It is insisted that this letter, being a writing signed by respondent subsequent to the time he signed the lease, is admissible to modify its terms. The letter does not tend to prove a modification of the contract, and its rejection was not error.

[2] Counsel for appellants insist that their clients' liability is a question for the jury, for the reason that the contract "impliedly warrants that the animals are reasonably fit and suitable for the work which they are hired to perform"; that the sickness of the horse in question on the way from Cœur d'Alene to the logging camp was known to Long, who was respondent's agent, and that his knowledge amounted to notice to his principal.

Conceding there was an implied warranty that the horse, at the time he was delivered to appellants, was reasonably fit and suitable for the work which he was hired to perform, there was a failure to establish a breach of the warranty. No evidence was offered tending to show that the horse was not, in all respects, fit and suitable for such work, and there is nothing in the record to have justified the jury in finding, had the question been submitted to it, that he died from the disorder from which he suffered on the way from Cœur d'Alene to the logging camp. On the other hand, it was established that, following his delivery to appellants on Wednesday evening, he worked at skidding and hauling logs on Thursday, Friday, and Saturday, during which time, and until he took sick on Sunday evening, preceding his death on Monday morning, he ate and drank regularly.

The judgment appealed from is affirmed. Costs are awarded to respondent.

RICE and BUDGE, JJ., concur.

(32 Idaho, 269)

INDEPENDENCE PLACER MINING CO., Limited, v. KNAUSS et al.

(Supreme Court of Idaho. May 31, 1919.)

1. MINES AND MINERALS ⟸38(11)—SUIT TO QUIET TITLE TO MINING CLAIMS—COMPLAINT.

It is not necessary to allege in the complaint, in a suit to quiet title to mining claims, the manner in which they were located nor the qualifications of the locators. It is necessary to allege the ultimate fact of plaintiff's interest in or claim to the property.

2. APPEAL AND ERROR ⟸1170(3)—ERROR OR DEFECT—PLEADINGS OR PROCEEDINGS—REVERSAL.

An error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties is not ground for reversal of the judgment.

3. MINES AND MINERALS ⟸19(2)—DESCRIPTION OF MINING CLAIM—SUFFICIENCY.

If, by any reasonable construction, in view of the surrounding circumstances, the language employed in the description of a mining claim will impart notice to subsequent locators, it is sufficient.

4. APPEAL AND ERROR ⟸1011(1)—FINDINGS OF FACT—CONFLICTING EVIDENCE—REVIEW.

Findings of fact made by a trial judge who has had the benefit of observing the demeanor of witnesses upon the stand and of listening to their testimony will not be disturbed because of conflict if the evidence in support thereof, if uncontradicted, would be sufficient to sustain it.

Appeal from District Court, Kootenai County; R. N. Dunn, Judge.

Suit to quiet title by the Independence Placer Mining Company, Limited, against Herman Knauss and others. Judgment for plaintiff, motion for new trial denied, and defendants appeal. Judgment and order affirmed.

H. J. Hull, of Wallace, and John M. Gleeson and Joseph F. Morton, both of Spokane, Wash., for appellants.

Walter H. Hanson and Harlan L. Heward, both of Wallace, for respondent.

MORGAN, C. J. On March 7, 1905, the Aggy, Independence, and Moose placer mining claims were located, and on October 30, 1906, the locators conveyed them to respondent. While it does not appear that the original Aggy location has ever been abandoned, respondent's employés, on September 17, 1913, relocated the ground embraced within that claim as three claims called the Aggy, Gold Dollar, and Falls, and October 13, 1913, conveyed the same to respondent. On May 29, 1916, Jack Moore and W. R. Simons, acting for and on behalf of appellants, located, and on June 5, 1916, caused to be re-

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corded, notices of location of, the Montana, Virginia, Oregon, Texas, Kentucky, Idaho, Missouri, Illinois, and Utah placer mining claims. Because of conflict in these locations respondent commenced this action in Clearwater county, where the ground is situated, to quiet its title. The cause was transferred to and tried in Kootenai county, where a decree was entered quieting respondent's title, from which and from an order denying a motion for a new trial appeals have been taken. The appeals were heard together, and will be disposed of in one opinion.

Appellants demurred to the complaint generally and specially, and have assigned as error the failure of the court to sustain their special demurrer, which was based upon the ground that portions of the complaint were ambiguous, unintelligible, and uncertain. It is insisted that the complaint does not show where respondent's claims are situated, that their description is not pleaded with sufficient accuracy so they may be found and identified therefrom, and that the complaint does not show that the ground was properly located as required by the laws of the United States and of the state of Idaho.

It is alleged in the complaint:

"That heretofore and prior to the commencement of this action there were duly and regularly located on Independence creek and Moose creek, in old Moose City mining district, Clearwater county, Idaho, the following described placer mining claims: Aggy, Gold Dollar, Falls, Independence, and Moose—all of which were located by the predecessors in interest of the plaintiff, in the manner required by law, and were by divers and mesne conveyances conveyed to and became the property of the plaintiff."

Respondent also alleged its ownership and adverse possession for more than five years prior to the commencement of the action, of the mining ground in question.

[1] It was not necessary for respondent to allege in detail the manner in which the claims were located, nor the qualifications of the locators. It was necessary to allege the ultimate fact of its interest in, or claim to, the property, and in that particular the complaint is sufficient. Hammitt v. Virginia Mining Co., 181 Pac. 336. It is true the property cannot be identified by the description found in the complaint. However, at the trial respondent introduced the notices of location of its claim, together with oral testimony touching their location and description, and this evidence was admitted without objection that the complaint was insufficient.

The record discloses that on August 29, 1913, Jack Moore and another man entered into a contract with respondent whereby they leased this ground for a period of five years, and that during the years 1913 and 1914 they and their employés performed the assessment work thereon. There is conflict as to whether or not the assessment work was performed in 1915. The trial court found it was, and there is sufficient evidence to justify the finding; also to establish that it was done by Moore and W. R. Simons. There is no dispute that Moore and Simons spent the greater part of the summer of 1915 on and about the ground in question. It is entirely clear that, when they located this ground for and on behalf of appellants in 1916, they knew of the conflict between the claims they were locating and those of respondent, and it is equally clear that appellants were not placed at a disadvantage, nor deprived of any substantial right, by the insufficiency of the description in the complaint of respondent's claims.

[2] If the failure of the trial court to sustain appellants' special demurrer was error, it does not, in view of these circumstances, justify a reversal. C. L. § 4231, provides:

"The court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect." Smith v. Peterson, 31 Idaho, 34, 169 Pac. 290, and cases therein cited; Strong v. Oregon Short Line R. R. Co., 31 Idaho, 48, 169 Pac. 179.

[3] Appellants question the sufficiency of the notices of location of respondent's claims and insist that they do not contain a statement of the distances and directions from the posts upon which they were placed to natural objects or permanent monuments as is required by C. L. § 3222. The descriptions contained in the location notices of respondent's original claims are as follows:

The Independence:

"Beginning at corner No. 1, which is a stake not less than 4 inches in diameter and 4 feet high, which initial point is situated about 300 feet westerly from the mouth of Independence creek at its junction with Moose creek; thence running 545½ rods northerly to corner No. 2; thence 36⅓ rods easterly to corner No. 3; thence 545½ rods southerly to corner No. 4; thence 36⅓ rods westerly to place of beginning."

The Aggy:

"Beginning at corner No. 1, which is a stake not less than 4 inches in diameter and 4 feet high, which initial point is situated at the northwest corner hereof, about 500 feet southeast of the Independence cabin; thence running 640 rods southeasterly to corner No. 2; thence 5 rods southerly to corner No. 3; thence 640 rods northwesterly to corner No. 4; thence 5 rods northerly to place of beginning."

The Moose:

"Beginning at corner No. 1, which is a stake not less than 4 inches in diameter and 4 feet high, which initial point is situated 8 rods above the flume of the Independence mining claim, on the northerly side of Moose creek;

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thence running 36½ rods southerly to corner No. 2; thence 558 rods westerly to corner No. 3; thence 36½ rods northerly to corner No. 4; thence 558 rods easterly to place of beginning."

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It will be observed that the Independence claim is tied to the junction of Independence and Moose creeks; that the Aggy is tied to the Independence cabin, and the Moose to the flume of the Independence claim, reference also being made to the northerly side of Moose creek. The junction of Independence and Moose creeks is a natural object, and the cabin and the flume are permanent monuments, within the meaning of C. L. § 3222.

Mineral deposits are frequently discovered in the wilderness, remote from a government survey. These discoveries are usually made by men who are not equipped with proper instruments, nor possessed of sufficient education, to enable them to correctly run lines, make measurements, and accurately describe the ground sought to be located. Some of these difficulties, at least, attended the location of respondent's claims. In such a case the law does not exact the impossible, but the rule has been thus stated:

"If, by any reasonable construction, in view of the surrounding circumstances, the language employed in the description will impart notice to subsequent locators, it is sufficient." Farmington Gold Min. Co. v. Rhymney Gold & Copper Co., 20 Utah, 363, 58 Pac. 832, 77 Am. St. Rep. 913; Morrison v. Regan, 8 Idaho, 291, 67 Pac. 955; Bismarck Min. Co. v. North Sunbeam Co., 14 Idaho, 516, 95 Pac. 14; Snowy Peak Min. Co. v. Tamarack & Chesapeake Min. Co., 17 Idaho, 630, 107 Pac. 60; Flynn Group Min. Co. v. Murphy, 18 Idaho, 266, 109 Pac. 851, 138 Am. St. Rep. 201.

Tested by this rule, respondent's notices are sufficient.

[4] Appellants question the sufficiency of the evidence to sustain the findings. An examination of the record discloses that, while there is conflict in the testimony, the case is well within the rule that findings of fact made by a trial judge who has had the benefit of observing the demeanor of witnesses upon the stand and of listening to their testimony will not be disturbed because of conflict if the evidence in support thereof, if uncontradicted, would be sufficient to sustain it. Neil v. Hyde, 32 Idaho, 576, 186 Pac. 710, and cases therein cited.

Other assignments of error have been presented, but, in view of the foregoing conclusions, we do not deem a discussion of them necessary.

The judgment and order appealed from are affirmed. Costs are awarded to respondent.

RICE and BUDGE, JJ., concur.

(32 Idaho, 265)

MARK P. MILLER MILLING CO. v. BUTTERFIELD-ELDER IMPLEMENT CO., Limited.

(Supreme Court of Idaho. May 31, 1919.)

1. TROVER AND CONVERSION ⟸16—TITLE.
In an action for conversion, the plaintiff must rely upon the strength of his own title, and not upon the weakness of that of his adversary.

2. SALES ⟸197—EXECUTORY CONTRACT—INTENTION OF PARTIES.
Whether a contract for sale of chattels is to be considered executed or executory is to be determined by the intention of the parties.

3. CONTRACTS ⟸147(2), 169—CONSTRUCTION—INTENTION OF PARTIES.
The intention of the parties to a contract is to be gathered from the language thereof, if unambiguous; otherwise by its letter in the light of such circumstances as may properly be considered in determining the intention of the parties.

4. SALES ⟸218½—INTENTION OF PARTIES—QUESTION FOR JURY.
When the terms of a contract of sale are undisputed, and the attendant circumstances are agreed upon, the question of the intent of the parties in respect to the passing of title is, generally speaking, one of law for the court.

5. SALES ⟸197—EXECUTED OR EXECUTORY CONTRACT—TEST—RISK OF LOSS.
The usual test as to whether a contract of sale is executed or executory is to consider at whose risk the subject-matter of the contract is prior to actual delivery to the buyer. If the risk of loss from injury to or destruction of the property is on the buyer, the contract is executed, and, if on the seller, it is executory.

Appeal from District Court, Latah County; Edgar C. Steele, Judge.

Action for conversion by the Mark P. Miller Milling Company against the Butterfield-Elder Implement Company, Limited. Judgment of nonsuit, and plaintiff appeals. Affirmed.

Frank L. Moore, of Moscow, for appellant.
Orland & Lee, of Moscow, for respondent.

RICE, J. On June 22, 1914, the appellant and one C. H. Sutton entered into the following contract in writing:

"I have to-day sold to M. P. Miller Milling Co., for delivery on or before Nov. 1, 1914, ten thousand No. 1 red (10,000) bushels of No. 1 red Russian wheat, at the price of (66¢) sixty-six cents per bushel in the warehouse of Mark P. Miller at Moscow, Idaho, and hereby acknowledge having received on said sale, as earnest money, the sum of one dollar ($1.00) dollars.

"It is agreed and understood that the price of sixty-six ( ) cents mentioned, is for No. 1 red Russian wheat, equal to the Washington state standard now in effect, but off-grade wheat

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of the same variety will be received against this sale at the customary discount for such wheat.

"C. H. Sutton, Seller.

"Confirmed: M. P. Miller Milling Co., by M. P. Miller, Pres."

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Sutton was a farmer, and had then growing a large acreage of wheat in Latah county. The growing crop was then incumbered by two chattel mortgages, which specified the particular land upon which the crop was growing. The respondent was mortgagee of the second of the two mortgages. About September 4, 1914, the grain described in the mortgages was sold by respondent mortgagee, with the consent and upon the order of Sutton, to one Gibson, and thereafter delivered to him.

Trial was had to a jury. Appellant was permitted, over objection of respondent, to submit oral testimony to the effect that the wheat referred to in the contract of sale was the same as that covered by the mortgages. A judgment of nonsuit was entered, from which this appeal is prosecuted.

[1] In an action for conversion, the plaintiff must rely upon the strength of his own title, and not upon the weakness of that of his adversary. 38 Cyc. 2048. In this action it was necessary for appellant to show that title to the property in question had passed to him, and that he was entitled to the possession thereof at the time of the alleged conversion.

[2-4] Whether a contract of sale is to be considered executed or executory is to be determined by the intention of the parties. Idaho Imp. Co., Ltd., v. Lambach, 16 Idaho, 497, 101 Pac. 951. But that intention is to be gathered from the language of the contract (United States v. Woodruff, 89 U. S. [22 Wall.] 180, 22 L. Ed. 863; Smith v. Edwards, 156 Mass. 221, 30 N. W. 1017) if the language of the contract is unambiguous; otherwise by its letter in the light of such circumstances as may properly be considered in determining the intention of the parties (State ex rel. Pittsburg Coal Co. v. Patterson, 138 Wis. 475, 120 N. W. 227). When the terms of an agreement of sale are undisputed, and the attendant circumstances are agreed upon, the question of the intent of the parties in respect to passing title is, generally speaking, one of law for the court. Sempel v. Northern Hardwood Lumb. Co. (on rehearing) 142 Iowa, 586, 121 N. W. 23.

An examination of the contract in this case leads inevitably to the conclusion that it was not the intention of the parties that title to the wheat should pass to the appellant until the same should be delivered at the warehouse of Mark P. Miller at Moscow.

[5] It will be observed that the contract was merely for 10,000 bushels of No. 1 red Russian wheat. The delivery of any wheat, wherever grown, of the variety and grade specified, would fulfill the contract. If it were permissible to offer evidence to prove that the intention was to describe the wheat covered by the mortgages, the contract must still be considered executory.

By its terms, the sale was for delivery on or before November 1, 1914, and the price was 66 cents per bushel in the warehouse of Mark P. Miller at Moscow. It was shown by the evidence that the crop of wheat produced less than 10,000 bushels, or, to be exact, 8,191 bushels. The terms of the agreement may not be varied by parol evidence. Had Sutton delivered the 8,191 bushels to appellant, he would not have fulfilled his contract. On the other hand, had the crop exceeded 10,000 bushels, the contract would have been fulfilled by the delivery of any 10,000 bushels thereof. Furthermore, the price fixed in the agreement was for wheat delivered in the warehouse at Moscow. Had there been a loss of the crop before delivery, it could not be contended that the loss would have been that of appellant. Appellant was not obliged to pay until delivery at the warehouse was accomplished, and in case of prior destruction delivery could not have been made.

"The usual decisive test as to whether the contract is executed or executory is to consider at whose risk the subject-matter of the contract is prior to the actual delivery to the buyer; if the risk of loss from injury to or destruction of the property is on the buyer, the contract is executed, and, if on the seller, it is executory." 23 R. C. L. 1346.

The judgment is affirmed. Costs awarded to respondent.

MORGAN, C. J., and BUDGE, J., concur.

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(32 Idaho, 191)

LUKE v. KETTENBACH.

(Supreme Court of Idaho. March 28, 1919. Rehearing Denied June 23, 1919.)

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1. COURTS ⟸202(4) — PROBATE COURTS—VACATION OF JUDGMENT — APPLICATION OF STATUTE.

Comp. Laws, § 4229, providing for the setting aside of judgments or decrees on account of mistake, inadvertence or excusable neglect, applies to probate practice.

2. GUARDIAN AND WARD ⟸163—SETTLEMENT BY PROBATE COURT — RE-EXAMINATION ON FINAL ACCOUNTING.

The settlement and allowance of the annual or intermediate account of a guardian by the probate court is only prima facie evidence of its correctness, and is not conclusive against the ward, so as to prevent re-examination by the probate court on the final accounting of the guardian of his entire management of the ward's estate. Comp. Laws, § 5602, as to the conclusiveness of settlements of administrators' accounts, is not made applicable to guardians' accounts by section 5809.

3. GUARDIAN AND WARD ⟸54—USE OF WARD'S FUNDS—ACCOUNTING—INTEREST.

Where a guardian mingles his ward's funds with his own, and it is not shown that he received any profit from the use of the ward's funds, the guardian should be charged with interest at the legal rate, with annual rests, on the amount of the funds of the ward so mingled with his own.

4. GUARDIAN AND WARD ⟸58—ATTORNEY'S FEES.

A guardian is entitled to credit for an attorney's fee paid by him for services rendered to the estate, when he shows necessity for such service, and that the amount so paid was reasonable.

5. GUARDIAN AND WARD ⟸58—ATTORNEY'S FEES—DEFENDING ATTACK ON FINAL ACCOUNT.

A guardian is not entitled to recover attorney's fees incurred in resisting an attack upon his final account, which attack was invited by his own neglect and misconduct.

6. GUARDIAN AND WARD ⟸150—COMPENSATION—STATUTE.

Compensation of a guardian for his services, under Comp. Laws, § 5796, is not to be computed on the basis of fees and commissions, but is to be fixed in such amount as the court settling his accounts deems just and reasonable.

Dunn, District Judge, dissenting in part.

Appeal from District Court, Nez Perce County; Edgar C. Steele, Judge.

Annie Weaskus Luke, as executrix of George Weaskus, deceased, objected to the final account of William F. Kettenbach, as guardian of deceased, and the probate court disallowed his final accounting, adjudged him indebted to his ward, and the guardian appealed to the district court, and from its judgment for the executrix, both parties appeal. Reversed, and cause remanded, with instructions.

Eugene O'Neill and Lawrence E. O'Neill, both of Lewiston, for appellant and cross-respondent.

George W. Tannahill and S. O. Tannahill, both of Lewiston, for respondent and cross-appellant.

RICE, J., On September 12, 1906, William F. Kettenbach was appointed by the probate court of Nez Perce county guardian of the estate of George Weaskus, a blind and incompetent Indian. On February 26, 1909, he filed his first report, showing that he had received funds of his ward in the sum of $6,944.44, but not showing when the money was received, This report was verified by his oath on September 25, 1908. Deducting certain payments made by the guardian, and $367.20 fees and commissions claimed by him, this report showed a balance on hand of $3,311.82. The probate court approved this report March 8, 1909. The next report was filed by the guardian on February 2, 1910. It consisted of this simple statement:

"No change in amount on hand since last rendered account. Balance due, $3,311.82."

Annie Luke Bill, as sister and next friend of the ward, filed objections to this report, stating among her grounds of objection that—

"His said account filed on the 2d day of February, 1910, as and for his annual account of his dealings with the estate of the said incompetent, makes no showing as to the form in which the moneys heretofore received are held, in what property the same is invested, or what rate of interest the same is now drawing, or what interest it has earned during the time the same has been in the hands of said guardian."

The probate court thereupon disallowed this account, and ordered the guardian to render a more complete account on or before February 28, 1910. However, no further report was made until July 9, 1914, when he filed a report showing $3,311.82 on hand February 2, 1910, and interest collected amounting to $473.49. This report did not show the dates between which interest had been collected. The guardian stated in this report that the ward's money was then on deposit with the Idaho Trust Company, on a time certificate of deposit, dated February 19, 1914, and bearing interest at 4 per cent. per annum, on which six months' interest would be due August 19, 1914. In this report credit was claimed for attorney's fees in the sum of $50. The report was approved by the probate court July 22, 1914, and after allowing the credits claimed showed a balance in the guardian's hands, July 9, 1914, $3,735.31.

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On September 5, 1914, the ward died, leaving a will by which he appointed his sister, Annie Weaskus Luke, executrix. The validity of the will was attacked by his son Phillip, who, having lost the contest before the probate court, appealed to the district court for Nez Perce county. During the pendency of the appeal in the district court, the guardian, on January 25, 1915, filed his final account. In this account he charged himself with balance on hand, July 30, 1914, $3,735.31, and with interest, amounting to $139.64, to January 30, 1915, making a total of $3,874.95. He asked credit for $50 additional attorney's fees, $211.12 additional fees and commissions for himself, and $13.83 probate court costs, which would leave a balance in his hands, after deducting these amounts, of $3,600. Although the will contest was still undecided, the guardian prayed the court to distribute this estate to "Annie Luke, administrator of the estate of George Weaskus, deceased," which account was allowed, approved, and settled February 6, 1915.

On July 8, 1915, Annie Weaskus Luke filed with the probate court her motion to vacate and set aside the order of February 6, 1915, by which the final account of the guardian had been allowed, upon the ground of mistake, inadvertence, and excusable neglect. Comp. Laws, § 4229. The guardian resisted this motion, but on September 14, 1915, the probate court entered an order vacating and setting aside the order of February 6, 1915. The court further ordered the guardian to render a more complete account of his transactions with the property of said estate.

In compliance with this last order, the guardian, on September 24, 1915, filed another final account, showing the following items charged to himself: Balance on hand July 22, 1914, $3,735.31; interest on $3,735.31, July 22, 1914, to January 30, 1915, at 4 per cent. per annum, $139.62; interest on $3,600 from January 30, 1915, to September 23, 1915, at 4 per cent. per annum, $93.20, making a total of $3,968.13. He asked that he be credited with the following items: Attorney's fees, $50; fees of guardian, 7 per cent. on $1,000 and 5 per cent. on $2,968.13, $218.40; probate court costs, $13.83; additional attorney's fees to be allowed by the court, $250; probate court costs in closing up the estate, $ ——.

The executrix duly objected to this account for the reasons, among others, that the interest earned was much less than should have been earned, that there was no showing of necessity for the employment of an attorney by the guardian, that the probate fees claimed were excessive, and that the guardian was claiming double commissions for himself. After a hearing, the probate court disallowed this final account of the guardian, and adjudged him indebted to the estate in the sum of $4,533.53. From this judgment the guardian appealed to the district court for Nez Perce county. On trial of the matter anew in the district court, judgment was rendered for the executrix in the sum of $3,797.79, and from that judgment both parties have appealed to this court.

The final account disclosed for the first time that the funds of the ward were not invested in any interest-bearing securities until November 1, 1910. It was admitted by the guardian on the hearing that from the time he received the funds until the last-mentioned date they were on deposit in his own name and mingled with his own funds.

[1] It is contended that the probate court was without power to set aside the decree settling the first final account of the guardian, and that the district court erred in upholding the action of the probate court in setting aside the said decree. This contention cannot be sustained. Comp. Laws, § 4229, has been held by this court to apply to probate practice. Estate of Blackinton, 29 Idaho, 310, 158 Pac. 492; Chandler v. Probate Court, 26 Idaho, 173, 141 Pac. 635. The application was addressed to the sound discretion of the probate court, and its action should be sustained in the absence of an abuse of discretion. It is sufficient to state that the record does not disclose that the probate court abused its discretion in setting aside the order settling the first final account. Therefore the action of the district court in upholding the action of the probate court is approved.

[2] It is also contended that the allowance, approval, and settlement of the annual, or intermediate, accounts of the guardian by the probate court is final and conclusive against the ward to the extent that items passed upon cannot be re-examined by the probate court on the final accounting of the guardian. The Supreme Court of California, in the case of Guardianship of Cardwell, 55 Cal. 137, in construing statutes practically the same as our own, held that the settlement of a guardian's annual or intermediate account is only prima facie evidence of its correctness, and that the statutes relative to the conclusiveness of an administrator's accounts have no application to the annual or intermediate accounts of a guardian.

The case of Wells Estate and Guardianship, 140 Cal. 349, 73 Pac. 1065, is cited as authority to the contrary. In that case, however, the court construed the action to be one in equity to set aside the final account of the guardian, as well as the intermediate account, upon the ground of fraud, and it was decided that the demurrer to the complaint should have been sustained for failure to allege specifically the fraud complained of. The court also held that the judgment roll would not sustain the judgment, in that

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while the trial court failed to find that fraud had been committed, and therefore failed to show justification for setting aside the accounts of the guardian, nevertheless the court proceeded to re-examine his accounts. The Wells Case is not in point.

In the case of Brodrib v. Brodrib, 56 Cal. 563, the question of the conclusiveness, not of an intermediate, but of the final, account of a guardian, was involved, and it was sought to attack it, not in the guardianship proceeding, but by way of answer and cross-complaint in a suit wherein recovery was sought against the guardian by reason of disclosures made in his final account, the effect of which he sought to avoid upon the theory that when he rendered the account he was in such a condition, physically and mentally, as rendered him legally incompetent, and that items of his said final account were not true.

We do not think that the other cases cited in the Wells Case are authority for the statement that an order settling the guardian's intermediate account is conclusive against the ward to such an extent as to prevent a re-examination of the guardian's management of his ward's estate upon the final accounting of the guardian. The Cardwell Case, we think, announces the correct doctrine. Until the final accounting is due, the ward is always incompetent and unable to protect his own interests. A settlement of the intermediate accounts of the guardian should not be held to be conclusive, unless explicitly so made by statute.

[3] With reference to the amount which should be charged against the guardian, it is not shown in the record that he made any profit for himself out of the ward's funds while they were mingled with his own. The rule applicable to this case is stated in the cases of Estate of Eschrich, 85 Cal. 98, 24 Pac. 634; Estate of Stott, 52 Cal. 403; Estate of Clark, 53 Cal. 355; In re Cousins' Estate, 111 Cal. 441, 44 Pac. 182; Glassell v. Glassell, 147 Cal. 510, 82 Pac. 42; In re Dow, 133 Cal. 446, 65 Pac. 890; In re Noble's Estate, 178 Pa. 460, 35 Atl. 859; Hughes v. People, 111 Ill. 457; Bradford's Minor Heirs v. Bodfish, 39 Iowa, 681; In re Lux's Estate, 100 Cal. 606, 35 Pac. 345. The guardian should be charged with interest at the legal rate of 7 per cent. per annum, with annual rests, for the use of the funds during the period they were mingled with his own; i. e., from September 25, 1908, to November 1, 1910. The reason for the rule is stated in Re Cousins' Estate, supra, and in Re Lux, supra.

The final account disclosed, for the first time, that on November 1, 1910, the guardian invested $3,315.04 of the ward's funds in interest-bearing certificates of deposit, maturing semiannually. He does not show that he expended any substantial portion of the funds for the benefit of the ward. It was his duty, therefore, upon the maturity of each certificate, to add the interest to the principal, and take a new certificate for the whole amount. He states in his evidence that he did so. He is therefore liable to the estate for interest at the rate of 4 per cent. per annum, with semiannual rests, from the 1st day of November, 1910, on the amount of money which he invested at that time.

There was left in the guardian's possession the difference between the amount of money with which he should have credited the estate on November 1, 1910, and the amount which he actually invested in the certificate of deposit. This amount not being accounted for in any way, under the circumstances disclosed by the record, must be presumed to have remained mingled with his own funds. This amount, upon computation, is found to be $503.24, on which he should be required to pay interest at the rate of 7 per cent. per annum, with annual rests.

The decree of the district court in this case was entered March 1, 1917. The amounts with which the ward's estate should have been credited, based upon the rules above stated, are as follows:

September 25, 1908	$3,311 82
Interest on above at 7 per cent., compounded annually, from September 25, 1908, to November 1, 1910	506 46
Interest on $3,315.04 at 4 per cent. compounded semiannually, from November 1, 1910, to March 1, 1917	945 20
Interest on $503.24 at 7 per cent., compounded annually, from November 1, 1910, to March 1, 1917	269 55
Total	$5,033 03

[4, 5] The record amply justifies the allowance of the two items of $50 each for attorney's fees as reported by the guardian in his intermediate and final accounts. Attorney's fees are recognized as proper items of expense, when the services of attorneys are reasonably required. The burden is upon the guardian to show the necessity for the employment of an attorney, and the reasonableness of the fees paid him, and the allowance should never exceed the amount actually paid. In re Thompson's Estate, 101 Cal. 349, 35 Pac. 991, 36 Pac. 98, 508; In re Adams' Estate, 131 Cal. 415, 63 Pac. 838; Nagle v. Robins, 9 Wyo. 211, 62 Pac. 154, 796; Woerner on Guardianship, p. 351.

The item of $250 for attorney's fees, claimed in the final account, should be disallowed. The services of the attorney for which this allowance was asked were rendered in resisting the attack upon the final account itself. This attack was invited by the character of the account filed, since it showed both neglect and misconduct on the part of the guardian. Under such circumstances the guardian is not entitled to credit for attorney's fees paid by him. Woerner on Guardianship, p. 351.

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[6] The compensation which the guardian asked for himself was computed upon the basis of fees and commissions allowed to administrators or executors of the estates of deceased persons. Comp. Laws, § 5796, provides that—

"Every guardian must be allowed the amount of his reasonable expenses incurred in the execution of his trust, and he must also have such compensation for his services as the court in which his accounts are settled deems just and reasonable."

The compensation of the guardian under the section quoted is not to be determined on the basis of fees and commissions, but is to be in such amount as the court deems just and reasonable. We are of the opinion that there is no evidence in the record to justify the allowance of any compensation to the guardian for services, in addition to the $367.20 which he had received at the time of filing his first account.

The guardian should be credited with the court costs amounting to $28.68, and with attorney's fees in the sum of $100, and judgment should be rendered against him for the sum of $4,904.35.

The judgment of the district court is reversed, and the cause remanded, with instructions to enter judgment as of date of March 1, 1917, against the guardian for the sum of $4,904.35. Costs awarded to appellant and cross-respondent.

MORGAN, C. J., concurs.

DUNN, District Judge (concurring in part and dissenting in part). While I concur in the view that the amount of the judgment of the district court against the guardian should be increased, I cannot agree with the conclusion of the majority of the court as to allowances to the guardian for attorney's fees and for his personal services.

As to attorney's fees, it seems to me the majority opinion ignores the very wholesome rule there stated that the burden is on the guardian to show the necessity for the employment of an attorney. In this case no suit was brought, and none was threatened, that would have involved the guardian. Most of the so-called services of the attorney consisted of advice to the guardian about matters with which he had nothing to do and about possible lawsuits to which, if they had been brought, the guardian would not have been a party. The appearance of the attorney for the guardian in the probate and district courts was rendered necessary by the negligence of the guardian, and under the rule announced cannot, I think, be properly charged against the estate. In my judgment there is a total lack of necessity shown for the employment of an attorney.

As to the allowance of $367.20 to the guardian for his services, I am not in accord with the majority, for the reason that the guardian's course throughout the entire period of his guardianship, beginning in 1906, has been one of gross negligence and unfaithfulness. A re-reading of the record confirms me in this view, which is based almost wholly on the reports and testimony of the guardian himself. The estate of the ward in this case consisted entirely of money paid into the hands of the guardian, which required him to keep accurate accounts of the money received, the amount earned by him therewith, and the expenditures made by him. He admits receiving $3,311.82 belonging to the ward, but, though he was asked to give the date upon which he received this sum, we search his testimony and his reports in vain for the exact date. This court has been able to fix a definite date for the beginning of his responsibility only by taking the date upon which he verified his first report, September 25, 1908. While this is accepted as the earliest date that can be definitely fixed for charging him with these funds, there is evidence in the record strongly tending to show that on the date above mentioned he had been in possession of the funds for more than a year. He made no attempt to obtain interest for his ward until compelled to do so, after complaint had been made by the ward's sister, and then he was content to accept the low rate of 4 per cent., with no pretense that at any time he made the slightest effort to get more. Possibly this was the best that could be done safely, but, if so, it is somewhat singular that the guardian nowhere claims that it was. In the district court he testified that he was carrying the funds in a certificate of deposit, which he renewed every six months for the amount of the old certificate and interest for the preceding six months; but, when he rendered his account to the probate court, he charged himself with only simple interest. It is not necessary, however, to rely solely upon these matters in determining the degree of fidelity shown by the guardian in the execution of this trust, which the courts universally hold to be of the highest and most sacred character. His interest in and attention to his duties are clearly indicated by his answer when questioned as to his employment of an attorney:

"I had given a good-sized bond in this matter, and I wasn't giving it any special attention; it was more perfunctorily, my handling of it, and I wanted the advice of an attorney to keep me straight."

And further, when he said in reply to a question of his attorney as to what he meant when he said he thought this was to be a temporary affair:

"Why, I expected that at any time I might receive a court order to distribute the money. I was appointed at the instigation of some one

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interested in the heirs; I don't know who. I think it was Thompson, of Pendleton. It was merely perfunctory with me. I gave the bond and took the appointment, and, if I am allowed to say so, at that time I had matters that were of moment and weight to me, considerably more than was this along about those dates, and I didn't do anything more in this matter than I was naturally called upon to do, or give it much thought. It seemed to be running along all right, and I was given to understand from Mr. Smith this would be temporary, and I let it run along that way."

When we contrast the spirit and conduct of the guardian, as expressed above, with the spirit and conduct enjoined by the law in requiring the guardian "to dispose of and manage the estate according to law and for the best interest of the ward, and faithfully to discharge his trust in relation thereto," it seems to me there is no escape from the conclusion that the guardian has been guilty of gross negligence and unfaithfulness to his trust. So believing, I think the court should disallow all his claims for compensation for himself and for attorney's fees, and add to the sum of $4,904.35 the sum of $100 allowed as attorney's fees and the sum of $367.20 allowed the guardian for his services, with interest on said last-named amount at 7 per cent., compounded annually, from September 25, 1908, to March 1, 1917, and direct the district court to enter judgment as of March 1, 1917, against the guardian for the aggregate of these sums.

(75 Okl. 93)

DUNCAN et al. v. KEECHI OIL & GAS CO. et al. (No. 9432.)

(Supreme Court of Oklahoma. March 18, 1919. Rehearing Denied June 24, 1919.)

(Syllabus by the Court.)

1. TRIAL ⟸139(1)—DEMURRER TO EVIDENCE —RULING.

Where the evidence as a whole, with all the inferences that can be properly drawn from it, is insufficient to support a judgment in favor of the plaintiff, it is not error to sustain a demurrer thereto.

2. RESCISSION—STATUTE.

Rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence, to comply with the following rules:

First, he must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind; and,

Second, he must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so.

(Additional Syllabus by Editorial Staff.)

3. CANCELLATION OF INSTRUMENTS ⟸24(1)—ASSIGNMENT OF OIL AND GAS LEASES—CONDITIONS PRECEDENT—STATUTE.

Plaintiffs, suing to rescind their assignments of oil and gas leases, who did not plead or prove their offer to rescind promptly on discovering facts claimed to entitle them to rescind, and who gave no reason for not so rescinding, and did not offer to restore what they had received from assignees, as required by Rev. Laws 1910, § 986, were not entitled to cancellation and a reinvestment of title, or to any other equitable relief.

Error from District Court, Grady County; Will Linn, Judge.

Action by C. W. Duncan and Ida M. Duncan against O. W. Goolsbee, the Keechi Oil & Gas Company, and the Oklahoma Star Oil Company. Judgment for defendants on demurrers to plaintiffs' evidence, and plaintiffs bring error. Affirmed.

F. E. Riddle, of Tulsa, and Harry Hammerly, of Chickasha, for plaintiffs in error.

Bond, Melton & Melton, of Chickasha, and Asp, Snyder, Owen & Lybrand, of Oklahoma City, for defendants in error.

RAINEY, J. This was an action instituted by C. W. Duncan and Ida M. Duncan, plaintiffs in error, plaintiffs below, against O. W. Goolsbee, the Keechi Oil & Gas Company, and the Oklahoma Star Oil Company, defendants in error, defendants below, to cancel the assignments of certain oil and gas leases made by the plaintiffs to one Goolsbee, and subsequently assigned by Goolsbee to the Keechi Oil & Gas Company, and by the Keechi Oil & Gas Company to the Oklahoma Star Oil Company, of an undivided one-half interest in said leases, and to restore the title in the same to the plaintiffs. A trial amendment was had, in which a money judgment in the sum of $500,000 was prayed in the event it was found that the leases could not be restored to the plaintiffs. An accounting was also asked as against the Keechi Oil & Gas Company and the Oklahoma Star Oil Company.

The material allegations in the plaintiffs' petition are that on the 8th day of February 1915, they entered into a contract with one Goolsbee, whereby they assigned to the said Goolsbee approximately 5,000 acres of oil and gas leases in the cement field in Caddo county, Okl.; that under the terms of said contract the said Goolsbee agreed to organize a corporation under the laws of this state, with a capital stock of $25,000, and to assign the leases assigned to him by plaintiff to said

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corporation, less approximately 1,100 acres, which he was to reassign to the plaintiffs, and the company so organized was to drill a test well to the depth of 3,000 feet, unless oil and gas were found in paying quantities at a lesser depth. The contract further provided that the plaintiffs were to receive $400 cash and 2,000 shares of the stock of said corporation of the par value of $1 per share, and that the corporation was to begin the drilling of a well within 30 days from the date of the contract, and upon failure so to do was to forfeit to the plaintiffs the sum of $500. As grounds for the cancellation of the leases it was alleged that the said O. W. Goolsbee, as an inducement to the plaintiffs to enter into the said contract, represented to them that he and his associates were financially able to drill a test well to the depth of 3,000 feet; that said representations were untrue, and that said plaintiffs relied thereon; that the Keechi Oil & Gas Company was the company organized by the said Goolsbee under the terms of the contract; that said company was without financial means with which to carry out the contract, which was known by the defendant Goolsbee prior to the assignment of said leases, and that said Keechi Oil & Gas Company, through the efforts of the said Goolsbee, entered into a contract with the Oklahoma Star Oil Company, whereby an undivided one-half interest in and to the leases assigned to the Keechi Oil & Gas Company by Goolsbee were assigned to the Oklahoma Star Oil Company as the consideration for the drilling of said test well; that said Goolsbee and the Keechi Oil & Gas Company never intended to start drilling operations in good faith, but that drilling operations were commenced by them solely for the purpose of creating a market for their oil and gas leases in order that they might speculate thereon to their advantage, and that the officers of said company might profit thereby. It was further alleged in the petition that the defendants Keechi Oil & Gas Company and the Oklahoma Star Oil Company failed to carry out the terms and provisions of the drilling contract made with Goolsbee, and that they practically abandoned the well commenced, and that the plaintiffs, in order to protect their interests in the oil and gas leases, as against the owners of the land, were compelled to and did pay a large part of the expenses of drilling the test well and created a large indebtedness for labor and material; that said well was drilled to a depth of approximately 1,500 feet; and that oil and gas were found in paying quantities. There were other allegations in the petition not material to a decision of this case.

Defendants answered by general and special denials of all the allegations contained in the plaintiffs' petition, and further alleged, in effect, that they had complied with all the terms of the contract entered into with the plaintiffs by their codefendant Goolsbee; that the contract made by the defendant Keechi Oil & Gas Company with the defendant Oklahoma Star Oil Company, to drill the test well was made with the knowledge and consent of the plaintiffs, and that one of the plaintiffs, C. W. Duncan, entered into a contract with said Oklahoma Star Oil Company to complete the drilling of said well, and that the expenses incurred by the plaintiffs were in pursuance to his contract with said company. The answer admits that oil and gas were found in paying quantities, as alleged by the plaintiffs.

[1, 2] The plaintiffs offered their evidence, whereupon each of the defendants demurred thereto, and all of said demurrers were sustained by the trial court. On appeal plaintiffs urge that the judgment of the trial court should be reversed, and invoke the rule that a demurrer to the evidence admits all the facts which the evidence in the slightest degree tends to prove, and all the inferences or conclusions which may be reasonably and logically drawn therefrom. This calls for an examination of the evidence. Plaintiffs did not offer evidence in support of many of the allegations in their petition, and the evidence introduced, viewed in the most favorable light, is in substance as follows:

That the defendant Goolsbee entered into negotiations with plaintiffs to drill a test well in consideration of the assignment of the leases by the plaintiffs to him, and that they first wanted to know whether Goolsbee was able to drill or not, as they had an opportunity of entering into contracts with other parties, and that plaintiffs had only 30 days to begin operations; that Goolsbee said to them, "Well I think I can do it;" that plaintiffs then gave him 2 days to find out, and he returned to them and said he was in shape to drill the well; that the contract was entered into, and that Goolsbee thereupon organized the Keechi Oil & Gas Company, paid plaintiffs the cash consideration, and issued plaintiffs the stock as provided in the contract; that after the leases had been assigned to the Keechi Oil & Gas Company said company made a contract with the Oklahoma Star Oil Company to drill the test well in consideration of an undivided one-half interest in the leases. We have been unable to find any evidence in the record that any false representations were made to the plaintiffs inducing them to enter into the contract with Goolsbee, and it does not appear from their testimony that any of the terms of said contract were breached. Their testimony fails to disclose the exact date within which the test well was commenced. It appears that the Oklahoma Star Oil Company started drilling a well on one of the leases, and that the plaintiff C. W.

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Duncan expressed his dissatisfaction with the location, and that on his suggestion the location was changed, and that he himself then entered into a contract with the said Oklahoma Star Oil Company to complete the drilling of the test well; that the plaintiffs at all times knew about the beginning of the work, and made no objections whatever as to the time the drilling operations were commenced; that the said plaintiff assigned his drilling contract to his two sons, but he, himself, worked at the well until the same was completed and oil was found in paying quantities. Under the contract entered into by plaintiff C. W. Duncan with the Oklahoma Star Oil Company to finish the well, he was to pay for the labor, and the company was to furnish the equipment. The evidence also shows that the well was brought in in September after the contract was entered into in June, and that the Oklahoma Star Oil Company made full settlement with the plaintiffs' sons. Proof of this settlement was made at the trial, and receipts were admitted in evidence.

It seems clear that under the terms of the contract with Goolsbee the plaintiffs did not have the right to cancel the leases, even though the defendants did not commence drilling operations within the 30 days, for the said contract specifically provided that if a test well was not commenced within 30 days the plaintiffs were to receive $500 liquidated damages. The plaintiffs are not here suing for the damages provided for by the contract; and, even if they were, it is exceedingly doubtful whether they would be entitled thereto under the circumstances surrounding the drilling of the test well as above related. But if it be assumed, for the purposes of this case, that the Oklahoma Star Oil Company did breach the contract with the plaintiffs, in that it failed to furnish some of the equipment, as it was its duty to do, under said contract with the plaintiffs, plaintiffs would not be entitled to a cancellation of the assignment of the leases and restoration of title thereto in themselves, for the reason that the Keechi Oil & Gas Company was not a party to this contract. The two contracts were entirely separate, and we do not see how the plaintiffs are in a position to rely upon a breach of this contract, inasmuch as he had assigned it to his two sons, who had made complete settlement with the Oklahoma Star Oil Company.

The action instituted by plaintiffs is equitable in its nature, and, in effect, seeks to rescind the contract entered into by them with Goolsbee. Plaintiffs neither pleaded nor proved that they had offered to rescind promptly upon discovering the facts which they claimed entitled them to rescind, and failed to give any reason for not rescinding promptly; and they did not offer to restore what they had received under said contract. This was essential to a recovery under section 986, Rev. Laws of 1910, which provides:

"Rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules:

"First. He must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind; and,

"Second. He must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable, or positively refuses to do so."

After a very careful consideration of all the evidence in the record we are of the opinion that the plaintiffs have wholly failed to prove any facts entitling them to a cancellation of the leases and a reinvestment of the title thereto in themselves or for any other relief, and, measured by the rule invoked by the plaintiffs, the judgment of the trial court must be sustained.

All the Justices concur, except SHARP, J., not participating.

(75 Okl. 48)

In re HUDDLESTON. (No. 10203.)

(Supreme Court of Oklahoma. June 3, 1919.)

(Syllabus by the Court.)

1. LIMITATION OF ACTIONS ⟸6(10)—DISBARMENT—STATUTES.

On September 15, 1918, an information was filed to disbar an attorney for fraud alleged to have been committed in May, June, July, and September, 1912, to which statutes of limitation were pleaded. *Held* that, under section 267 of the Compiled Laws of Oklahoma of 1909, fixing a limitation of one year for the commencement of the action, the plea was a bar to the prosecution; and further, *held*, the omission of section 267, supra, from the Revised Laws of Oklahoma of 1910, did not toll the statutes of limitation, for the reason that the act approved March 3, 1911 (Laws 1911, c. 39), adopting the Revised Laws of 1910, provides that the running of the statutes of limitation shall not be affected thereby.

2. ATTORNEY AND CLIENT ⟸53(2)—DISBARMENT—SUFFICIENCY OF EVIDENCE.

Evidence in support of count No. 2 examined, and *held* not sufficient to disbar an attorney.

Petition in Supreme Court for the disbarment of C. T. Huddleston, an attorney. Petition for disbarment denied, report of Hon. Frank Wells, referee, confirmed, and proceedings dismissed.

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Fred M. Carter, of Okmulgee, and W. H. Dill, of Okemah, for complainant.

Frank B. Burford, of Oklahoma City, and J. W. Patterson, of Okemah, for respondent.

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HIGGINS, J. This is an original proceeding commenced in this court to disbar C. T. Huddleston, an attorney. The information was filed in this court September 5, 1918, containing five counts, each count presenting a distinct charge. Hon. Frank Wells, an attorney of the Oklahoma City bar, was by this court appointed referee, and directed to hear evidence and to file a transcript of the evidence taken, together with his findings of fact and conclusions of law.

On March 15, 1919, the referee filed in this court a transcript of the evidence taken, together with his findings of fact and conclusions of law, finding that all matters complained of in the first count were barred by the statutes of limitation, and that the testimony did not warrant disbarment on counts 2, 3, and 4, and that disbarment should not be had on count 5. Exceptions were filed to the findings of fact and conclusions of law, as far as the same related to counts 1 and 2, but no exceptions were taken as to the other counts in the information. The court's attention will be directed to those counts, to wit, 1 and 2, to which exceptions were taken.

In count 1 it was alleged that in the months of May, June, July, August, and September, 1912, the respondent while acting as attorney for a minor Creek freedman in the sale of her property in the county court of Okfuskee county, was guilty of fraud to the detriment of his client. To this charge the plea of limitation was interposed and sustained by the referee.

[1] The law of limitation as applied to the suspension or removal of an attorney at the time the fraudulent acts are alleged to have taken place is set forth in section 267 of the Compiled Laws of Oklahoma of 1909, and that portion of the section fixing limitation for the commencement of an action is as follows:

"All actions for suspension or removal shall be brought within one year after the act charged was committed, and not thereafter."

However, prior to the expiration of one year, to wit, on May 16, 1913, the Revised Laws of Oklahoma of 1910, became effective, and section 267, supra, was omitted therefrom. It is thus contended that this tolled the statutes of limitation. This contention, however, is met by section 2 of the act approved March 3, 1911, adopting the Revised Laws of 1910. Section 2, supra, is as follows:

"All general or public laws of the state of Oklahoma not contained in said revision are hereby repealed: Provided, that this act shall not be construed to repeal, or in any way affect any special or local laws, or any appropriation, special election, validating act or bond issue thereby authorized, nor to affect any pending proceeding or any existing rights or remedies, nor the running of the statute of limitation in force at the time of the approval of this act; but all such local and special laws, appropriations, special elections, validating acts, bond issues, pending proceedings, and existing rights and remedies shall continue and exist in all respects as if this act had not been passed. * * *" Laws 1911, c. 39.

We find that the referee, as a matter of law, was correct in sustaining the plea to the statutes of limitation; but by so doing we do not wish to be understood that the statutes of limitation will be a bar to a prosecution of any act charged as having taken place since the Revised Laws of 1910 became effective, in which section 267, supra, is omitted.

[2] As to matters complained of in count 2 of the information, the testimony shows that the respondent was attorney for J. S. Bearden, and appeared in court as attorney for Israel Long, an Indian, and procured certain orders in the interest of the said Bearden, who had purchased from Israel Long, soon after he became of age, all the claims of the said Long against his former guardian at a price which now seems to have been inadequate. It does not appear from the testimony that the purchase by Bearden from Long was fraudulently procured, or that the said respondent was either attorney or advised the sale of same, and it further appears that Long knew and understood that Huddleston was appearing in his name as attorney for Bearden, the assignee of the claim. We find that the evidence in support of count 2 is not sufficient to disbar the respondent from the further practice of law.

It is therefore the judgment of this court that the prayer of the relator's petition, asking that the respondent be disbarred from the further practice of law, be and the same is hereby denied.

OWEN, C. J., and SHARP, PITCHFORD, and McNIELL, JJ., concur.

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(75 Okl. 46)

PHILLIPS v. STATE. (No. 10328.)

(Supreme Court of Oklahoma. June 8, 1919.)

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(Syllabus by the Court.)

1. ELECTIONS ⟸315—BETTING ON ELECTION —OFFENSE.

Making a bet or wager upon the result of an election of a subdivision less than the whole territory in which the vote is cast is a violation of section 2108, Revised Laws of Oklahoma of 1910.

2. OFFICERS ⟸66—REMOVAL—CONSTRUCTION OF STATUTES — HABITUAL OR "WILLFUL NEGLECT OF DUTY."

Under subdivision 1 of section 5592, providing for a removal of an officer from office for a "habitual or willful neglect of duty," *held*, a willful neglect of duty means that the act or failure to act was for a bad or evil purpose, or when the officer conscientiously acts or fails to act contrary to a known duty, he must be guilty of some conscious wrong or inexcusable carelessness or recklessness in the discharge or a failure to discharge an official duty. Mere thoughtless acts, with no bad or evil purpose, in which there is no inexcusable carelessness or recklessness on the part of an officer, will not justify a removal on the ground of habitual or willful neglect of duty.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Willful Neglect.]

3. OFFICERS ⟸74—REMOVAL FOR NEGLECT OF DUTY—VERDICT.

The jury must believe from the evidence beyond a reasonable doubt the truthfulness of the accusation against an officer before a verdict can be returned against him.

Error from District Court, Bryan County; Cham Jones, Judge.

John A. Phillips was convicted of betting upon an election, and there was a judgment removing him from his office of Sheriff of Bryan County. His motions for a new trial and in arrest of judgment were overruled, and he brings error. Reversed and remanded with directions to set aside the order removing defendant from his office and to dismiss the cause.

Utterback & MacDonald, of Durant, C. A. Welch, of Antlers, and J. G. Ralls, of Atoka, for plaintiff in error.

S. Prince Freeling and C. W. King, both of Oklahoma City, and Hayes & McIntosh, of Durant, for the State.

HIGGINS, J. A grand jury of Bryan county presented an accusation against John A. Phillips, its sheriff, containing 11 counts. Upon trial plaintiff in error was convicted upon count No. 1, but was acquitted upon all the other counts. A motion for a new trial and a motion in arrest of judgment were each overruled, to which exceptions were taken. The court entered its judgment removing the plaintiff in error from the office of sheriff of his county, from which judgment an appeal was lodged in this court.

[1] Count No. 1, upon which plaintiff in error was convicted, alleges in substance that in the year 1918 two men (naming them) were candidates for the nomination of Governor on the Democratic ticket, and that plaintiff in error bet with one W. L. Townsend that in the city of Durant one of these candidates would not receive twice the number of votes that the other candidate would receive. The statute claimed to have been violated is set forth in section 2108, Revised Laws of Oklahoma of 1910, and is as follows:

"Any person who makes, offers or accepts any bet or wager upon the result of any election, or upon the success or failure of any person or candidate, or upon the number of votes to be cast either in the aggregate, or for any particular candidate, or upon the vote to be cast by any person, or upon the decision to be made by any inspector or canvasser, of any question arising in the course of an election, or upon any event whatever depending upon the conduct or result of an election, is guilty of a misdemeanor."

The prosecution for the removal of the plaintiff in error appears to have been commenced under the general statutes for the removal of officers, as set forth in article 4 of Procedure Criminal of the Revised Laws of Oklahoma, of 1910, and the cause for removal upon the ground set forth in subdivision 1 of section 5592, supra, wherein it is provided that an officer may be removed from office for a "habitual or willful neglect of duty."

The case is briefed by the plaintiff in error on the theory that, unless the bet was upon general results of the governorship election, then no crime had been committed, and is briefed by the defendant in error on the theory that a bet upon the results of an election by a sheriff is a willful neglect of duty in contemplation of the statute and as set forth in subdivision No. 1 of the statute quoted above. As this prosecution appears to have been commenced under article 4, Procedure Criminal, supra, chapter 205 of the Session Laws of 1917, mentioned in briefs, is not applicable to the case at bar.

The contention of plaintiff in error that a bet upon the result of the vote of the city of Durant, and not upon the final result of the vote of the whole state, in a governorship election or nomination, is not a violation of section 2108, above, we believe is untenable and not the law, and that no reasonable construction of the statute will justify such construction.

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[2, 3] The only other question in this case left for the consideration of this court is the one presented by defendant in error that it is a willful neglect of duty for a sheriff to bet on the result of an election and fail to report it. It is not every neglectful official act of an officer that will authorize his removal. The word "willful" is not without meaning. Let us examine the authorities as to the meaning of "willful," as applies to an act of an officer. 22 Ruling Case Law, 281, in discussing the subject, states:

"An act is considered done willfully when it is done with a bad or evil purpose, or when the officer conscientiously acts contrary to a sworn duty; but conduct may be voluntary, thoughtless, or even reckless, without necessarily being willful."

Defining "willfulness" in an action to remove an officer, the Iowa court used the following language:

"Every voluntary act of a human being is intentional; but, generally speaking, a voluntary act becomes willful in law only when it involves some degree of conscious wrong or evil purpose upon the part of the actor, or at least an inexcusable carelessness on his part, whether the act be right or wrong." State v. Meek, 148 Iowa, 671, 127 N. W. 1023, 31 L. R. A. (N. S.) 566, Ann. Cas. 1912C, 1075.

In Bradford v. Territory, 2 Okl. 228, 37 Pac. 1061, Chief Justice Burford held that where a county clerk issued a saloon license, collected less than the statutory fee, and kept it, he had willfully neglected his official duties. We are under the belief, from the authorities quoted, that willful neglect of an officer, authorizing his removal, means neglect in the relation to the duties of his office, willful in its character.

In order to decide whether the acts of an officer are willful, it is necessary to examine the facts as disclosed by the evidence. In the instant case, the plaintiff in error and Mr. Townsend met at his store, and a bet of $10 against $20 was made as herein stated. The record is silent as to what was said or done at the time the bet was made or prior thereto, but does show what was done immediately thereafter. Mr. Townsend testified as follows:

"Q. Now, tell the jury what took place and was said between you immediately thereafter. A. Well, I followed him up to the American National. I was a little mad at him. He was talking to some one, I think it was Prof. Harris, and I told him I would like to bet some more money.

"Q. What took place? Tell the whole story. A. Well, he said he did not want to bet; that he was sorry he had bet, and asked me to please 'let's call the bet off.'

"Q. What else was said? A. I wanted to bet more, $500 or $1,000. Friends of mine told me to bet $10,000 if he had the money.

"Q. What did John say? A. Well, he said he did wrong; that he did not want to bet. He said, 'Let's call it off;' and I said, 'No, sir.'"

In view of the facts, as shown by the record, that the result of the vote showed the judgment of the sheriff formed previously thereto to have been a correct one, we shall take it for granted, without fear of successful contradiction, that Mr. Townsend now believes that there was much virtue in the sheriff's statement that it was wrong to bet on an election.

In case of Maben v. Rosser, 24 Okl. 588, 103 Pac. 674, it is stated that the degree of proof required is the same as required in the trial of a misdemeanor, so, in a cause to remove an officer, the jury must believe from the evidence in the case, beyond a reasonable doubt, that the officer is guilty of the charge, and in the instant case the jury must believe from the evidence beyond a reasonable doubt that the failure of the sheriff to arrest Mr. Townsend for betting with him was for a bad or evil purpose, or that he obstinately refused to act when he was conscious of a known duty. If his failure to act at the time was on account of a want of thoughtfulness, then he would not be guilty of a willful neglect of duty. One's personal observation convinces us that men are too quick to bet on a result of an election, usually do so in crowds, under excitement, with no thought that their act is a violation of law. Under the general law for removal of officers, stated above acts constituting a misdemeanor are not necessarily grounds for removal. Betting by the sheriff would be misconduct on his part, personal in its nature, for which prosecution could be had against him, the same as against any other citizen. The neglect of official duty would be his failure to arrest Mr. Townsend after betting with him.

Betting on the result of an election is wrong, and is to be condemned. We believe, from the record in the instant case, that the act of the sheriff in betting on an election, and his failure to arrest the one against whom he bet, was a thoughtless act, and that there is total lack of evidence showing beyond a reasonable doubt that in so doing he was guilty of "willful neglect of official duty."

The cause is reversed and remanded, with instructions to the trial court to set aside the order removing the officer and to dismiss the cause.

OWEN, C. J., and SHARP, PITCHFORD, and McNEILL, JJ., concur.

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(76 Okl. 192)

ARMSTRONG v. PHILLIPS et al.
(No. 9458.)

(Supreme Court of Oklahoma. Dec. 3, 1918. Rehearing Denied June 24, 1919.)

(Syllabus by the Court.)

1. RECORD AND FORECLOSURE OF MORTGAGE—STATUTE.

Section 1156, Rev. Laws 1910, provides that "every instrument purporting to be an absolute or qualified conveyance of real estate or any interest therein, but intended to be defeasible or as security for the payment of money, shall be deemed a mortgage and must be recorded and foreclosed as such."

2. REAL ESTATE — SECURITY — NOTICE — STATUTE.

Section 1158, Rev. Laws 1910, provides that "any person purchasing or taking any security against real estate in good faith and without record notice from one holding under an instrument purporting to be a conveyance but intended as security for the payment of money, and which instrument has been duly recorded without any other instrument explanatory thereof, shall be protected to the extent of the purchase price paid or actual outlay occasioned, with lawful interest, against all persons except those in actual possession at the time of such purchase or outlay."

3. INDIANS ⟸27(7)—CANCELLATION OF INSTRUMENTS—DEMURRER TO EVIDENCE.

Record examined, and *held* that the trial court erred in sustaining the demurrer to plaintiff's evidence.

Error from District Court, Washington County; R. B. Boone, Judge.

Action by Minnie B. Armstrong against Frank Phillips and the Lewcinda Oil Company. Demurrer to plaintiff's evidence sustained, and judgment for defendants, and plaintiff brings error. Reversed and remanded, with directions.

Hainer, Burns & Toney, of Oklahoma City, and Norman Barker, of Bartlesville, for plaintiff in error.

John H. Kane and Rowland & Talbott all of Bartlesville, for defendants in error.

KANE, J. This was an action commenced by the plaintiff in error, plaintiff below, against the defendants in error, defendants below, for the purpose of recovering possession of certain real estate and canceling several instruments of writing which it was alleged clouded the title of the plaintiff.

Hereafter for convenience the parties will be called "plaintiff" and "defendants," respectively, as they appeared in the trial court. After the plaintiff had introduced her evidence and rested the court sustained a demurrer thereto and entered judgment for the defendant, so that the only error assigned for review is the action of the trial court in sustaining defendants' demurrer to plaintiff's evidence. The facts necessary for the consideration of this question may be briefly summarized as follows:

On the 8th day of June, 1908, the plaintiff executed a deed to the land in controversy to one V. J. Knisley, which deed was subsequently canceled by a decree of court upon the ground of fraud. It seems that immediately after the execution of this deed, and before the cancellation thereof, Knisley executed a mortgage on said land to secure the payment of a loan of money made to him by the Citizens' Bank & Trust Company of Bartlesville, Okl. In the course of the action brought by the plaintiff against Knisley for the cancellation of the deed to him, the Citizens' Bank & Trust Company filed its petition in intervention, wherein it prayed for the foreclosure of its mortgage, but no judgment or decree was taken by said Citizens' Bank & Trust Company on said petition in intervention. Thereafter the defendant Frank Phillips, who was the president of the Citizens' Bank & Trust Company, threatened to foreclose said mortgage, and informed said plaintiff that unless she would immediately pay the same she would lose her land; that, being unable to pay said incumbrance, including attorney's fees and court costs, the plaintiff executed an instrument in writing, in the form of a deed purporting to convey said land to her grandfather, Arthur Armstrong, but intended as security for the payment of money furnished by the grantee for the purpose of paying off the incumbrance to the bank. It was alleged that this deed, which under the statute (section 1156, R. L. 1910) must be deemed to be a mortgage, was absolutely null and void for the reason that at the time the same was executed by the plaintiff she was a minor under the age of 18 years, and was enrolled as a Cherokee Indian of the degree of three-eighths blood; that said deed was made without the consent, supervision, authority, or order of the county court of Washington county, in which county the plaintiff was then a resident; that thereafter, to wit, on the 19th day of June, 1915, the said Arthur Armstrong purported to convey the above-described land by warranty deed to said defendant Frank Phillips, and that said deed was void for the reason that said Arthur Armstrong had no right, title, or interest in and to said real estate, or any part thereof to convey to the said Frank Phillips, and that Frank Phillips well knew that said purported deed executed by Minnie B. Armstrong, the plaintiff herein, to the said Arthur Armstrong, her grandfather, on the 28th day of February, 1910, was intended as security for the payment of money; that

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said Arthur Armstrong was a full-blood Indian about 80 years of age, infirm in body and mind and unable to read and write or understand the English language, and the said Frank Phillips, knowing that the said Arthur Armstrong reposed special trust and confidence in him as his banker, wrongfully and fraudulently induced him to execute a warranty deed to him in fraud of the rights of this plaintiff, and with actual notice and knowledge that said deed of February 28, 1910, aforesaid was given merely to secure the said Arthur Armstrong for the payment of the incumbrances above stated for and on behalf of this plaintiff, and that said purported deed constituted merely a mortgage, and was not intended as an absolute conveyance of plaintiff's title to said real estate above described.

The answer of the defendant Frank Phillips, after denying each and every and all the allegations set forth in plaintiff's petition except such as are specifically admitted, alleges that he purchased the said real estate from Arthur Armstrong for valuable consideration, and took the deed thereto without any knowledge or notice of any defect in the title or any purported adverse claim against said title; that by virtue of a certain decree of the district court of Washington county the right of majority was conferred upon the plaintiff prior to the execution of said deed, and, having accepted the benefit of said decree removing her disabilities as a minor, in acquiring title to said land, she is estopped from denying its validity in connection with the sale of the same, and that the deed executed by her February 28, 1910, in favor of Arthur Armstrong, and relating to the lands above described, was, and is, a legal and valid conveyance of said lands. Defendant denies that said deed was intended as a mortgage and alleges that plaintiff received valuable consideration for the same; that the plaintiff is now barred from complaining in this action, and should not be permitted to recover herein, because the action was not brought within 1 year after she arrived at the age of 18 years, and for the further reason that her cause of action is barred by the statutes of limitation of 1 year, and of 2 years, and of 3 years, under the laws of the state of Oklahoma; that the plaintiff should not be allowed to recover in this action for the reason that she is guilty of laches, etc.

By reason of disclaimers by other defendants, admissions of the parties, etc., the only instruments involved in the action at this time are the deed to Arthur Armstrong, which the plaintiff prays shall be decreed to be a mortgage, the deed from Arthur Armstrong to Frank Phillips, which she prays shall be canceled, and an oil and gas lease from Phillips to the Lewcinda Oil Company.

The only assignment of error relied upon for reversal by counsel for plaintiff is stated in their brief as follows:

"The court erred in sustaining the demurrer of defendants in error to the evidence of plaintiff in error herein, and in dismissing her petition and rendering judgment in favor of said defendant in error."

[1] As there can be no question that the evidence introduced by the plaintiff clearly tends to establish her contention that the deed made by her to her grandfather was intended as security for the payment of a loan of money, this instrument, although an absolute conveyance in form, must be deemed to be a mortgage by virtue of section 1156, R. L. 1910, which provides:

"Every instrument purporting to be an absolute or qualified conveyance of real estate or any interest therein, but intended to be defeasible or as security for the payment of money, shall be deemed a mortgage and must be recorded and foreclosed as such."

[2] Now we may assume that the defendant Frank Phillips had no notice of the true nature of this instrument at the time he took his conveyance, and concede that, although it was voidable at the time of its execution on account of the infancy of the grantor, it subsequently became a valid instrument because it was not disaffirmed by the minor within one year's time after her majority (section 885, R. L. 1910), and still it was error for the trial court to sustain the demurrer to the evidence and dismiss the plaintiff's cause of action. Section 1158, R. L. 1910, provides:

"Any person purchasing or taking any security against real estate in good faith and without record notice from one holding under an instrument purporting to be a conveyance but intended as security for the payment of money, and which instrument has been duly recorded without any other instrument explanatory thereof, shall be protected to the extent of the purchase price paid or actual outlay occasioned, with lawful interest, against all persons except those in actual possession at the time of such purchase or outlay."

When this statute is considered it becomes quite apparent that the very most the defendant Frank Phillips and those claiming under him are entitled to is protection to the extent of the purchase price paid, etc., as stated in the statute.

In a supplemental brief counsel for defendants contend that section 1158, supra, applies only where an explanatory instrument is taken pursuant to section 1157, R. L. 1910; that in such cases section 1158, supra, protects the innocent purchaser to the extent of his investment, etc., where the explanatory instrument has not been recorded and he has no notice thereof. In our opinion the plain language of the statute itself refutes this contention.

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[3] As the action of the court below in sustaining the demurrer to the evidence must be set aside for the reasons stated we do not deem it necessary to notice any of the other grounds for reversal urged against it by counsel in their briefs and oral arguments.

The judgment of the court below is reversed and the cause remanded, with directions to grant a new trial.

All the Justices concur.

(75 Okl. 97)

FIRST NAT. BANK OF WELLSTON v. KREUZBERG. (No. 9376.)

(Supreme Court of Oklahoma. April 8, 1919. Rehearing Denied June 24, 1919.)

(Syllabus by the Court.)

1. REPLEVIN ⟸8(4)—GIST OF ACTION—POSSESSION.

The gist of the action of replevin is plaintiff's right to the immediate possession of the personal property in controversy at the commencement of the action, by reason of his being the owner or having a special interest therein.

2. CHATTEL MORTGAGES ⟸172(1)—REPLEVIN—SALE OF MORTGAGED PROPERTY—ISSUE.

In a replevin action between the mortgagee and the mortgagor, when the mortgagee has obtained possession of the mortgaged property under the writ of replevin, the question of whether the mortgagee had sold the mortgaged property prior to the determination of the replevin action cannot be made an issue in the replevin action.

3. CHATTEL MORTGAGES ⟸136 — LOSS OF MORTGAGE LIEN.

It is reversible error, in a replevin action brought by the mortgagee against the mortgagor for the possession of mortgaged property, for the court to instruct the jury that, by reason of the mortgagee having received possession of the property under and by virtue of the writ of replevin in the above action and having disposed of the property prior to the termination of the suit, mortgagee thereby destroyed his lien on said property, and defeated his right to prosecute his replevin action to final determination.

Appeal from District Court, Lincoln County; Chas. B. Wilson, Jr., Judge.

Replevin by the First National Bank of Wellston, Okl., against Frank Kreuzberg. Judgment for defendant on a directed verdict, and plaintiff appeals. Reversed and remanded, with instructions to grant a new trial.

Jarrett & Speakman, of Chandler, for plaintiff in error.

Erwin & Erwin, of Wellston, for defendant in error.

McNEILL, J. The First National Bank of Wellston commenced this action against the defendant, Frank Kreuzberg, to replevy two mules, claiming a special ownership in the property by reason of a chattel mortgage. The mules were taken by a writ of replevin, and the defendant failed to give a redelivery bond, and the mules were delivered to the plaintiff. The defendant filed his answer, which was a general denial, and claiming that the note upon which the mortgage was given to secure was usurious, and there was nothing due thereon, and further alleging that the plaintiff had sold the mules and thereby lost his lien, and was entitled to damages for the unlawful detention of the same, and for the value of the mules. The plaintiff replied by general denial and pleading that the question of usury as set forth in the answer had been once adjudicated in a former case.

At the close of the evidence, upon motion of the defendant, the court peremptorily instructed the jury to return a verdict for the defendant for the value of the property and the wrongful detention thereof, stating as follows:

"It is the judgment of the court from the evidence in the case the defendant is entitled to recover on the theory that the mules taken under the mortgage were sold without the determination of this replevin action, and, these mules being exempt property, the defendant is entitled to recover from the plaintiff as damages for the wrongful taking and selling the mules. * * *"

[1-3] To the giving of this instruction the plaintiff excepted. The jury returned a verdict according to the instruction of the court in favor of the defendant and against the plaintiff for the value of the mules and the wrongful detention thereof. From this judgment the plaintiff has appealed. The question presented is:

"Whether the disposing of the property by the plaintiff prior to the determination of the replevin action affected the issues in the case"?

This question has been before this court in identically the same kind of an action, and has been settled by this court in the case of Fidelity Trust Co. v. Pumroy, 45 Okl. 66, 144 Pac. 1052, wherein the court held in effect that the sale of the property by plaintiff pending the determination of the case in no way affected the issues in the replevin case.

The gist of replevin is plaintiff's right to the immediate possession of the personal property in controversy at the commencement of the action by reason of his being the owner or having a special interest therein. Tulsa Rig Reel & Mfg. Co. v. Arnold, 166 Pac. 135. This is the issue to be determined in the case

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at bar, and this issue should have been submitted to the jury.

The question as to whether the mortgaged property had been disposed of by the mortgagee pending the determination of the suit was not an issue in the case, and had no place either in the pleadings or the evidence unless incidentally to ascertain the value of the property. The questions to be determined were:

First. Was the plaintiff entitled to the possession, at the time of the commencement of the suit?

Second. If the defendant recover, then section 4807, Revised Laws of 1910, provides that, if the defendant recover in a replevin action, the judgment shall be for the return of the property or the value thereof in case the return cannot be had, and damages for the unlawful taking and withholding the same.

These are the issues that should have governed in the case at bar. The court evidently went upon the theory that the case of Haltom v. Nichols & Shepard Co., 166 Pac. 745, overruled the case of Fidelity Trust Co. v. Pumroy, supra, but in this we cannot agree. In the case of Haltom v. Nichols & Shepard Company, supra, Justice Hardy stated, in effect, that the mortgagee replevied the property and did not foreclose the mortgage, but obtained possession thereof and removed the same from the state and beyond the reach of any process of the court in which it was held subject to the attachment, and redelivered the property to the mortgagor, which fact, in view of the proceedings in that case, prevented the defendant from obtaining any relief in the case. The court did not hold as between the mortgagor and mortgagee the lien was destroyed, but as between the attaching creditor and the mortgagee, where the mortgagee had obtained possession of the property, not for the purpose of foreclosing its mortgage, but for the purpose of delivering the property to the mortgagor, thereby using its mortgage to obtain possession of the property for the mortgagor, and doing indirectly what the mortgagor could not himself do, and thereby using the process of the court for the purpose of defeating any judgment that might be rendered in favor of attaching creditor. The court held in that case as between the mortgagee and the attaching creditor the mortgagee's lien was destroyed. There was no similarity between the two cases, and they are easily distinguishable.

There are other assignments of error complained of, but it would be impossible to pass upon the same in this proceeding, as this error had the effect of eliminating the other questions.

The court committed error in instructing the jury to return a verdict for the defendant.

The case is therefore reversed and remanded, with instructions to grant plaintiff in error a new trial.

All the Justices concur.

(75 Okl. 49)

PHELAN v. BARNHART BROS. & SPINDLER. (No. 9067.)

(Supreme Court of Oklahoma. June 3, 1919.)

(Syllabus by the Court.)

1. CHATTEL MORTGAGES ⟸136, 157(2)—SALE BY MORTGAGOR AS AGENT FOR MORTGAGEE—ORAL CONSENT—EVIDENCE.

A chattel mortgage which provides that the property cannot be sold without the written consent of the mortgagee does not prevent the mortgagee from orally constituting the mortgagor his agent to sell the property, and where oral consent is relied upon as a defense in an action for the conversion of the mortgaged property, the evidence as to such consent must be clear, positive, and unequivocal.

2. APPEAL AND ERROR ⟸1066 — HARMLESS ERROR—INSTRUCTIONS—ISSUE NOT MADE BY PLEADINGS AND EVIDENCE.

It is prejudicial error for the trial court to give an instruction covering an issue not made by the pleadings and the evidence in the cause, where such instruction tends to confuse the issues and is calculated to mislead the jury.

3. APPEAL AND ERROR ⟸1066 — HARMLESS ERROR — INSTRUCTIONS — ISSUES OUTSIDE EVIDENCE.

Where there is no evidence reasonably tending to establish a material issue submitted to the jury under the instructions of the court, which the jury must have found in favor of the prevailing party, in order to have returned the verdict, the verdict will be set aside.

Error from District Court, Oklahoma County; John W. Hayson, Judge.

Action by J. R. Phelan against Barnhart Bros. & Spindler. Verdict and judgment for defendant, motion for new trial overruled, and plaintiff brings error. Reversed and remanded.

Rollin E. Gish, of Tulsa, for plaintiff in error.

Fulton, Shirk & Danner, of Oklahoma City, for defendant in error.

PITCHFORD, J. The plaintiff in error J. R. Phelan, was the plaintiff in the trial court, and the defendant in error, Barnhart Bros. & Spindler, was the defendant below. The parties will be referred to hereafter as plaintiff and defendant. The plaintiff sued for the conversion of type and printing equipment upon which he held a chattel mortgage, which was duly filed for record. The mortgage had the usual written provi-

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sions against the mortgagor selling or disposing of the property without the written consent of the mortgagee. The plaintiff sought to recover from the defendant the sum of $200 on account of the alleged conversion of the mortgaged property by the defendant. Issue was joined, and trial was had before a jury. The jury returned a verdict in favor of the defendant. Plaintiff filed his motion for a new trial in due time, and from the overruling of said motion an appeal was taken. The plaintiff has assigned as grounds for reversal error in giving instructions Nos. 8 and 9, which are as follows:

"No. 8. You are instructed that, after a fair and impartial consideration of all the testimony in this case, if you find that the plaintiff, J. R. Phelan, either before or after the sale of these goods to the defendant, consented to such sale, that he cannot recover in this case, regardless of whether or not the defendant had notice of the mortgage covering such goods. In other words, if the plaintiff, J. R. Phelan, either before or after the sale of said goods to Halbert R. Stephens, consented to the sale of said goods, by so doing he would waive the provisions of the mortgage covering the said goods.

"No. 9. You are instructed that, while the mortgage provides that the property shall not be sold or disposed of in any way by the mortgagor without written consent of the mortgagee, yet if you find that the plaintiff actually consented to the sale of said property, it would be immaterial so far as the defendant is concerned whether such consent would be verbal or in writing."

The above assignments of error will be considered as one, as the argument and authorities cited by the parties respectively cover both. It appears that no demurrer to the evidence was filed in the lower court, nor did the plaintiff move to have a verdict directed in his favor; therefore the only question for this court to consider is: Was there any evidence justifying submitting to the jury the instructions complained of? The defendant had sold to the mortgagor new type amounting to a large sum, and had received as part payment thereon the old type covered by plaintiff's mortgage, and had taken a mortgage on the new type to secure the balance of the purchase money therefor.

[1] We have gone carefully over the briefs filed by counsel, and also the record in the case, and the only evidence we have been able to find which in any manner tends to show that the plaintiff authorized the mortgagor to dispose of the mortgaged property is found on page 70 of the case-made in the evidence of Halbert R. Stephens, the mortgagee, which is as follows:

"Q. Did you talk to Dr. Phelan about getting this new type? A. Yes, sir.

"Q. What did he say? A. Said that would be all right.

"Q. Did you tell him that you had got the new type? A. Yes, sir.

"Q. Did he say anything about it? A. Yes, sir.

"Q. Was that all right with him? A. Yes, sir."

The above, so far as we have been able to gather, is the entire evidence on that point. Nothing additional is pointed out by either the plaintiff or the defendant. In the answer filed by the defendant there is no allegation that the plaintiff had at any time authorized or consented to the sale of any of the mortgaged property by the mortgagor, and in the evidence above quoted there is nothing showing that the plaintiff consented that any of the mortgaged property be sold. As far as is disclosed, the mortgagor only informed the mortgagee that he was going to buy some new type, and that he had bought new type, not that he was going to sell the type mortgaged, or that he had sold the same. Where there is an entire lack of evidence to sustain the verdict, the same should be set aside. Howard v. Farrar, 28 Okl. 490, 114 Pac. 695; Gaar, Scott & Co. v. Rogers, 46 Okl. 67, 148 Pac. 161; Terry v. Creed, 28 Okl. 857, 115 Pac. 1022.

We should not lose sight of the fact that the purpose of a mortgage is to furnish security. Section 2755, R. L. 1910, provides:

"Any mortgagor of personal property, or his legal representative, who, while such mortgage remains in force and unsatisfied, conceals, sells, or in any manner disposes of such property, or any part thereof, or removes such property, or any part thereof, beyond the limits of the county, or materially injures or willfully destroys such property, or any part thereof, without the written consent of the holder of such mortgage, shall be deemed guilty of a felony, and shall, upon conviction, be punished by imprisonment in the penitentiary for a period not exceeding three years or in the county jail not exceeding one year, or by a fine of not to exceed five hundred dollars: Provided, that the writing containing the consent of the holder of the mortgage, as before specified, shall be the only competent evidence of such consent, unless it appear that such writing has been lost or destroyed."

From the foregoing statute it will be observed that the property mortgaged cannot be disposed of without the written consent of the mortgagee. Notwithstanding the positive terms of this statute, they are not intended to, nor do they, prevent the mortgagee from constituting the mortgagor as his agent to dispose of the mortgaged property. The cases cited by both the plaintiff and the defendant in their respective briefs have been examined, and, as we understand, the rule therein announced goes to this extent, and this only. See Carr v. Brawley, 34 Okl. 500, 125 Pac. 1131, 43 L. R. A. (N. S.) 302; New England Mort. Sec. Co. v. Great Western Elevator Co., 6 N. D. 407, 71 N. W. 130; Drexel v. Murphy, 59 Neb. 210, 80 N. W. 813;

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Frick Co. v. Western Star Mill Co., 51 Kan. 370, 32 Pac. 1103.

[2, 3] We have been unable to find any authority, nor has counsel cited any, sustaining instruction No. 8, in which the jury were told that, if the plaintiff either before or after the sale consented to the same, he thereby waived the provisions of the mortgage covering the said goods. We understand that there might be instances where the mortgagee would be estopped; that is, the consent of the mortgagee might be implied from the circumstances of the particular transaction. Consent is not to be implied merely from equivocal conduct, or from the fact that the mortgagee remained silent when told of an intended sale; however, if the mortgagee remains silent in the presence of an actual sale, or, not being actually present, allows the mortgagor to appear as the owner and has knowledge of the mortgagor's intention to sell, and the purchaser relies thereon in ignorance of the truth, under these circumstances the law of estoppel would apply. Livingston v. Stevens, 122 Iowa, 62, 94 N. W. 925; Etheridge v. Hilliard, 100 N. C. 250, 6 S. E. 571; Livingston v. Heck, 122 Iowa, 74, 94 N. W. 1098; Barnesville First National Bank v. St. Anthony, etc., El. Co., 103 Minn. 82, 114 N. W. 265. But it has been held that, where an approval or confirmation of a previous sale is treated on the theory of a release, rather than estoppel, it is not binding on the mortgagor if made without consideration. Riner Lbr. Co. v. O'Dwyer, etc., Co., 96 Ark. 20, 130 S. W. 529. If, however, the mortgagee consents to the sale of the property, subject to the mortgage, it is no waiver of his mortgage lien, even as against a purchaser from such vendee who buys without actual notice of the mortgage, or with the mortgagee's assent to the first sale. The lien, never having been waived, is good against the last purchaser. Cobbey's Chattel Mortgages, § 637.

Should we hold that the evidence in the case at bar was sufficient to take the case to the jury, we would, in effect, destroy the object and purpose of all law upon the subject of chattel mortgages and render the same meaningless. In all of the cases we have examined we find standing out in bold relief the material fact of the consent for the sale on the part of the mortgagor, and that the proceeds were to be applied upon the indebtedness secured by the mortgage. In none of the cases was there any question or doubt upon this point. In the instant case the mortgagee positively denied giving his consent.

Judgment of the trial court is therefore reversed and remanded.

All the Justices concur, except SHARP, J., not participating.

(75 Okl. 51)

GIBSON v. ROGERS COUNTY ex rel. HALL, Co. Atty., et al.

(Nos. 9442, 9443.)

(Supreme Court of Oklahoma. June 3, 1919.)

(Syllabus by the Court.)

1. TURNPIKES AND TOLL ROADS ⟸9—APPROVAL OF REPORT AND SURVEY—ORDER OF NEW SURVEY.

Where the county commissioners have approved the report and survey of the road commissioners appointed by them, and granted a franchise for a toll road, and certain taxpayers appeal therefrom, and the case is tried de novo in the district court, and the taxpayers raise only jurisdictional questions, but do not object to the route of said road, and it appears that the road commissioners have complied with the law in filing their survey and report with the county commissioners, it is error for the trial court to refuse to accept said report, and to order a new survey, unless it appears from the evidence that there is a more feasible route, or unless it appears that the route is not sufficiently defined, or the survey not complete in some particular.

2. TURNPIKES AND TOLL ROADS ⟸9 — PLEADINGS—EVIDENCE.

The judgment of the trial court was not in accord with the pleadings and was against the clear weight of the evidence.

Appeal from District Court, Rogers County; W. J. Campbell, Judge.

Proceedings by Rogers County, Okl., on relation of William M. Hall, County Attorney, and the Board of County Commissioners of Rogers County, to vacate orders and agreements made and entered into by and between the Board of County Commissioners granting to Kelly F. Gibson a franchise to operate and maintain a toll road. Report of road commissioners selected to lay out the toll road rejected, and cause remanded to Board of County Commissioners, with directions, and Gibson brings error. Reversed and remanded, with instructions to dismiss the appeal.

Carroll & Mason, C. H. Rosenstein, and A. B. Honnold, all of Tulsa, for plaintiff in error.

W. H. Lucas, Mack R. Shanks, Co. Atty., and D. M. Battenfield, Asst. Co. Atty., all of Claremore, for defendants in error.

McNEILL, J. On November 9, 1916, Kelly F. Gibson submitted to the board of county commissioners of Rogers county a proposition for the construction and maintenance of a toll road from Chelsea to Claremore. The board of county commissioners appointed two road commissioners to act with another to be appointed by Gibson, and these three commissioners were instructed to lay out the

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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proposed toll road and report their findings to the county commissioners and file a map giving the general course and width of the road. On the 11th day of November, 1916, these commissioners made their report, filed a map showing the course and location of the proposed road, and made their recommendations thereto. This report was approved by the board of county commissioners, and a resolution was adopted granting to Kelly F. Gibson and his heirs the right of franchise to purchase, construct, operate, and maintain a toll over the land and route described in the survey and map filed with the county commissioners and giving him the right to charge toll in the operation of said road.

Thereafter an appeal was taken by the county attorney upon a petition of about 70 taxpayers to the district court. In the district court the county attorney, being the appellant, filed his motion to set aside and hold for naught the resolutions, orders, and agreements made and entered into by and between the board of county commissioners granting to Kelly F. Gibson the franchise to operate and maintain the above toll road, and for reasons therefor set forth:

First. The county commissioners did not have jurisdiction to allow and grant a franchise for a toll road.

Second. The board of county commissioners did not have jurisdiction to appoint the commissioners to act with the commissioner appointed by Kelly F. Gibson in laying out and surveying and making maps and profiles of the proposed toll road; that all the acts, maps, and profiles done, drawn, and filed by the commissioners were done without authority of law, and were illegal and void.

Third. That each and every act done, and each and every resolution, order, and agreement made and entered into by and between the county commissioners and Kelly F. Gibson, was without right and authority, illegal, and void. The board of county commissioners did not have jurisdiction of the above numbered and styled cause of action.

Upon the trial of the case in the district court the defendant Gibson moved to dismiss the appeal for the reason the order of the county commissioners granting said franchise was not appealable, and that the statute which permitted the appeal without notice was unconstitutional and void. On the trial of the case the court rendered judgment. The material parts of the same are as follows:

"It is therefore ordered, adjudged, and decreed by the court that the report of the road commissioners selected to lay out the toll road and highway between the town of Chelsea, Rogers county, Okl., and the city of Claremore, Rogers county, Okl., the same having been filed in the office of the county clerk of said county on the 11th day of November, 1916, be, and the same is hereby, disapproved and rejected, and the cause remanded to the board of county commissioners of Rogers county, with directions to proceed further by having a new survey made if in their judgment they see fit to do so."

From said judgment Kelly F. Gibson has appealed, and the case is now before this court.

[1, 2] The plaintiff in error alleges 12 separate and distinct assignments of error; the third assignment being that the order, decree, and judgment of the court is contrary to the law, and not sustained by sufficient evidence.

It is agreed that the law applicable to establishing a toll road is found in article 16, chapter 15, Revised Laws of 1910, being sections 1485 to 1496, inclusive. The law permitting the establishment of toll roads provides that, after the commissioners have been appointed, they must view the road and route, and the same must be surveyed and a map filed with the board of county commissioners giving the general course of the road, the principal points by which it runs, its width, which must in no case exceed 100 feet. The board of county commissioners must then either approve or reject the survey.

The history of this road appears to be that prior to November, 1916, the general public was using a road from Claremore to Chelsea on the right of way of the St. Louis & San Francisco Railroad. The witnesses all described this as the old trail. Several places along the railroad this trail extended away from the right of way of the Frisco Railroad out on private property. There is no contention, as we gather from the evidence, that this was a public highway, but was a road or trail that was used by the public on the right of way of the Frisco Railway Company, and certain places the trail extended off of the railway right of way on private land for the purpose of preventing the crossing of some obstruction on the right of way.

The record further disclosed that the county commissioners in Rogers county act as township officers of each township. It further disclosed that the townships through which this road extended voted certain bonds for building roads, and the inference would be the building of this particular road. The county commissioners entered into a contract with Kelly F. Gibson to build and construct this particular road running alongside of the right of way of the Frisco Railroad. The evidence disclosed that no right of way was obtained for this road, but the road was actually constructed for about 14 miles. It appears that they signed the contract as the board of county commissioners, when in fact the contract for the road should have been signed by them.

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as trustees for the several townships. It appears that the district court of Rogers county enjoined the county commissioners from paying for this road; that at the trial of the injunction suit Gibson asked to intervene, and to be made a party, but the court refused to permit him to be made a party thereto, and denied him the right to intervene.

There was evidently some feeling over the outcome of this case. The record discloses upon several occasions the court voluntarily stated that he had not enjoined Gibson from proceeding individually against the commissioners for his pay for building this road. It appears that after the injunction suit enjoining the county commissioners from paying for the road, a great portion of which had been built and constructed, Kelly F. Gibson filed his application for making this a toll road. The evidence disclosed that the county had no right to the road; it was not even designated as a public highway; that Gibson purchased a great portion of the right of way for this toll road. The county commissioners appointed two road commissioners according to law to view the road, and the commissioner appointed by Gibson viewed the road, and filed their survey, report, and map of the road with the county commissioners. The board of county commissioners approved the same, and from this order approving the report of the road commissioners certain taxpayers appeal.

The record disclosed that no objection was made to the county commissioners granting this franchise, but, after the same had been granted, a number of persons filed a petition requesting the county attorney to appeal, claiming that they were taxpayers and freeholders of Rogers county. After the appeal the assistant county attorney representing the taxpayers filed in the form of a motion their objection to the order of the county commissioners granting the toll road. This was evidently treated as an answer, and raised only jurisdictional grounds. The trial court evidently found the county commissioners had jurisdiction. There is nothing in the record to disclose why the county commissioners did not have jurisdiction. The trial court does not disclose why it refused to approve the survey and map filed with the county commissioners by the road commissioners. There is no evidence in the record, nor is there an intimation in the record, that the route of the road was not fully described, nor is there any intimation by any one why the same should not be accepted. We have examined the record, and, peculiar as it may seem, over 70 people signed the petition requesting the county attorney to appeal from the order of the county commissioners granting the franchise for this toll road. Ordinarily one would expect that they had some interest in the case, and would be called as witnesses to testify why the order of the county commissioners appealed from was wrong.

This record disclosed that of these 70 persons who signed the petition not one was used as a witness in the trial of the case. The only witnesses examined in the trial of the case were the county officials and ex county officials, being the three members of the county commissioners who approved the order. The ex county surveyor who had made the survey, and had drawn the maps, and an attorney by the name of C. B. Holtzendorff. We have examined his evidence, and the testimony offered by him upon direct examination was about a bridge being removed from the old trail to a place where the toll road was constructed, and then further testified that he felt that a toll road injured the county. If there was any reason or any evidence to show wherein this survey or this road should be changed, it is not in the evidence.

The evidence of Mr. Holtzendorff states there were places along the old trail where the old trail left the right of way of the Frisco Railroad and extended out on private ground, and where this occurred the building of this toll road to a certain extent interfered with the traveling of the old trail on private ground, or, in other words, it prevented the general public from trespassing upon private ground.

The appellants below also introduced the evidence of Mr. McClellan, but he testified that the old trail could be traveled, and was not interfered with by the construction of the toll road. This was the only evidence against the granting of this franchise, or objection that we can find in the record. Why the taxpayers objected to this toll road does not appear. The county commissioners were familiar with the road. The county surveyor stated all the parties were familiar with the road, and the road had been practically graded. Every one was familiar with the route, and the county commissioners approved it. The county did not own the right of way; did not pay for the grading. It was agreed that Mr. Gibson had done the grading, and that the public in general was not entitled to use the road until paid for.

The trial judge made a very extensive cross-examination of several of the witnesses. The examination was technical in its nature, and was directed to a portion of the report of the road commissioners wherein the report stated as follows:

"We have duly examined the feasibility of the construction of said road, and the necessity for the construction of the same."

The judge in this examination attempted to show that the report of the commissioners was incorrect, as the commissioners did not examine the feasibility of the construction of

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the road, because the construction had already been completed, and that the report in referring to the necessity for the construction of the road was also incorrect, in that the road had already been constructed, or at least a great portion of the same. While this may be technically correct, and while it is the privilege of the trial judge to examine witnesses, and especially in equity cases, in order that the judge may be fully advised as to the facts in the case, and to render a proper judgment thereon, we doubt the wisdom or practice of the trial judge engaging in an extensive and technical examination of the witnesses such as might be expected of opposing counsel, and when said examination extends over six or seven typewritten pages of testimony as to each witness, it seems somewhat lengthy, especially when the examination is technical in its nature and not attempting to elicit new information. This practice would, no doubt, influence the judge, or bias him in deciding questions that must be decided by him impartially. So far as this record is concerned, there does not appear to be any contradictory evidence of any kind or character unless it is the fact that two of the witnesses for the appellants below contradicted themselves, but only in minor details. One said that the toll road interfered in some places with traveling the old trail. The other one stated that it did not.

It is true that the road commissioners appointed to view this road did not view it with the same careful attention that might be given a road where the boundaries and lines were not easily ascertained. In viewing a route for establishing a toll road, one would naturally expect, if the party had already constructed his road and graded the same, that it would not require the same careful attention to determine the most feasible route the road should take as it would require if the boundaries of the road were not distinctly defined. The boundary lines to the route of this road were in plain view. There is no one asking to have the route of this road changed, and no one even suggested that another route would be more beneficial or feasible, and the only objection to the granting of the franchise that we can gain from reading the testimony was that the attorney stated that he did not believe the toll road was beneficial to the county. This we do not think sufficient to overcome the opinion of the board of county commissioners.

From an examination of the evidence it appears that the appeal from the order of the board of county commissioners was without merit. The persons desiring the appeal did not appear to have sufficient interest in the case to testify. Upon what grounds the appeal was taken does not appear in the evidence, unless it was based upon the idea that the general public might obtain a road for the use and benefit of the county for nothing, to wit, a road which had cost about $27,000, which was built by a private individual, and which certain taxpayers enjoined the county from paying for. This road was built upon private ground. The county is not entitled nor the general public entitled to receive something for nothing. If they do not desire to pay for this road built upon private ground, they have no right to the use of the same.

The question of the county commissioners being enjoined in another action occupies considerable space in the evidence in this case, and while the merits or demerits of that case is not before us, still this court has held that municipal corporations cannot receive benefits and use the same, and then claim the contract was void and defeat paying for them. This has been decided in the case of D'Yarmett v. School District No. 27, 179 Pac. 20. The appeal from the order of the county commissioners was based upon jurisdictional grounds. The trial court evidently found the commissioners had jurisdiction, and there is nothing in the case to show want of jurisdiction.

There is no evidence to show in what way the taxpayers or any one would be affected by the granting of this franchise or accepting this survey, unless it would do to say that, where a party has constructed about 14 miles of road on private ground, the general public would be entitled to travel the same without any expense to them. This does not appear to be right nor just. If the public did not desire to pay for the building of this road, they have no right to use the same. The order of the trial court in disapproving the survey and the report of the road commissioners and in ordering a new survey does not appear to be supported by any issue in the case, nor supported by the evidence in the case, but is contrary to the evidence.

There are other assignments of error, but it will be unnecessary to pass upon any of the same as this one question disposes of the case.

It therefore follows that the judgment of the trial court is reversed, and the case is remanded, with instructions to the court to dismiss the appeal of the taxpayers from the order granting the franchise by the county commissioners.

OWEN, C. J., and SHARP, PITCHFORD, and HIGGINS, JJ., concur.

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BILBY v. OWEN. (No. 7897.)

(Supreme Court of Oklahoma. Jan. 13, 1919.)

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(Syllabus by the Court.)

1. APPEAL AND ERROR ⟸117—APPEALABLE ORDERS—SETTLEMENT OF CASE-MADE.

The order of the trial court settling a case-made is not appealable, and objections thereto present nothing for this court to consider.

2. PLEADING ⟸93(1) — TRIAL ⟸252(1) — ANSWER — INCONSISTENT DEFENSES — SUBMISSION OF ISSUES.

While the defendant may set out in his answer inconsistent defenses, yet the trial court is not warranted in submitting any issue to the jury which there is no evidence to support.

3. TRIAL ⟸252(12) — INSTRUCTION — STATUTE OF FRAUDS—EVIDENCE.

Where the defendant is sued on an alleged original oral promise to repay money furnished to another at the instance and request of the defendant, and the only issue presented by the evidence is as to whether or not any promise at all was made, there being no evidence that such promise, if made, was to answer for the debt, default, or miscarriage of another, the statute of frauds is not involved, and the court should not instruct the jury as to such statute.

4. TRIAL ⟸193(1) — INSTRUCTIONS — OPINION ON WEIGHT OF EVIDENCE.

The court, in its instructions to the jury, should not call attention to particular facts in evidence in such a manner as to amount to an intimation of the court's opinion as to the weight of the evidence.

5. EVIDENCE ⟸470 — WITNESSES ⟸249 —OPINION AND CONCLUSION—ARGUMENT.

Where one of the parties to a cause is an attorney at law and takes the stand as a witness in his own behalf, he is governed by the same rules as any other witness, and should not be allowed by the court to give opinions and conclusions or make argument while testifying, on the theory that he is an attorney and appearing for himself as such.

Commissioners' Opinion, Division No. 1. Error from District Court, Muskogee County; R. P. De Graffenried, Judge.

Action by John S. Bilby against Robert L. Owen. Judgment for defendant, and plaintiff brings error. Reversed and remanded, with instructions to set aside the judgment rendered, and to grant a new trial.

J. C. Stone, Charles A. Moon, and Francis Stewart, all of Muskogee, for plaintiff in error.

W. W. Noffsinger, of Muskogee, and Y. P. Broome, of Tulsa, for defendant in error.

STEWART, C. Action was brought by John S. Bilby against the defendant, Robert L. Owen, for the sum of $11,599.29, alleged balance due by defendant to plaintiff for money furnished by plaintiff for the use and benefit of the Indian Land & Trust Company at the special instance and request of the defendant, and which is alleged to have been furnished by the plaintiff on the original oral promise of the defendant to repay the same. The defendant answered by general denial and by pleading the statute of limitation and the statute of frauds. Trial being had before a jury, verdict was returned for defendant, after which the court rendered judgment in accordance with such verdict. The plaintiff duly appealed to this court.

[1] We are met at the threshold by a motion of defendant in error to dismiss the appeal for the alleged reason that the case-made does not contain all the evidence necessary for a full and complete consideration of the case. The motion to dismiss sets up the objections to the case-made and suggestions of amendment filed with the trial court, together with the finding of the trial judge. The objections and suggestions each were overruled, except suggestion No. 6, relating to exhibit No. 9, claimed by defendant to have been offered in evidence, which exhibit the judge found to be lost and not capable of being produced. The case-made was thereupon settled. We do not understand how any error of the trial court may be considered by this court in the absence of a petition or cross-petition in error. Nor can the action of the trial court or judge in settling a case-made be reviewed by this court. When a party deems himself aggrieved by the action of the trial judge in refusing to include in a case-made suggestions offered, such party, under authority of section 5249, R. L. 1910, may make proper affidavit and have a special judge hear the evidence and make order with reference to the facts. The defendant has not availed himself of the remedy afforded by statute. The trial court, in settling the case-made, determined what were the facts and the matters necessary to be incorporated. The order of settlement necessarily included a finding against the suggestions made or that they were not material, and the law does not authorize a review of such action by this court. The fact that one of the exhibits was lost and could not be supplied would not avail the defendant, but such fact, if the lost exhibit were necessary to a proper consideration of the error urged, would entitle the plaintiff to a new trial on account of impossibility to make a case-made; he being without fault. We may further add that an examination of the record before us discloses that the case-made contains all the evidence necessary to determine the decisive questions raised in the appeal. The motion to dismiss is denied.

[2] The court gave voluminous instructions

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to the jury concerning the statute of frauds. The defendant in his answer denied that he made any contract at all to repay the money furnished by the plaintiff to the corporation. He also invoked the statute of frauds. The pleas are inconsistent. The plea of the statute of frauds involves an admission that defendant agreed to repay the money, being merely an effort to escape liability on the ground that the promise was to answer for the debt, default, or miscarriage of another, not being in writing, and not to be performed within one year. While it is true that, under the rule prevailing in this jurisdiction, inconsistent defenses may be offered, and the defendant was within his legal rights in pleading the same, however inconsistent, yet the trial court was not warranted in submitting to the jury any defense pleaded unless there was evidence raising an issue as to such defense. In order to determine whether or not the defendant was entitled to instructions on the statute of frauds, a brief résumé of the evidence is necessary.

[3] The corporation was organized by the defendant, and afterwards a two-thirds interest in the capital stock originally issued was sold to John S. Bilby, the plaintiff, and his son, N. V. Bilby; the defendant retaining a one-third interest in such issue of capital stock. The defendant was made president, the plaintiff vice president, and N. V. Bilby secretary-treasurer. It appears that the plaintiff was a man who controlled considerable money, and by agreement of all concerned he furnished at divers time various sums of money for the use of the corporation in purchasing and improving Indian land and leases, in which business the corporation was engaged, under agreement for each stockholder to become liable for one-third of the total sums so furnished; the defendant agreeing to repay the plaintiff one-third of such sums. A settlement was had when the amounts furnished had reached $20,000, the defendant executing his note to the plaintiff for one-third of such sum, which was afterwards paid, the issue of capital stock of the corporation being increased by $20,000, the defendant and the Bilbys each receiving one-third of such additional issue. The corporation seemed to be thriving, but had most of its funds invested, and the opportunities for increased profitable purchases were in sight. More money was needed. The plaintiff had the money, and from time to time furnished it to promote the business of the corporation. He claims to have furnished the additional moneys because of the original agreement, still in force, between the stockholders, including the defendant, that each was to furnish and become liable for one-third of the money used, the plaintiff to advance all of the money, and the defendant to repay him one-third of such sums furnished. He also claims that the defendant made additional specific agreement to become liable and to repay his part of such money according to the capital stock owned by him, that is to say, one-third of the sums furnished; that such one-third was furnished by agreement with the defendant solely on the credit of the defendant, and not on the credit of the corporation. He asserts that afterwards the defendant refused to comply with the agreement to pay, and on such account is indebted to the plaintiff in the sum of $11,599.77. Aside from such construction as may be placed on the answer filed, the defendant does not claim that he agreed to answer for the debt, default, or miscarriage of the corporation, and there is no evidence whatever to such effect. The testimony of the plaintiff and his son was that one-third of the money was furnished, by agreement with the defendant, on the credit of the defendant alone, and not on the credit of the corporation. The testimony of the defendant was adverse to his plea of the statute of frauds. He was emphatic in denying that any contract was made by which he agreed, orally or otherwise, to become liable for any sum of money furnished to the corporation, whether on the credit of the corporation, or on his own credit. Neither the testimony offered by the plaintiff nor that offered by the defendant tended in any wise to support the plea of the statute of frauds. The issue raised by the evidence is in accord with the issue defined in Waters v. Shafer, 25 Neb. 225, 41 N. W. 181, in which the court says:

"The issue made by the defendant in his answer was that he made no promise either to see the debt paid or to pay it; or, stated differently, the issue presented by him is not as to the kind or character of the promise, but that no promise of any kind was made. If the promise was made, therefore, it was a direct one to pay for the goods."

In the case just cited the court had in mind the issue raised by the answer, but it is not inaccurate to observe that an issue set forth in a pleading, without evidence to support it, has no more force than it would have had, not having been pleaded. From Geary v. O'Neil, 73 Ill. 593, we quote:

"It is also objected that the court erred in refusing to give appellant's sixth instruction. That instruction had no evidence to support it. It proceeded upon the theory that, if a promise was made by appellant, it was to pay a debt of his brother. The defense was that appellant never promised to pay for the goods in any manner, but that they were sold and delivered to James, and that the credit was alone given to him. There was not, so far as we can see, any defense that the promise was collateral, but it denied any promise of any description. Instructions must be based on the evidence, and announce correctly the principles, to entitle them to be given."

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The evidence in the case at bar presents no issue as to the kind and character of promise; the only issue, under the evidence, being whether or not any promise at all was made by the defendant. If it should be found that he made any promise, such finding, of necessity, would have its foundation in the testimony of the plaintiff and his son, which is to the effect that the promise was original, and not collateral, and in such case the defendant would be liable. If the greater weight should be given to the defendant's testimony, the defendant would not be liable, because of the finding that he made no promise at all, not because of evidence showing that there was a collateral promise; for there is no such evidence. The trial court erred in submitting to the jury the question of the statute of frauds.

[4] We will now consider such of the court's charge on the statute of frauds as is necessary in order to ascertain whether the error of the court was prejudicial. Paragraph 8 of the instructions reads:

"You are instructed that, if you find from the evidence in this cause that the plaintiff, John S. Bilby, had the right to elect whether he would hold the defendant, Robert L. Owen, the promisor, in regard to the alleged agreement between the plaintiff and the defendant that defendant would repay plaintiff one-third of all moneys advanced by plaintiff to the Indian Land & Trust Company, or hold the corporation for whose benefit such alleged promise was made, in this case the Indian Land & Trust Company, then and in such event the alleged promise is within the statute of frauds, and cannot be enforced by plaintiff in this action."

Paragraph 9 is in the following words:

"You are instructed that the mere fact that the defendant, Robert L. Owen, was a stockholder in the Indian Land & Trust Company, does not make him personally liable for any of the debts of the said corporation, nor does this fact make him liable for the payment of plaintiff's demand. The Indian Land & Trust Company was a corporation authorized to contract and to be contracted with, and was liable for its debts or obligations, and if it received and used the money which plaintiff is suing for, it is liable to the plaintiff for such sums of money."

The latter part of paragraph 9, in which it is said that, if the corporation "received and used the money which plaintiff is suing for, it is liable to the plaintiff for such sums of money," is clearly prejudicial error. There is no dispute as to the corporation receiving and using the money, and from the instruction the jurors are in effect told that the corporation is liable, leaving them to infer that the defendant is not liable. If the defendant made an original promise, in consideration of the plaintiff furnishing money to the corporation, that he would repay the same, he would be liable to the plaintiff notwithstanding the corporation received and used the money. While there is apparent conflict in the decisions of the courts as to the application in certain instances of that part of the statute of frauds requiring a promise to answer for the debt, default, or miscarriage of another to be in writing, it is a well settled principle of jurisprudence that one may contract orally as an original obligation to become liable for money or other value to be furnished for the use of another, and, if he so contract, he becomes liable to the same extent as if furnished for his individual use. Instructions 8 and 9, considered in connection with each other, practically direct the jury to return a verdict in favor of the defendant. No. 8 tells the jury that, if the plaintiff has the right to elect—that is, if he may sue either the corporation or the defendant—he cannot recover from the defendant. Under No. 9 the jury could draw no other conclusion than that the plaintiff could sue the corporation. If the jury gave full force to each of the two paragraphs, there was no escape from finding for the defendant which was done. The error is prejudicial.

We are also of the opinion that instruction 7 is error, the same reading as follows:

"You are further instructed that, if you believe from the evidence that the plaintiff, Bilby, did in fact furnish sums of money to the Indian Land & Trust Company, and you further believe that at the various times that he did advance money to said corporation he then and there took credit from said corporation on the books of said corporation, intending thereby to advance said sums of money to the corporation on his own responsibility and on the credit of the corporation, then and in that event the plaintiff cannot recover in this action, and your verdict should be for the defendant."

There is evidence that the money furnished by the plaintiff was credited to him on the books of the corporation, but it appears that the plaintiff was not the bookkeeper, did not direct the keeping of the books, and there is no evidence that he requested any credit on the books for money claimed to have been furnished for the defendant. The instruction is also a charge on the weight of the evidence, and the same is particularly objectionable in that it warranted the jurors to assume that the plaintiff intended to advance the money on the corporation's responsibility from the fact of the entries being made. At most, the credit on the books was a mere circumstance which could be reasonably explained as a convenient way of keeping account of the money furnished. Even if directed by the plaintiff, and the evidence does not show that it was, it was not incompatible with the contract which he claims to have had with the defendant. Often jurors, like members of the bar, like to make technical distinctions, and are therefore quick to seize upon apparent intimations by the court. The trouble lies in the fact that usually, through lack of

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legal training, their judgment in such matters is not so accurate as that of members of the legal profession. It is safe, however, to trust them for a correct finding of the facts, and when the issue is not beclouded by instructions, which they scarcely understand, generally they will apply the law correctly.

[5] The only remaining error likely to recur, in case of a new trial, is the action of the trial court in permitting the defendant, when on the stand in his own behalf, to give testimony containing opinions, conclusions, and argument. Without going into detail as to the specific testimony complained of, we will say that witnesses are not permitted to usurp the province of the jury and give testimony in the nature of conclusions, opinions, or argument. The witness must state the facts and leave the jury to draw their conclusion from such facts. This rule applies to a party to an action who takes the stand to the same extent as to any other witness. The defendant in this case was an attorney at law. When the plaintiff objected to such testimony, the court observed that, if the witness was making the statement as attorney, "it was all right," but, if he was making the statement as a witness, "it was all wrong." The witness replied, "I am making the statement as an attorney." To which statement of the witness the plaintiff responded that the defendant was represented by able counsel, the witness replying, "I wish the record to also show that I appear, that I am represented by myself, that I represent myself." The court then overruled the objection, to which exceptions were duly made. An attorney who takes the witness stand, although a party to the cause, has no special license that does not belong to witnesses in other walks of life. The opinion and argumentive testimony should have been excluded by the court.

For the reasons given, the cause is reversed and remanded, with directions to set aside the judgment rendered, grant a new trial, and otherwise proceed in conformity with the views herein expressed.

PER CURIAM. Adopted in whole.

(75 Okl. 206)

LUSK et al. v. HALEY. (No. 9230.)

(Supreme Court of Oklahoma. May 27, 1919.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⟸1170(1)—RAILROADS ⟸400(8), 401(1)—INJURY ON TRACK—QUESTIONS FOR JURY—INSTRUCTIONS—TECHNICAL ERROR.

Record examined, and *held:* (1) That there was sufficient evidence to take the case to the jury on the merits; (2) that the instructions given by the court state the law with substantial accuracy and sufficiently cover the issues joined by the pleadings and proof; (3) that in the opinion of the court it does not appear that any of the errors complained of based upon the ground of misdirection of the jury or the improper admission or rejection of evidence, or of error in any matter of pleading or procedure, have probably resulted in a miscarriage of justice or constitute a substantial violation of any constitutional or statutory right.

(Additional Syllabus by Editorial Staff.)

2. RAILROADS ⟸358(1)—TRESPASSER OR LICENSEE—CARE REQUIRED.

The only duty a railroad owes to a licensee in addition to the duty owed to a mere trespasser is to keep a lookout for his presence.

3. RAILROADS ⟸369(3), 376(2)—PERSONS ON TRACK — CARE REQUIRED — DISCOVERED PERIL.

A railroad does not owe an unauthorized person upon its tracks the duty to use ordinary care to discover him on its tracks or his dangerous position, but, after discovering his peril, must use ordinary care to avoid injury.

4. RAILROADS ⟸377—DISCOVERY OF PERSON ON TRACK — CONTRIBUTORY NEGLIGENCE — PRESUMPTION.

Trainmen are justified in presuming that persons on the track will retire to a place of safety if it appears that they know the train is approaching.

5. RAILROADS ⟸397(4)—INJURY ON TRACK—MATERIALITY OF EVIDENCE.

Evidence as to whether deceased, who was struck by a train, was a licensee or a trespasser, is immaterial, where it is conceded that engineer and fireman were keeping a sharp lookout.

6. RAILROADS ⟸397(9) — INJURIES UPON TRACK—EVIDENCE.

Evidence as to whether there was anything to prevent the engineer from seeing deceased upon the track was admissible to show whether the engineer saw deceased on the track.

7. RAILROADS ⟸397(9)—INJURY ON TRACK—EVIDENCE.

Evidence as to whether the engineer rung bell or sounded the whistle after passing a crossing before he struck deceased was admissible on the question of due care, in view of fact that engineer had discovered deceased in a place of peril.

8. TRIAL ⟸228(4) — INSTRUCTIONS — SUFFICIENCY.

Instructions covering the various questions of law arising out of the issues joined by the pleadings and the proof with substantial accuracy are all that is required.

Error from District Court, Murray County; F. B. Swank, Judge.

Action by Anna Haley against James W. Lusk and others, receivers of the St. Louis & San Francisco Railroad Company. Verdict and judgment for plaintiff, and defendants bring error. Affirmed.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt and J. H. Grant, both of Oklahoma City, for plaintiffs in error.

Giddings & Giddings, of Oklahoma City, for defendant in error.

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KANE, J. This was an action for damages for personal injuries resulting in death commenced by the defendant in error, Anna Haley, plaintiff below, widow of the decedent, against James W. Lusk, W. C. Nixon, and W. B. Biddle, receivers of the St. Louis & San Francisco Railroad, a corporation, plaintiffs in error, defendants below. Hereafter, for convenience, the parties will be designated "plaintiff" and "defendant" respectively, as they appeared in the trial court.

Upon trial to a jury there was a verdict for the plaintiff in the sum of $20,000, upon which judgment was duly rendered, to reverse which this proceeding in error was commenced. The grounds for reversal relied upon by counsel for the defendants are summarized in their brief as follows:

(1) Error of the court in overruling the motion of the defendants to direct verdict against the plaintiff at the close of the evidence.

(2) Error of the court in excluding competent and material evidence offered by defendants.

(3) Error of the court in admitting incompetent evidence on behalf of the plaintiff.

(4) Error of the court in giving to the jury instructions numbered 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18 and in giving each of said instructions to the jury.

(5) Error of the court in refusing to give to the jury instructions requested by the defendants, numbered from 1 to 17, inclusive, and in refusing to give each of said instructions to the jury.

(6) Excessive damages awarded by the jury, which appear to have been given under the influence of passion and prejudice.

(7) Misconduct of counsel for plaintiff to the material prejudice of defendants.

[1-4] It seems that the deceased was an employé of the Pioneer Telephone & Telegraph Company, who, for several weeks prior to his injury, had been engaged in cooking for a gang of men engaged in doing reconstruction work for that company upon or near the right of way of the railway company between the towns of Stroud and Depew; the work camp being situated upon or near the right of way some 2½ miles northwest of the latter point.

On the evening of December 18, 1915, the deceased went from the work camp to Depew for the purpose of purchasing medicine and other necessaries for his wife, who worked with him in the camp, and shortly after midnight he started to walk back to camp, upon the tracks of the railway company, in company with his brother Martin Haley and one Gilbert, who were also telephone company employés. Just before the three men had reached their destination, according to the theory of the plaintiff, they heard the whistle of a passenger train which was rapidly approaching from their rear, whereupon they immediately attempted to get off the track, but before the deceased could reach a place of safety he was struck by the locomotive of the train and killed.

Upon the trial and in their briefs counsel for the respective parties devoted considerable time to the development and discussion of the question whether the deceased was upon the track of the railway company as a licensee or as a mere trespasser, but as the only additional duty the defendant would owe the deceased if it was conceded that he was a licensee would be to keep a lookout for his presence, and the engineer and fireman testified without contradiction that they were keeping a sharp lookout for any one who might be upon the track, whether licensee or trespasser, we are unable to perceive how this question is very material to the consideration of the case upon its merits. The case, it seems to us, turns on the question whether there was any evidence tending to show that the engineer and fireman saw the plaintiff in a place of peril in time to save him from injury by the exercise of due care. The engineer testified that he was keeping a constant lookout on the night of the accident, and that with the headlight he was using he could see for seven or eight telegraph poles ahead of his train, but that he did not see the deceased until after the accident on account of a sharp curve in the track at the point where the accident occurred. The fireman testified that he also was keeping a careful lookout; that he discovered the three men walking single file in the middle of the track when his locomotive was about 500 feet from them. The following is an excerpt from his testimony as to what happened after that:

"Q. Well, now what did they do if anything, just after you saw them about 500 feet ahead of you? A. Well, the one that was in the middle of the track and the one behind got off, and went on down the dump, and the other fellow seemed to be in the clear until we were right near close to him, and it seemed that he either got closer or stepped closer to the track and staggered that way.

"Q. Now, when he moved a little closer to the track, instead of going down the dump with the others, how far were you from him? A. Well, we were, oh, probably—I couldn't hardly approximate the distance. That was just as the headlight was leaving.

"Q. Well, how close was he to the engine? A. He was real close. It was probably 20 or 30 feet.

"Q. Now, from that time when you saw that he was staggering or getting nearer the tracks instead of going down the bank, state whether

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or not you had time to inform the engineer or do anything to stop the train before you struck him? A. No, sir; I did not. * * *

"Q. What did you do when you saw him? A. I informed the engineer as quick as I could.

"Q. What did he do? A. He stopped the train as quick as possible."

The first contention of counsel for the defendants is based upon the assumption that this positive evidence of the engineer that, although he was keeping a sharp lookout, he did not see the deceased until after he was hit, on account of the curve, and of the fireman that after the deceased reached a place of safety he staggered back toward the track when the locomotive was almost upon him, and was hit, is uncontradicted. Of course, if this contention is well taken, the trial court should have directed a verdict for the defendants. On the other hand, it is contended by counsel for the plaintiff that, conceding that the engineer and fireman were looking, as they testified they were, there being other evidence tending to show that the deceased and his companions were walking single file in the center of the track which was perfectly straight for a distance of a half or three-quarters of a mile back of them, the physical facts as well as the positive testimony of witnesses contradict the positive statements of the engineer and fireman that they did not see the deceased in a place of peril. If there is any evidence reasonably tending to support this theory of course the court was right in sending the case to the jury, for both parties concede that:

"A railroad company in the operation of its trains, while it does not owe an unauthorized person upon its tracks the duty to use ordinary care in discovering such person on its tracks or to discover his dangerous positon, must, after the discovery of his peril, use ordinary care to avoid doing him injury." A., T. & S. F. Ry. Co. v. Miles, 170 Pac. 886; St. Louis & S. F. Ry. Co. v. Clark, 42 Okl. 638, 142 Pac. 396.

The engineer and fireman do not claim that, outside of keeping a lookout for any one who might be upon the track, they exercised due care or any care at all to avoid injuring the decedent; their contention being that no further care was necessary on their part: First, for the reason that the engineer, although he kept a sharp lookout, could not see the deceased on account of the curve; and, second, according to the testimony of the fireman, the deceased, having reached a place of safety, was apparently in no danger.

Now let us examine the evidence relied upon by counsel for the plaintiff, for the purpose of ascertaining in what particulars, if any, it contradicts the evidence of the engineer and fireman.

Two witnesses, the companions of the deceased, testified that the track was perfectly straight for a distance of three-quarters of a mile back from the place where the deceased was hit, that the deceased was hit just before he reached the curve, which the engineer claims prevented him from discovering the presence of the deceased upon the track, and that there was nothing in the way of the engineer and fireman seeing the deceased. All of the witnesses concede that, if the track was straight at the place the injury occurred, as these witnesses testified, the deceased could have been seen. The engineer himself testified that he would have seen the deceased if the track was straight but that he did not see him because of the curve. It seems to us that this evidence flatly contradicts the testimony of the engineer in at least two important particulars: (1) That the accident occurred upon a curve; and (2) that the engineer, who was admittedly looking, did not see the deceased upon the track. The fireman testified that he saw the deceased on the track at a distance of 500 feet, at which distance he sought and reached a place of safety. There is conflict between his testimony and the testimony of the witnesses for the plaintiff in that they testified that they did not see or hear the train or get off the track until it whistled for a crossing a short distance from them, when they immediately sought places of safety. If the engineer and fireman or either of them saw the deceased, then it was their duty to use ordinary care to avoid injuring him, after becoming aware of his perilous position. A., T. & S. F. Ry. Co. v. Baker, 21 Okl. 51, 95 Pac. 433, 16 L. R. A. (N. S.) 825; St. Louis & S. F. Ry. Co. v. Clark, 42 Okl. 638, 142 Pac. 396.

There is some contention to the effect that, even if there was evidence tending to show that the engineer or fireman saw the deceased walking on the track, it did not necessarily follow that he was in a perilous position, as the presumption was that he would get off the track in time to avoid injury. The parties were engaged in a perilous undertaking from the moment they started on their midnight journey from Depew to their camp. They were in a perilous position from whatever time the evidence tends to show the engineer or fireman discovered them on the track a half or three-quarters of a mile ahead of the rapidly approaching train, and from that moment the duty to use ordinary care not to injure them commenced. Of course, the engineer or fireman would be justified in presuming that the parties would retire to a place of safety if it appeared that they knew the train was approaching, but in the case at bar there was no signal or warning given of the approach of the train, and there was nothing in the evidence to show that the deceased or his companions were conscious of its approach; the evidence of the surviving parties being to the effect that they were not until, in the case of the deceased, it was too late to avoid injury by retiring to a place of

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safety. We think in these circumstances the trial court was right in submitting the case to the jury.

[5] The next assignment of error is based upon the action of the court in sustaining an objection to certain questions asked witness Donavan whose evidence was offered upon the question whether the deceased was a licensee or a trespasser. As the difference between the duty a railway company owes a licensee and a trespasser has been hereinbefore pointed out, and it is conceded that the engineer and fireman were keeping a sharp outlook, we are unable to perceive the materiality of this evidence or any harm which could be caused by its exclusion.

[6, 7] The next error is based upon the action of the court in admitting certain evidence in behalf of the plaintiff upon the ground that it was incompetent. One of the questions and the answer thereto is as follows:

"Q. Was there anything to prevent the engineer of said train from seeing you on the track? A. No, sir."

Another question asked:

"Q. Do you know whether or not that night while you boys were walking northeast on the track as you have described there was anything in the way of an obstruction that would prevent the engineer from seeing what was upon the track northeast of him?"

Another was:

"Q. Did he ring the bell or sound the whistle after he got over the crossing before he struck Haley? A. No, sir."

It is claimed that these questions and several others of like import are incompetent because the railway company was not under obligation to keep a lookout for the deceased nor to sound the whistle or ring the bell except at the usual places required by law or the rules of the company. We think the first question objected to and questions of that class were competent as tending to show whether the engineer saw the deceased upon the track, and in view of our conclusion that there was evidence reasonably tending to show that the engineer did discover the deceased in a place of peril, the evidence as to ringing the bell and sounding the whistle, etc., was competent on the question of due care.

Whilst in their next assignment of error counsel complain of the refusal of the trial court to give the jury requested instructions numbered 1 to 17, inclusive, they rely in their brief upon error in refusing to give requested instructions numbered 4, 5, 6, 8, 12, 15, and 16. We have examined these instructions and find that where they state the law correctly they have been covered in substance by the instructions given by the court on its own motion. On the whole we are perfectly satisfied that the trial court committed no harmful error in refusing any of the instructions requested.

[8] The same may be said also of the instructions given by the court and excepted to by the defendant. The trial court seems to have covered the various questions of law arising out of the issues joined by the pleadings and the proof with substantial accuracy. This is all that is required.

We have examined the record carefully, and are unable to find any evidence that the damages awarded by the jury were given under the influence of passion and prejudice. Whilst the verdict is liberal in view of the deceased being a young man, with a long expectancy, we think the evidence reasonably tends to show that his loss to the plaintiff is no more than justly compensated for by the verdict returned by the jury.

The misconduct of counsel complained of in the next assignment of error arose as follows: It seems that during the course of the trial counsel for the plaintiff missed certain exhibits which, by stipulation of counsel, were to be attached to certain depositions taken on behalf of the defendants. Upon making this discovery counsel for the plaintiff charged counsel for the railway company with bad faith in not attaching the exhibits and in argument charged that the absence of the exhibits indicated a conspiracy between the telephone company and the railway company against the plaintiff. It subsequently developed that the exhibits were attached to the depositions as per stipulation of counsel, and that they had become misplaced by inadvertence on the part of counsel for the plaintiff. Of course, it is apparent at once that this circumstance furnished no basis whatever for the statement of counsel. On the other hand, the charge of conspiracy between the two companies seems to us to be so obviously without any foundation to support it that it is difficult to believe that the mere statement of counsel could possibly influence the jury on that point or work any injury to the defendant. In our judgment the case on its merits turns upon whether the jury believed the plaintiff's witnesses or the defendant's witnesses as to the respective theories of their case. The evidence as it appears to us being sharply conflicting, the verdict of the jury in favor of the plaintiff establishes liability on the part of the railway company. In its last analysis the record presents but few disputed questions of fact for consideration, and when these are found in favor of the plaintiff the case becomes one of considerable simplicity. Being satisfied that the findings of the jury on the disputed facts are reasonably supported by the evidence, we are not at liberty to set aside the judgment rendered or grant a new trial on the ground of misconduct of the jury or the improper admission or rejection of evidence or as to error in any matter of plead-

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ing, or procedure, unless, in our opinion, after an examination of the entire record, it appears that the errors complained of have probably resulted in a miscarriage of justice or constitute a substantial violation of any constitutional or statutory right. Section 6005, Revised Laws 1910.

It not appearing that any of the errors complained of belonging to the class mentioned in the statute have probably resulted in a miscarriage of justice, the judgment of the court below must be affirmed.

All the Justices concur.

(75 Okl. 101)

PIERCE OIL CORPORATION v. SCHACHT et al. (No. 9480.)

(Supreme Court of Oklahoma. May 13, 1919. Rehearing Denied June 24, 1919.)

(Syllabus by the Court.)

1. MINES AND MINERALS ⟸5—OIL AND GAS LEASE — CONSTRUCTION OF DEPARTMENTAL LEASE—SINGLE OR SEPARATE LEASES — EXTENSION BY DRILLING WELL.

A departmental oil and gas lease upon 160 acres of land which has been approved by the Department of Interior, and thereafter the lessor has divided said land into subdivisions and sold separate subdivisions to different parties, after the restrictions are removed, the lessee enters into a written contract with the owners of the premises that the depository for the payment of the oil and gas rentals and royalties is changed from the place provided in said lease to places designated by the different landowners. This fact does not make the lease a separate lease upon each tract of land, but the same remains a lease upon the entire tract of land, and the drilling of a gas well upon any portion thereof and the payment of the royalty on the gas well as provided in the lease to the owner of the portion of the land where said gas well is found extends the life of the lease upon the entire tract of land.

2. MINES AND MINERALS ⟸5—TRANSFER—SUBJECT TO LEASE—TITLE OF PURCHASER—ROYALTIES.

Where a tract of land subject to an oil and gas lease is transferred to different parties, the purchaser of each portion takes the same subject to such lease; and, should the lessee thereafter discover and produce oil or gas from the leased premises, the purchaser is entitled to the royalties accruing from the oil and gas produced on the portion of the premises owned by him.

3. MINES AND MINERALS ⟸5—OIL AND GAS LEASE—FORFEITURE—NOTICE.

A departmental oil and gas lease, which provides, if the lessee fails to comply with any of the terms thereof, that the lessor may declare the lease forfeited upon giving 10 days' notice. The notice is not complied with by the lessor notifying the lessee that he has declared the lease forfeited, but in order to comply with said provision in said lease, it is necessary to notify the lessee of the terms of the lease that have been violated, and provide, if the same is not complied with within ten days, then the lease will be considered forfeited.

4. MINES AND MINERALS ⟸78(5)—OIL AND GAS LEASE—CANCELLATION.

A lessor, invoking the jurisdiction of a court of equity to cancel and rescind an oil and gas lease for breach of one of the covenants, must act with reasonable dispatch after the discovery of his rights to forfeiture on account of such breach, and if he claims delay rental and advance royalty due June 19, 1910, in the sum of $52, but he permits the lessee to take charge of the premises in September, 1910, and drill a gas well upon a portion of the premises covered by said lease, and permits the lessee to pay the royalty due under said lease to the owner of the portion of the land where the gas well is found, for a period of three years, and permits the premises to be sold, and the record title shows that said lease is in full force and effect, and thereafter the lessee takes possession of said portion of the premises belonging to the lessor, although over his protest, but without any proceedings, and drills three producing oil wells thereon at a cost of $19,000, and tenders to the lessor the royalty due under said lease, said plaintiff would be guilty of laches, and a court of equity would not enforce a forfeiture for the payment of $52 rental due June 19, 1910, especially where there is a controversy over the question of said rental being due.

Appeal from District Court, Okmulgee County; Ernest B. Hughes, Judge.

Suit by William H. Schacht and others against the Pierce Oil Corporation. Judgment for plaintiffs, and defendant appeals. Reversed and remanded, with instructions to grant defendant a new trial.

Rice & Lyons, of Tulsa, for plaintiff in error.

G. R. Horner and C. B. McCrory, both of Okmulgee, for defendants in error.

McNEILL, J. This controversy arose by William H. Schacht et al. filing suit to cancel a lease on the southeast quarter of the southwest quarter of section 15, township 13, north of range 14 east, containing 40 acres, which said lease was owned by Pierce Oil Corporation, and was in possession of and developing the same at the time of bringing suit. For convenience William H. Schacht et al. will be referred to as the plaintiffs and Pierce Oil Corporation the defendant, being the position they occupied in the court below.

The facts are, substantially, that Lee Doyle, a mixed blood Creek Indian, received as his allotment the southwest quarter of section 15, township 13, north, range 14 east, Okmulgee county, containing 160 acres. That on the 19th day of February, 1907, he executed an oil and gas lease, being a de-

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partmental oil and gas lease to the Tulsa Fuel & Manufacturing Company, and the same was approved June 19, 1907, by the Secretary of Interior. The form of the lease is what is known as a regular departmental oil and gas lease. On April 5, 1909, Lee Doyle sold the southeast 40 of said quarter section to I. H. Cox, who on the 12th day of June, 1909, transferred the same to William H. Schacht and his brother.

That after the execution and approval of the lease in question said Lee Doyle transferred the other 120 acres to J. W. Adair et al. That after Lee Doyle sold the 120 acres to J. W. Adair et al., an agreement was entered into between J. W. Adair et al., and Tulsa Fuel & Manufacturing Company, which changed the place of payment of all rentals and royalties due under said lease from the Union Agency, Department of Interior, Muskogee, Okl., to Quincy National Bank of Quincy, Ill., and that on the 25th day of November, 1908, William H. Schacht et al. entered into the same kind of an agreement with Tulsa Fuel & Manufacturing Company, changing the place of payment of royalties and rentals to the First National Bank of Morris, Okl.

That thereafter said lease was transferred, and again on September 22, 1910, the said lease was assigned to L. S. Skelton. That L. S. Skelton during the year 1910 entered on the premises and drilled a gas well on the portion of the land belonging to the Adairs et al., and found gas in paying quantities. He paid the gas rentals due from the producing gas well to Adair et al. according to the terms of the lease. The lease contained the provision that if gas was produced from said premises at the end of the year, the lessee should pay $150 from each gas-producing well. The lease further provides that the advance annual royalty of 15 cents per acre in advance for the first and second years, and 30 cents per annum in advance for the third and fourth years, and 75 cents per acre per annum in advance for the fifth year, and further provided, should the party of the second part neglect or refuse to pay said advance royalty and rental for a period of 60 days after the same becomes due and payable, the Secretary of Interior, after 10 days' notice to the parties, might declare the lease null and void. The lease further provided that the well should be drilled within 12 months from the date of the approval of the bond by the Secretary of Interior, or refusing to drill one well within the time stated, this lease may, within the discretion of the Secretary of Interior, become null and void after 10 days' notice to the parties, provided that the lessee shall have the privilege of delaying operations for a period of not exceeding five years from the date of the approval of the bond to be furnished in connection herewith, by paying in addition to the advance royalty the sum of $1 per acre per annum for each leased tract remaining undeveloped. The lease further contained the provision that if the lessee violated any of the stipulations or failed for 60 days to pay the royalties, the Secretary of the Interior after 10 days' notice to the parties thereto shall have the right to avoid the lease and cancel the same when all the rights, franchises, and privileges of the lessee, or assigns hereunder shall cease and end without resorting to the courts and without further proceedings, and the lessor shall be entitled to immediate possession of the leased land and the permanent improvements thereon.

That after L. S. Skelton took possession of said premises he paid the royalties due under the terms of said lease from the producing gas well. This was paid direct to Adairs et al., and Skelton operated said gas well on said premises, and connected pipes on and across said premises to said well.

On March 21, 1913, Skelton assigned said lease to Waters-Pierce Oil Company, and on July 7, 1913, Waters-Pierce Oil Company assigned said lease to the Pierce Oil Corporation. The plaintiffs' suit was brought for the purpose of canceling the lease, on the theory that the defendant never paid the rentals and advance royalties falling due in June, 1910, 1911, 1912, and 1913, on this particular 40. The defendants answered that they were innocent purchasers; that Skelton was in possession of the premises, operating the same for oil and gas purposes at the time of purchase. The record title was clear, and it paid a valuable consideration therefor, and in addition to the gas well drilled by Skelton in 1910 the defendant in June, 1913, drilled its first well which produced oil in paying quantities; that it had drilled three wells on this particular 40 acres of land. At the time of the trial it had expended about $19,000, and received about $16,000 in return. It had tendered to the plaintiffs the one-tenth, being amount provided in lease, of all oil received, and offered to do equity.

The facts further disclosed that prior to drilling said wells, to wit, in May, 1913, the defendant sent what is known as a division order to the plaintiffs, informing them it expected to drill said wells, and asked them to sign the same. This plaintiffs refused to execute. There was some controversy over this question, but the defendant went ahead and drilled said wells.

In the latter part of December, 1911, the plaintiffs wrote a letter to L. S. Skelton, informing him that he had failed to pay the rentals and royalties due on this 40 acres, and they declared the lease null and void. In January, 1912, Skelton replied, stating that he had complied with the terms of the lease. On January 10, 1912, the plaintiffs again wrote to Skelton, stating that the rentals and royalties had not been paid on this

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40 acres, and they declared the lease null and void.

On trial of the case, the court found the issues in favor of the plaintiffs, and against the defendant, canceling the lease, and by a subsequent motion the court attempted to adjust the damages and to award to the plaintiff all of the material and equipment on said lease, but this award was afterwards set aside, and is not before this court at this time.

[1, 2] The case is now before this court upon the judgment of the court canceling said lease. The first finding of which defendant complains is as follows:

"That the leasehold estate covering the 40-acre homestead allotment, belonging to the plaintiffs and involved in this action, became effectually severed from the leasehold estate, covering the surplus allotment which had been sold to other parties, when the owner of the oil and gas lease in controversy paid to the owners of each of said tracts their proportionate benefits accruing thereunder in accordance with separate stipulations theretofore made with each of them, to which finding the defendant excepts."

In making this finding the court committed error. This lease embraced 160 acres of land, and was not a lease on any tracts or subdivisions of the same. There was no agreement that the lease should be considered as a separate lease as to each landowner. The contract or agreement entered into with the parties only provided that the portion of the rentals or royalties belonging to each party might be paid into certain banks, instead of the Union Agency, at Muskogee, which was made a depository by the lease. The United States released all interest in the premises by reason of restrictions being removed from the land and the land being sold. It was then agreed by all of the parties that whatever rentals and royalties might be due under the lease should be paid at a different place. This in no wise changed the form of the lease, but only provided for the place of payment. This added no new burdens to the lessee, changed none of the rights and liabilities of the lessee, and the plaintiffs acquired no new rights by reason of changing the depository. The plaintiffs, having become the owner of 40 acres of said premises, became entitled to whatever delay money in the nature of rentals or advance royalties were due, for their portion of the premises, but as soon as the said premises were developed and oil or gas produced in paying quantities then they were not entitled to receive any of the royalties received from either said gas or oil wells, unless the same were upon their premises, nor were they entitled to receive any rental or advance royalty thereafter, for none would be due or payable under the lease. This was decided by this court in the case of Kimbley v. Luckey et al., decided April 8, 1919, 179 Pac. 928, and not officially reported. Justice Sharp, speaking for the court, said:

"Where an oil and gas lease is made to extend to the heirs, administrators, and assigns of both lessor and lessee, and before the discovery and production of oil or gas thereon a third party purchases a portion of the leased premises, each owner is ordinarily entitled to the profits and royalties arising and accruing from the oil and gas produced on his tract, free of any claim or demand of the other."

"Where a tract of land subject to an oil and gas lease is subdivided by the owner and lessor by selling a portion thereof, the purchaser of such portion takes the same subject to such lease; and, should the lessee therein thereafter discover and produce oil or gas from the residue of the leased premises, such purchaser is not entitled to an apportionment or share of the royalties accruing from the oil and gas produced thereon."

This rule is supported by the case of Northwestern Ohio Natural Gas Co. v. Ullery, 68 Ohio St. 259, 67 N. E. 494; Osborn v. Arkansas Territorial Oil & Gas Co., 108 Ark. 175, 146 S. W. 122; Fairbanks v. Warrum, 56 Ind. App. 337, 104 N. E. 983, 1141.

Upon this theory, after Skelton had produced a gas well on said premises in 1910 and paid the stipulated royalties thereon as provided in said lease for a gas well, and the lease providing the annual advanced royalty should be credited upon the stipulated royalty, the stipulated royalty being more than the annual advanced royalty, then and from that time on there would be no indebtedness for future rentals due from that time on. This would not only apply to the portion of the land where the gas well is situated, but to the land in its entirety, and the payment of said stipulated royalties continued the lease in force and effect as to the entire 160 acres of land. It is necessary to keep in mind and distinguish the difference between stipulated royalties, advance royalties, and the term rentals, or delay money. It was admitted or agreed that all of the rentals and advanced royalties were paid to June 19, 1910. The defendant claims that Skelton paid the same from June 19, 1910, to June 19, 1911. It was uncontradicted that during the year 1910, as provided by said lease, Skelton paid the stipulated royalties on the gas well. This was paid also in the years 1911, 1912, and 1913, and that after the oil well in 1913 was drilled, the defendant in this case tendered to the plaintiff the one-tenth of the oil produced from said premises, being the stipulated royalty. There could be nothing due on this lease, unless it was the rentals and advanced royalties that became due the 19th day of June, 1910, and as to this 40 acres would only amount to $52 under the terms of the lease.

[3] The lease provides that upon 10 days' notice the lessor may declare a forfeiture

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when the lessee does not comply with the terms of the lease, and provides how the same may be forfeited. If the plaintiff desired to exercise the forfeiture in said lease for nonpayment of the advanced royalty and rental, he could give 10 days' notice, notifying the lessee in possession that there was so much rental due, and that upon the failure to pay the same in 10 days the lease would be declared forfeited. This they did not do, but permitted the lessee to take possession and develop the premises, and permitted the lessee, according to the uncontradicted testimony, to keep possession, drill a gas well, and to pay at least two years' stipulated royalty that was due on the gas well, as provided in said lease, before ever claiming any rental due. At that time they failed to give any notice that rentals were due, and if not paid within 10 days, as provided by the terms of said lease, that the lease would be declared forfeited, but notified the lessee that they had declared the lease forfeited, which was declaring a forfeiture without a notice, and contrary to the terms of the lease. This they could not do. They were notified that the lessee claimed that he had complied with the terms of the lease; still they permitted him to retain possession under the lease and produce gas therefrom, permitted the records to remain clear, permitted the lessee who was in possession to sell and dispose of the leased premises, and did not attempt to quiet title until January, 1914. This, after the defendant had taken possession and drilled three oil wells on the premises and expended $19,000.

This court in the case of Indiana Oil, Gas & Development Co. v. McCrory, 42 Okl. 136, 140 Pac. 610, laid down the following rule:

"A lessor invoking the jurisdiction of a court of equity to cancel and rescind a lease for breach of an implied covenant must come into court with 'clean hands,' and must act with reasonable diligence after the discovery of his right to the forfeiture on account of such breach."

Again, in the case of Wellsville Oil Co. v. Miller, 44 Okl. 493, 145 Pac. 344, the court quotes with approval from Judge Sanborn in the Michigan Pipe Co. Case, 111 Fed. 284, 49 C. C. A. 324, as follows:

"A suit in equity is an appeal for relief to the moral sense of the chancellor. A court of equity is the forum of conscience. Nothing but good faith, the obligations of duty, and reasonable diligence will remove it to action. Its decree is the exercise of discretion; not of an arbitrary and fickle will, but of a wise judicial discretion, controlled and guided by the established rules and principles of equity jurisprudence."

[4] In the case at bar, the stipulated royalties for the years of 1911, 1912, and 1913 were paid as provided in said lease. During the year 1910 the stipulated royalties on the gas well were paid, and there is only one controversy in this case, the question whether $52 due June 19, 1910, was paid or not. Can a person who claims an advanced royalty and rental amounting to $52 due June 19, 1910, permit an assignee of the lessee to go in possession in September, 1910, and drill a gas well and develop the premises, pay the stipulated royalties due from the gas well in 1910, pay the same in the year 1911, and then notify the lessee that he claims the lease forfeited, and when a controversy arises, and he is informed that the lessee claims that he has paid all the advanced royalties and rentals as provided by said lease, then permits the lessee to remain in possession during the year 1912, permit him to sell the lease in 1913, while in possession, sit idly by in 1913 and permit three oil wells to be drilled upon his portion of the premises, then ask a court of equity to declare the lease forfeited by reason of claiming $52, which amount is in controversy, if due at all. was due June 19, 1910?

This is neither equitable nor just, and the plaintiffs would be guilty of such laches that would prevent a court of equity from enforcing a forfeiture, especially in a case where the lessee offers to do equity. The plaintiffs are guilty of such laches that would prevent them from recovering, and the further fact that no notice was given before attempting to declare a forfeiture as provided in said lease.

The plaintiffs rely upon the case of Guffey Petro. Co. v. Jeff Chaison Town-Site Co., 48 Tex. Civ. App. 555, 107 S. W. 609, on the question of separation of leases, but we do not think this case is in point. That case was an action for damages, where the lease covered a tract of land and the same was partitioned, and the lessee would not drill the portion of the land owned by one landowner. The suit was for damages for the reason the lessee failed to protect the line, or the portion of land owned by the plaintiff in that case, and was draining the oil and gas from thereunder. No such question as that arises in the case at bar, but this court reserved the right to say what it would do in a case of that kind and character, in the case of Kimbley v. Luckey, supra.

The evidence in the case at bar is exactly contrary to the Guffey Case, for the reason the evidence disclosed in the case at bar that the oil wells were drilled upon this plaintiffs' land, and there was no contention that their premises were being drained. This lease being a lease upon the whole 160 acres of land, the only controversy in dispute that can arise is over the question of whether there is due $52; and, the plaintiffs having waited 3½ years before attempting to enforce their rights, and after the defendant had expended $19,000 and produced oil and gas in paying quantities, it must be admitted that the plaintiffs have been guilty of such laches as to waive their rights to declare a forfeiture upon this

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ground, also have failed to give the proper notice as provided by the terms of the lease, and their remedy would be for a judgment, for the amount of rental and advanced royalties found due if any.

The case is therefore reversed and remanded, with instructions to grant the defendant a new trial.

SHARP, C. J., and RAINEY, HARRISON, PITCHFORD, and JOHNSON, JJ., concur.

(16 Okl. Cr. 686)

HALE v. STATE. (No. A-2719.)

(Criminal Court of Appeals of Oklahoma. June 27, 1919.)

(Syllabus by Editorial Staff.)

1. INTOXICATING LIQUORS ⟸236(1)—UNLAWFUL TRANSPORTATION—EVIDENCE.

Evidence *held* sufficient to sustain a conviction on appeal for unlawfully conveying intoxicating liquors.

2. CRIMINAL LAW ⟸1169(5)—HARMLESS ERROR—IMPEACHING EVIDENCE.

In a prosecution of two for unlawfully conveying intoxicating liquors, appellant's claim of error in admitting evidence to impeach his codefendant, who was used as a witness in his behalf, was without merit, where court limited jury's consideration of such evidence solely to impeach the codefendant as a witness, and where the impeaching evidence was material to the issue.

Appeal from County Court, Garvin County; W. R. Wallace, Judge.

J. F. Hale was convicted of a violation of the prohibitory liquor law, and he appeals. Modified and affirmed.

Stanley & Osborn, of Pauls Valley, for plaintiff in error.

S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. This is an appeal from a conviction rendered against the plaintiff in error in the county court of Garvin county for unlawfully conveying intoxicating liquors. Plaintiff in error was sentenced to pay a fine of $250 and to serve 3 months' imprisonment in the county jail.

[1] J. F. Hale and Ed Hodge were informed against in the county court of Garvin county, jointly charged with conveying four cases of whisky from a place unknown in said county to a point about two miles west of the town of Foster, in said county. Hodge pleaded guilty and was sentenced to pay a fine of $100 and to serve imprisonment for a period of 30 days. Hale pleaded not guilty, and while the evidence on the part of the state showed that he was riding with Hodge on a farm wagon in which there was being unlawfully conveyed at the time four cases of whisky, that both of the parties had been to Wichita Falls, Tex., where the whisky was procured, and were returning with the same to their home in Garvin county, Okl., the defendant Hale denied any ownership in the liquor or any connection with its conveyance, other than being a passenger with Hodge. The evidence against the defendant Hale, while not nearly so strong as that against Hodge, is sufficient to sustain a conviction on appeal, as it cannot be said there is no evidence of incriminating nature against Hale.

[2] The contention made that certain evidence was erroneously admitted, tending to impeach Hodge, who was used as a witness in behalf of Hale, is without merit, for the reason that the court limited the jury in the consideration of this evidence solely to the purpose of impeaching Hodge as a witness, and the impeaching evidence was material to the issues joined on the trial. The instructions complained of are not prejudicial and sufficiently cover the law of the case.

The punishment imposed is unusual. Three months' imprisonment and a fine of $250 is the punishment ordinarily imposed upon those who are shown to be more than first offenders. The defendant in this case is a man past 60 years of age, a farmer living in that community for 15 or 20 years, and in view of the evidence against him it is the opinion of the court that the ends of justice will be best subserved by modifying the judgment to provide an imprisonment for a term of 30 days and a fine of $50; and it is ordered that the judgment be thus modified, and, as modified, be affirmed.

(16 Okl. Cr. 687)

McCULLOCH v. STATE. (No. A-3164.)

(Criminal Court of Appeals of Oklahoma. June 28, 1919.)

(Syllabus by Editorial Staff.)

CRIMINAL LAW ⟸1069(6)—TIME FOR FILING APPEAL—DISMISSAL.

Where judgment was pronounced and entered according to verdict on June 8, 1917, an appeal not filed in Criminal Court of Appeals until October 8, 1917, more than 120 days from entry of judgment, will be dismissed, because not filed within the time provided by law, and because court was without jurisdiction.

Appeal from County Court, Comanche County; R. J. Ray, Judge.

Ben McCulloch was convicted of a violation of the prohibitory liquor law, and he appeals. Appeal dismissed, with direction

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to cause the judgment and sentence to be carried into execution.

J. F. Thomas, of Lawton, for plaintiff in error.

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The Attorney General and W. C. Hall, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error, Ben McCulloch, was convicted in the county court of Comanche county on a charge of unlawfully conveying intoxicating liquor in said county, and his punishment fixed at confinement in the county jail for 60 days and a fine of $200.

The Attorney General has moved to dismiss the appeal, on the ground that the appeal was not filed within the time provided by law, and for the reason the appellate court is without jurisdiction.

From the record it appears that judgment was pronounced and entered in accordance with the verdict on the 8th day of June, 1917, and the appeal was not filed in this court until the 8th day of October, 1917, being 122 days from the date the judgment was pronounced and entered. The motion of the Attorney General is well taken. The appeal is therefore dismissed, with direction to the trial court to cause the judgment and sentence to be carried into execution.

Mandate forthwith.

(16 Okl. Cr. 684)

BRADEN v. STATE. (No. A-2956.)

(Criminal Court of Appeals of Oklahoma. June 27, 1919.)

(Syllabus by Editorial Staff.)

CRIMINAL LAW ⊜1182 — CONVICTION — AFFIRMANCE.

Where evidence in prosecution for selling intoxicating liquor presented a plain conflict, and testimony of state's witnesses clearly supported the conviction and no brief was filed by defendant appellant, and no appearance was made to orally argue cause at submission and an examination of record discloses no error prejudicial to his substantial rights, the conviction will be affirmed.

Appeal from County Court, Okmulgee County; Mark L. Bozarth, Judge.

J. H. Braden was convicted of selling intoxicating liquors, and he appeals. Judgment affirmed.

Joe S. Eaton, of Okmulgee, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

PER CURIAM. J. H. Braden was convicted in the county court of Okmulgee county of having sold to one Blaine Hill a pint of whisky on the 17th day of May, 1916.

This transaction took place in the defendant's place of business in the city of Henryetta, and the evidence on the part of the state by the witness Blaine Hill is to the effect that he bought a pint of whisky from the defendant and paid him $1.25 therefor. The witness Hill is corroborated by one Stormont.

The defendant admitted that the prosecuting witness, Hill, was at defendant's place of business on the date alleged and tried to buy a pint of whisky from him, but defendant contends that he refused to sell Hill any whisky. Mrs. J. H. Braden testified that she was present at the time Hill came to their place of business, and that the defendant refused to sell Hill any whisky.

This presents a plain conflict of evidence. The testimony of the witnesses in behalf of the state clearly supports the conviction. No brief has been filed in behalf of the defendant, and no appearance was made to orally argue the cause at the time the same was submitted. An examination of the entire record fails to disclose any error prejudicial to the substantial rights of the defendant.

The judgment is affirmed.

(16 Okl. Cr. 175)

DUNCAN v. STATE. (No. A-2884.)

(Criminal Court of Appeals of Oklahoma. June 21, 1919.)

(Syllabus by the Court.)

1. HIGHWAYS ⊜164(2)—OBSTRUCTION—SUFFICIENCY OF INFORMATION.

For information held sufficient to charge offense of obstructing public highway, see body of opinion.

2. INDICTMENT AND INFORMATION ⊜111(1)—NEGATIVING EXCEPTIONS IN CRIMINAL STATUTES.

Exceptions to the operation of criminal statutes which form no substantive element of the offense, need not be negatived in the information.

3. PLEA OF NOT GUILTY.

Under section 5800, Rev. Laws 1910, three kinds of pleas to indictments or informations are authorized; all matters of fact tending to establish a defense, other than of a former conviction or acquittal, may be given in evidence under a plea of not guilty.

4. HIGHWAYS ⊜164(3)—OBSTRUCTION—DEFENSE—EVIDENCE.

Where the defendant claimed that the highway which he was charged with obstructing constituted a part of a stock-grazing district authorized to be established by section 1 of chapter 61, Sess. Laws 1913, evidence tending to

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prove that such stock-grazing district was established subsequent to the fencing across such highway by defendant, and subsequent to the commencement of the prosecution, is properly excluded.

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5. HIGHWAYS ⟸163(1)—OBSTRUCTION—DEFENSE.

For other matters held to constitute no lawful defense to a prosecution for obstructing a section line highway, see opinion.

Appeal from County Court, Ellis County; S. A. Miller, Judge.

Donald Duncan was convicted of the offense of obstructing a public highway, and sentenced to pay a fine of $5 and the costs of the action, and appeals. Affirmed.

C. B. Leedy, of Arnett, for plaintiff in error.

S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

MATSON, J. This is an appeal from the county court of Ellis county, wherein the defendant was convicted on the 14th day of November, 1916, of the offense of obstructing a section line highway, and sentenced to pay a fine of $5 and the costs of the action.

[1] The trial was had before the court, a jury having been waived. Defendant interposed a demurrer to the information, which was overruled, and to the action of the court in overruling the same the defendant excepted, and presents this as ground for reversal. The information filed July 24, 1916, is in substance as follows:

"On the ——— day of May, 1916, one Donald Duncan did then and there unlawfully, willfully, knowingly, and wrongfully obstruct and damage a certain public road then and there duly and lawfully established, to wit, the section line highway running east and west between sections 16 and 21, in township 18, north of range 22, West Indian meridian, at a point just east of and near the point common to sections 16, 21, 17, and 20 in said township and range, by erecting and maintaining a fence across and upon said section line highway and public road, contrary to," etc.

The information is based on section 7, art. 6, c. 173, Session Laws 1915, which reads in part as follows:

"Any person or persons who shall willfully or knowingly obstruct or damage any public road * * * by fencing across or upon the right of way of the same * * * shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than five dollars nor more than two hundred dollars, or by imprisonment in the county jail for not exceeding six months, or by both such fine and imprisonment."

The information states the acts constituting the offense in ordinary and concise language and in such a manner as to enable a person of common understanding to know what is intended. It also states the particular circumstances of the offense charged, and is sufficient to charge the offense under the provisions of section 7, art. 6, c. 173, Laws 1915, above quoted.

[2] The contention advanced that the information is insufficient for the reason that it contains no allegation that said fences were not erected by the defendant in compliance with section 1, c. 61, Session Laws 1913, establishing grazing districts and permitting rough lands to be inclosed in fences under certain conditions, is untenable, for the reason that said provisions of law form no substantive part of the offense set out in section 7, art. 6, c. 173, Session Laws 1915, but constitute a matter of defense not necessary to be negatived in the information.

[3, 4] Defendant also filed what he styled a special plea in bar to the action, and alleged in said plea that he should not be required to answer or plead to the merits of the charge made against him, and should not be placed upon trial upon said charge for the reason that the fences erected by him upon and across the section line and public highway were lawfully constructed by virtue of section 1, c. 61, of the Session Laws of 1913, in that the lands embraced in the inclosure constituted two or more sections of land, two-thirds and more of which lands are unsuitable for cultivation and were being used for grazing purposes prior to and at the time of the filing of the said information; that said land is sandy, rough, and unbroken grazing land, and unfit for cultivation, and the defendant constructed the fences about and around said land prior to the commencement of this prosecution, and has permitted public roads to be run anywhere across said grazing district wherever designated by any legal authority; that the section lines were not at the time said fences were constructed nor since that time have been used or needed for public mail routes, and defendant has at all times maintained substantial gates which were easily opened and closed across said section line, and that said gates were erected and maintained long prior to the filing of the information in this cause, and were erected by virtue of the law above referred to; that defendant has more than 650 head of cattle in said pasture for grazing purposes, and is maintaining said grazing district in accordance with the laws of this state, and is ready and willing to erect and maintain swinging and automatic gates at any and all points designated by any lawful authority.

The defendant further stated: That, on the 8th day of November, 1916, the board of county commissioners of Ellis county established a grazing district of all of the territory embraced within the fences which he is

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alleged to have unlawfully erected, and further that there is pending in the district court of Ellis county an action in equity, seeking to enjoin the defendant from maintaining the fences and gates across the section line; that contempt proceedings were instituted against defendant, seeking to punish him for maintaining the fences across said section line, and that on the 7th day of October, 1916, said court refused to punish defendant for contempt, but gave defendant until November 17, 1916, to remove all fences and obstructions on and across said section line embraced within said alleged grazing district, provided the board of county commissioners of said Ellis county did not, in the meantime, establish a grazing district of said territory. That thereafter the said board as heretofore alleged did, on November 8, 1916, establish a grazing district of said territory, and that by virtue of said order of said board the fences and gates upon and across all of the section lines described in the information were lawful.

That the information in this cause was filed prior to any lawful action on behalf of the board of county commissioners of Ellis county, and should have been maintained. That on the 13th day of September, 1916, the prosecuting witnesses in this case, or some of them and others, did unlawfully remove, tear down, and open the gates and inclosures around certain section lines embraced within the said alleged grazing district. That on the 18th day of September, 1916, a majority of the board of county commissioners of Ellis county did find that the land embraced within the said grazing district was suitable for cultivation, and refused by their order to permit a grazing district to be established within the boundary as set forth herein. That thereafter, on November 8, 1916, said board of county commissioners, upon petition of the township board of the township in which said lands were located, did annul and set aside their order of September 18, 1916, and did establish a grazing district of said lands.

For which reasons defendant prays that the information be quashed and set aside, and that he be discharged from custody.

To this purported plea in bar the state filed a demurrer for the reason that the said plea did not state facts constituting a defense to the charge set forth in the information.

The court sustained the demurrer to the plea in bar, to which action the defendant excepted, and alleges that the court erred. This assignment of error is wholly without merit.

Under section 5800, Rev. Laws 1910, three kinds of pleas are authorized to an indictment or information, to wit: First, a plea of guilty; second, a plea of not guilty; third, a plea of former judgment of conviction or acquittal of the offense charged.

Section 5805 provides:

"The plea of not guilty puts in issue every material allegation in the indictment or information."

Section 5806 provides:

"All matters of fact tending to establish a defense other than specified in third subdivision of section 5800 may be given in evidence under a plea of not guilty."

The action of the court therefore in sustaining the demurrer to the special plea in bar was clearly correct. If as a matter of fact the defendant had erected the fences around a stock district established according to law, the evidence tending to establish that defense was permissible under the plea of not guilty. A special plea in bar was entirely unnecessary, and only tended to incumber the record.

[5] But as the defendant offered evidence to show that at the time of the trial the board of county commissioners of Ellis county had established a stock district out of the lands embraced within the fences alleged to have been unlawfully constructed across the public highways as charged in the information, attention will be paid at this time to the merits of this defense. There was no attempt or offer by the defendant to prove that the provisions of section 1, c. 61, Session Laws 1913, had been complied with by him prior to the erection of fences across the section line or prior to the commencement of this prosecution. All that he claims and asks to be considered as a valid defense to this action occurred subsequent to the building of the fences by him across the section lines and subsequent to the commencement of this prosecution. None of the matters pleaded as a defense existed at the time of the commencement of the prosecution; and, while the defendant may have thought that a stock district would and should be established out of the land embraced within the fences, and while it was undoubtedly his intention to permit the lawful authorities to designate public highways across said alleged stock district, yet nevertheless it was his duty to have said district designated for public highways before any fences were built by him across any section line highways.

It was clearly the intention of the Legislature by the enactment of chapter 61, Session Laws 1913, to permit the establishment of grazing districts of rough lands unsuitable for cultivation and to permit the erection and maintenance of fences across section lines only in cases where the owner or lessee of such grazing districts permits public roads to be run anywhere across said district designated by the road overseer, or the township board, county commissioners, or other officials legally authorized to designate public highways.

It was clearly not the intention of the Legislature to permit the owner or lessee of such lands upon his own initiative to fence up

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section line highways in this state without the permission of the lawful authorities for the establishment of highways across said district at other points, and for the erection and maintenance of gates in said fences at points where said highways intersect the same under the direction and supervision of the official authorized to establish and maintain public highways. The action of the county commissioners in subsequently designating the land herein inclosed as grazing district forms no valid defense to the defendant's action in unlawfully fencing the section line highways prior to the establishment of such grazing district.

The defense interposed therefore was not well founded in law, and evidence tending to establish the same was properly rejected by the trial court, and as no other defense was interposed, but defendant admitted the constructing and maintaining of fences across said section line as alleged in the information, his conviction was proper, and clearly sustained by the evidence, and is not contrary to law.

The judgment is affirmed.

DOYLE, P. J., and ARMSTRONG, J., concur.

(16 Okl. Cr. 683)

DUNCAN v. STATE. (No. A-2904.)

(Criminal Court of Appeals of Oklahoma. June 21, 1919.)

Appeal from County Court, Ellis County; S. A. Miller, Judge.

Donald Duncan was convicted of the offense of obstructing a public highway, and sentenced to pay a fine of $5 and the costs of the action, and he appeals. Affirmed.

C. B. Leedy, of Arnett, for plaintiff in error.
S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error, Donald Duncan, was convicted in the county court of Ellis county of the offense of obstructing a public highway, described in the information as follows:

"The section line highway running east and west between section 5 and 8, in township 18, north of range 22, West Indian meridian, in Ellis county, state of Oklahoma, at a point at and near the point where the half section line, running north and south across said sections crosses said section line highway," etc.

A trial was had before the court, and punishment assessed at a fine of $5 and the costs of the prosecution. From said judgment of conviction an appeal has been taken to this court.

The questions involved are identical with those raised in the appeal of this plaintiff in error in case No. 2884, 181 Pac. 736, this day decided adversely to the contentions of plaintiff in error.. For the reasons stated in that opinion, the judgment is affirmed.

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C. B. Leedy, of Arnett, for plaintiff in error.
S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error, Donald Duncan, was convicted in the county court of Ellis county of the offense of obstructing a public highway, described in the information as follows:

"The section line highway running east and west between sections 4 and 5 on the north and sections 8 and 9 on the south, in township 18, north of range 22 West Indian meridian in Ellis county, Oklahoma, at and near the point common to said sections 4, 5, 8, and 9," etc.

A trial was had before the court, and punishment assessed at a fine of $5 and the costs of the prosecution. From said judgment of conviction an appeal has been taken to this court.

The questions involved are identical with those raised in the appeal of this plaintiff in error in case No. 2884, 181 Pac. 736, this day decided adversely to the contentions of plaintiff in error. For the reasons stated in that opinion, the judgment is affirmed.

(56 Mont. 140)

HANSEN v. GOODRICH. (No. 4006.)

(Supreme Court of Montana. June 2, 1919.)

1. JUDGMENT ⟸479—COLLATERAL ATTACK—FORECLOSURE.

Where mortgage foreclosure proceedings were regular, court, having jurisdiction of cause of action and defendant appearing, ejectment to recover the land will not lie where based on collateral attack of foreclosure decree.

2. JUDGMENT ⟸150 — OPENING DEFAULT—FILING AMENDED COMPLAINT.

Default entered for failure to answer, complaint is set aside by filing of amended complaint.

3. PLEADING ⟸252(1) — DEMURRER—CONFESSION—AMENDMENT.

Filing an amended complaint after demurrer filed to original complaint confesses the demurrer.

4. PLEADING ⟸252(2)—AMENDMENT — EFFECT.

When a second amended complaint is served and filed, former pleadings become functus officio.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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5. JUDGMENT ⟸106(2)—DEFAULT—AMENDED COMPLAINT—TIME FOR ANSWER.

Under direct provisions of Rev. Codes, § 6537, defendant, to avoid default, must answer an amended complaint 20 days after filing and service.

Appeal from District Court, Blaine County; Frank N. Utter, Judge.

Ejectment by C. W. Hansen against G. H. Goodrich. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions to enter judgment for defendant.

I. W. Church and Fletcher Maddox, both of Great Falls, for appellant.

HOLLOWAY, J. This action in ejectment was brought to recover possession of land located in Blaine county, formerly in Chouteau county. It is alleged in the complaint that Sarah A. Hansen (née Cook) owned the land at the time of her death; that plaintiff, as one of her heirs at law, succeeded to an undivided half interest therein; that defendant, on the 5th day of March, 1905, wrongfully ousted Sarah A. Cook, and still wrongfully withholds possession from plaintiff and his cotenant. Defendant by answer denied the plaintiff's ownership or right to possession and any wrongful ouster, and as an affirmative defense set forth that Sarah A. Hansen, then Sarah A. Cook, the owner of the premises in question, mortgaged the same to defendant to secure an indebtedness; that she defaulted in payment of the mortgage debts, that defendant instituted an action to foreclose the mortgages; that such proceedings were had therein that a decree of foreclosure was duly given and made, an order of sale issued, and the property sold after due notice given; that defendant became the purchaser at the sale; that a certificate of sale was delivered to him; that the period of redemption expired; that the property was not redeemed; and that he took possession by virtue of such proceedings. The reply admits the execution and delivery of the notes and mortgages, the institution of the foreclosure suit, and the proceedings taken thereunder, but alleges that the district court was without jurisdiction of the subject-matter of the suit and of the person of Sarah A. Hansen, and was without jurisdiction to render the decree of foreclosure, and that the proceedings therein were and are null and void. The trial court, without indicating any infirmities in the proceedings in the foreclosure suit, held that the court in which that suit was prosecuted was without jurisdiction, and rendered judgment for plaintiff herein, from which defendant prosecuted this appeal.

The record discloses these facts: The foreclosure suit was instituted in the district court of Chouteau county in which county the land was situated; that personal service of summons was made upon Sarah A. Hansen on June 17, 1902; that on July 8th her default was entered; that on the same day an amended complaint was served and filed; that on July 22d Mrs. Hansen filed a demurrer to the amended complaint, and thereafter, on September 29th, secured from the court an order granting her until October 13th to answer; that on October 18th a second amended complaint was served and filed, and on November 10th the default of Mrs. Hansen for want of an appearance was entered; that on November 17th proof was adduced, and the decree of foreclosure duly given and made; that on November 25th an order of sale was issued; that the property was duly noticed for sale and sold to defendant Goodrich on December 22d; that a certificate of sale was delivered to the purchaser and duly recorded; and that thereafter, on March 6, 1905, a sheriff's deed was executed and delivered to Goodrich. The respondent has not appeared in this court, and we are not advised as to the defects which it was claimed in the trial court vitiated the decree of foreclosure.

Counsel for appellant suggest in their brief that the contention below was that, since Mrs. Hansen's demurrer to the first amended complaint was never disposed of by the court, she was not in default, and the court was not authorized to render the decree against her.

[1] The proceedings taken in the foreclosure suit appear to be regular. The court had jurisdiction of the subject-matter—the foreclosure of the mortgages upon lands located in the county where the suit was instituted—and jurisdiction of the person of Mrs. Hansen by reason of personal service of summons upon her and her general appearance in the action.

[2-4] The effect of filing the first amended complaint was to set aside the default which was entered on July 8th. 21 R. C. L. 589. The effect of filing the second amended complaint was to confess the demurrer to the first amended complaint. 31 Cyc. 468. When the second amended complaint was served and filed, the former pleadings became functus officio (Ben Kress Nursery Co. v. Oregon Nursery Co., 45 Mont. 494, 124 Pac. 475), and Mrs. Hansen was required to answer within 20 days, in the absence of any extension of the statutory time to plead.

[5] It is further suggested that the trial court was apparently influenced by language contained in the opinion of this court in Gettings v. Buchanan, 17 Mont. 581, 44 Pac. 77. In that case, however, the attack upon the judgment was direct, while in this case it is collateral. In that case the court did not hold that the answer to the original com-

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plaint served as an appearance to the amended complaint, but intimated that it might have had that effect but for the order secured granting time to plead to the amended complaint. The statute in force when the judgment was rendered in the Gettings Case was somewhat different from the statute which governed the proceedings in the foreclosure suit of Goodrich v. Hansen et al. Section 6537, Revised Codes, in force when the foreclosure proceedings were pending, provides:

"If the complaint is amended a copy of the amendments must be filed, or the court may in its discretion require the complaint as amended to be filed and a copy of the amendments, or amended complaint must be served upon defendants affected thereby. The defendant must answer the amendment or complaint as amended within twenty days after service thereof or such other time as the court may direct and judgment by default may be entered upon failure to answer as in other cases."

This language is too plain to admit of the application of rules of construction. When the second amended complaint was served upon Mrs. Hansen and filed in court, she was required to answer it within 20 days, and failing to do so, her default was properly entered.

We fail to discover any defects in the foreclosure proceedings which would subject the decree to collateral attack. Upon the undisputed facts disclosed by the record the court should have found for defendant.

The judgment is reversed, and the cause is remanded to the district court, with directions to enter judgment for defendant.

Reversed and remanded.

BRANTLY, C. J., and COOPER, J., concur.

(92 Or. 581)

HERR v. McALLISTER et al.

(Supreme Court of Oregon. June 17, 1919.)

1. SPECIFIC PERFORMANCE ⟸121(1)—PAROL CONTRACT—SATISFACTORY PROOF.

Where the contract rests wholly in parol and the alleged promisor is dead, courts should demand clear and satisfactory proof of the terms of the agreement and its strict performance by the promisee.

2. WILLS ⟸58(2)—CONTRACT BY TESTATOR TO CONVEY IN CONSIDERATION OF SERVICES—EVIDENCE.

Evidence *held* insufficient to establish an oral contract by which testator promised to convey property to plaintiff in consideration of services in keeping house for him until his death; it appearing that she was fully compensated for her services.

In Banc.

Appeal from Circuit Court, Union County; J. W. Knowles, Judge.

Suit by Minnie Herr against Reece McAllister and others. From decree rendered, plaintiff appeals. Affirmed.

The plaintiff alleges that the defendants are the heirs and devisees under the last will of D. A. McAllister, deceased, which was executed on January 11, 1913, by which he bequeathed all of his property to the defendants, except lot 16 in block 2 of Grandy's Second addition to La Grande, that D. A. McAllister died in April, 1918, and that under the terms of his will his son, Reece McAllister, one of the defendants, was appointed executor of the estate. The complaint avers that during the year 1914, and for a long time prior thereto, the testator was the owner of the above-described real property in La Grande; that in November of that year he was living in the house of the said premises, and the plaintiff "was taking care of the house and home of said deceased, and had been so engaged for about one year"; that about that time the deceased "entered into an agreement with the plaintiff, and in consideration of what she had previously done for said testator and that she would look after him and care for him and make him a home thereafter during the remainder of his life, he would and did give her, the plaintiff herein, the said described premises and the house situated thereon, together with the furnishings therein, for her care, labor, and attention in making him a home, which she had already done and which she was to continue to do"; that plaintiff accepted his proposition and agreed to make a home and care for him and keep house for him until his death.

It is further alleged that the deceased was to make certain improvements in and around the house, pay the taxes, keep the property in good repair during his life, and furnish provisions for the plaintiff and her two children, as a part of the consideration of the agreement between them; that, pursuant to the alleged contract, the plaintiff entered into possession of the premises and assumed control and has remained in possession of the same continuously, and was in possession at the time of the death of D. A. McAllister; that she made a home for him and in all respects kept and performed her part of the contract; that at the time the alleged agreement was made it was understood that the deceased was to make out the proper papers to give her title to the premises; and that about June 7, 1915, he did draw a codicil to his will to that effect, but the said codicil does not appear to be attached to the will and cannot be found.

It is alleged that the agreement has been

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carried out by both parties, except that the deceased failed and neglected to attach said codicil so the same can be found, or, if he so attached it, the same has disappeared or has failed to come within the hands of the defendants in this cause; that the defendants have refused to give, deed, or allow plaintiff the property in accord with the alleged agreement; and that she was led to believe, and did believe, that the proper papers had been executed by D. A. McAllister, and was not aware that they had not been so executed until after his death.

The plaintiff prays that the alleged contract be specifically performed, and that she be decreed to be the owner of said lot in said block in the city of La Grande, with the house thereon and the furnishings therein.

The defendants specifically deny each and every allegation of the complaint, and allege "that the plaintiff was hired by D. A. McAllister as housekeeper, and was fully paid the agreed and reasonable compensation for said service, by said D. A. McAllister, in money, board, provisions, clothing, lodging, and maintenance." The plaintiff denies the new matter in the answer.

After a trial the court made findings of fact to the effect that the defendants are the heirs at law of D. A. McAllister, deceased; that during his life the latter was the owner of the lot in question; that there was never any agreement "to convey said property to the plaintiff or to give the same to her, although the said D. A. McAllister at one time intended to give said real property to the plaintiff, but he later changed his mind and decided not to give said property to her." The court further found:

"The plaintiff received a large share of her board and that of her children, and the house rent for same, from Mr. McAllister in consideration of her services, and was fully and amply repaid for her services by the support which her children and herself received at the hands of Mr. McAllister. * * * That plaintiff did not enter into possession of said premises, and there was no change in possession of said premises. The plaintiff came to said premises as a housekeeper, and there was no exclusive possession of said premises by the plaintiff."

Based upon these findings and the conclusions of law thereon, the trial court rendered a decree that the suit be dismissed, and that neither party recover costs, from which the plaintiff appeals, claiming that the court committed error in its findings of fact and that she should have a decree as prayed for in her complaint.

R. J. Kitchen, of La Grande, for appellant.
R. J. Green, of La Grande, for respondents.

JOHNS, J. (after stating the facts as above). The deceased, D. A. McAllister, familiarly known as "Bud," was an old, prominent resident of Union county, and the owner of considerable property exclusive of the town lot in controversy. For some time prior to his death, with his wife he had resided upon the lot, and it was their home.

On account of his wife's sickness, the plaintiff was employed by them to do the work around the house and to take care of Mrs. McAllister. To regain her health, D. A. McAllister took his wife to California, where she died, and was brought back to La Grande for burial.

The plaintiff had three boys, two of whom were twins about the age of 10 years, and the other about 23 years of age. After the death of the testator's wife, the plaintiff with her minor children continued to live at the McAllister home and performed the same kind of household duties that she did prior to the death of Mrs. McAllister.

It appears from the testimony that the home was of the probable value of about $3,000, and that it had a rental value of about $25 per month. The plaintiff admits that for the period of about three months after Mrs. McAllister's death there was no specific agreement between her and D. A. McAllister concerning the home place, but contends that in November, 1914, the oral agreement was made by which "he would and did give her" the home in consideration of what she had done and what "she was to continue to do" in taking care of and keeping house for him until his death, and that she accepted the proposition and performed her part of the agreement, and that in compliance therewith "Uncle Bud" paid the water rent and light bills and the taxes on the home property which were assessed in his name, that he failed and neglected to give her the property during his lifetime, and that the defendants refuse to carry out the agreement. It appears that the plaintiff and her two minor children had a home, and that "Uncle Bud" purchased and paid for at least some of the provisions which they consumed, and made some improvements upon the property. For this he received nothing but his board and some little personal care and attention from the plaintiff.

There is no claim that any deed was ever executed or that there was any written contract. The deceased executed his last will on January 11, 1915, in and by which he devised all his property to the defendants, "except lot 16 in block 2 in Grandy's Second addition to La Grande, Oregon, which property is not included in this will."

There is testimony tending to show that on June 7, 1915, Attorney J. P. Rusk, at the request of the deceased, prepared a codicil to the will in and by which the property in question would have been devised to the plaintiff. The original will consisted of two typewritten sheets of paper, the first of which was signed by the deceased, and the second by the wit-

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nesses. The same was in the bank across the street from the attorney's office, and Mr. Rusk testifies that he delivered the codicil to Mr. McAllister and advised him that to make it effective it would be necessary to attach it to and make it a part of the will itself, but there is nothing to show or indicate that the codicil was ever attached to or made a part of the original will, or what was ever done with the codicil after it was delivered to Mr. McAllister.

While it may be true that at one time Mr. McAllister did intend that the plaintiff should have the property in question at his death, as evidenced by the preparation of the codicil, the fact remains that there is no evidence that such intention, if any, was ever carried into execution, or that the codicil was ever attached to or became a part of the original will.

The plaintiff claimed and testified that at the time of the execution of the alleged oral agreement she entered into and took possession of the property, but she does not say how or in what manner she took possession, and there is no testimony of any eviction or ouster, that there was ever any change of possession, that she had any other possession after the alleged oral agreement than she had before, that the deceased ever intended to surrender or part with his property, or that he conveyed or ever did intend to convey or part with the title to the property during his lifetime. On this question the facts are very similar to those in Brown v. Lord, 7 Or. 302, 314, where this court said:

"He, to all appearances, exercised as much authority and control after as he did before the alleged contract. He maintained and supported himself and his wife out of his own means, and no one could detect any change in the condition of his affairs which would lead him to suppose that the old gentleman had ceased to be the owner of the house in which he had lived so long. We think the possession of the premises by the respondent under the alleged parol agreement is not sufficient to take this case out of the operation of the statute."

[1] The only evidence of the parol contract is the testimony of the plaintiff as to an alleged conversation which she claims to have had with the deceased. The law on this class of testimony is well stated by Mr. Justice McBride in the opinion in Hawkins v. Doe, 60 Or. 437, 441, 119 Pac. 754, 756 (Ann. Cas. 1914A, 765):

"Where the contract rests wholly in parol, and the alleged promisor is dead, courts should demand clear and satisfactory proof of the terms of the agreement, and its strict performance by the promisee. Such cases furnish abundant opportunity for the perpetration of those frauds which it was the object of the statute to prevent by requiring the contract to be reduced to writing."

On page 446 of 60 Or., page 757 of 119 Pac. (Ann. Cas. 1914A, 765):

"Our statute requires the judge presiding at jury trials to instruct them that evidence of the oral admission of a party should be viewed with caution (section 868, L. O. L.), and, if this is the rule as to admissions of parties living and able to explain their language and meaning, with how much greater force should it apply when the evidence is directed to the alleged declarations of one whose lips are sealed in death, and to establish a contract which the law requires to be in writing."

[2] There is a mass of testimony as to the value of the services which were rendered by the plaintiff to the deceased, but when we take into consideration the fact that the plaintiff and her children had a home, that the deceased paid the taxes, the light and water bills, bought at least some of the provisions for all of them, and received nothing but his board and ordinary care and attention, we agree with the trial court that the plaintiff was fully compensated for her services. As a matter of fact we are convinced from the testimony that it was the understanding and agreement between them that one claim was to offset the other, and that there never was any contract by which the deceased promised or agreed to convey the home property to the plaintiff.

The legal contentions of plaintiff's counsel are sound, but they are not sustained by the evidence.

The decree is affirmed, without costs to either party.

(92 Or. 600)

HAGER v. CLATSOP COUNTY et al.

(Supreme Court of Oregon. June 24, 1919.)

TAXATION ⟸733 — DELINQUENT TAXES — PURCHASE AND SALE BY COUNTY—TITLE OF PURCHASER—TAXES SATISFIED.

Under the statutory scheme for collection of delinquent taxes as embodied in L. O. L. §§ 3713, 3717, 3718, as amended by Laws 1913, c. 184, purchaser at sale by county of land it had bought for taxes of one year takes it discharged of all subsequent taxes, certificates of delinquency for which had been issued to the county, and subject only to taxes of the current year; that is, the year in which the sale is made.

Department 1.

Appeal from Circuit Court, Clatsop County; J. A. Eakin, Judge.

Suit by Mary Ward Hager, administratrix of B. L. Ward, deceased, substituted for B. L. Ward, against Clatsop County and another. Decree for plaintiff, and defendants appeal. Affirmed.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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In effect, this is a suit to quiet the plaintiff's title in certain lands in Clatsop county. Without quoting the pleadings in extenso, it is sufficient to say that the state, county, and general municipal taxes were duly assessed against these lands for the year 1909. No part of the taxes having been paid, certificates of delinquency were issued to Clatsop county on December 3, 1914. On June 5, 1915, the county instituted proceedings in the circuit court to foreclose the certificates, which resulted in a final decree, of date September 7, 1915, directing a sale of the lands for the satisfaction of the delinquency evidenced by the certificates. On October 26, 1915, at a sale under execution issued on the decree the land was sold to Clatsop county. On July 18, 1916, in pursuance of the statute, the county court directed the sheriff to publish notice that he would sell the lands thus acquired by the county, on October 19, 1916, to the highest bidder for cash at the time and place named in the notice. As a result, the lands were sold to B. L. Ward, the original plaintiff herein, and a deed was executed by the sheriff as of the date of sale and delivered to Ward. Taxes had been levied against the land for each of the years subsequent to 1909, up to and inclusive of the year 1915.

As no one else applied for a certificate of delinquency, such certificates were issued to the county court for the year 1910, and on January 16, 1916, the county instituted a suit to foreclose them and obtained a decree of foreclosure on July 8, 1916. An execution issued upon the decree last named, and at this point in the history of the transactions the plaintiff began this suit to restrain the sale under the last decree and to quiet his title to the property.

The contention of the plaintiff is that the sale of the land to him by the county, followed by its conveyance, automatically satisfied and discharged all of the taxes against the premises, except those current at the date of sale. On the other hand, the contention of the county is that the only tax affected was that of 1909. The court rendered a decree in favor of the plaintiff according to his prayer, and the defendant county and its sheriff have appealed.

G. C. Fulton, of Astoria (Edw. C. Judd, Dist. Atty., and G. C. & A. C. Fulton, all of Astoria, on the briefs), for appellants.

J. Q. A. Bowlby, of Astoria, for respondent.

BURNETT, J. (after stating the facts as above). According to the statutory scheme for the collection of delinquent taxes, as embodied in chapter 8, title 28, L. O. L., and the amendment thereto as set forth in chapter 184, Laws 1913, at the expiration of a certain time after taxes become delinquent, on the application of any individual, it shall be the duty of the sheriff to issue certificates of delinquency against the property containing certain details respecting the amount of tax and interest due and the name of the owner to whom the same is assessed, and other particulars, and this certificate constitutes a lien upon the realty mentioned therein. At any time after the expiration of three years from the first date of delinquency of any tax included in such certificate, the holder may institute proceedings for the foreclosure of the same. It is the duty of a private person holding a certificate of the sort to pay all the taxes which have been assessed against the property both before and after its issuance, failing in which he will forfeit his certificate to any subsequent certificate holder, so that at the suit of a private person the decree of foreclosure will include all taxes of whatsoever kind which he has paid. If no one applies for certificates of delinquency, the sheriff is required to issue such certificates from time to time to the county, but unlike the duty to pay all taxes, which is enjoined upon a private person, there is no obligation on the part of the county to pay any delinquent taxes. The county also may bring suit to foreclose the delinquency certificates issued to it by the sheriff, and, in the absence of other bidders at a sale on execution issued upon such decree of foreclosure, the county automatically becomes the bidder for the whole of the tract for the face of the decree, and the property is struck off to it.

Section 3713, L. O. L., reads thus:

"No claims shall ever be allowed against the county in favor of any municipality, school district, road district, or other taxing district for taxes levied on property acquired by the county by tax deed under the provisions of this act, but all taxes shall at the time of deeding said property be thereby canceled: Provided, that the proceeds of any sale of any property acquired by the county by tax deed shall be justly apportioned to the various funds existing at the date of the sale in the territory in which such property is located, according to the tax levies of the year last in process of collection."

Under section 3717 it is required that in pursuance of an order of the county court there shall be held annually a sale of lands—

"theretofore bid in for taxes by such county or any public corporation therein, and to which such county or any such public corporation shall have acquired title, as provided by the laws heretofore in force or as provided in this act."

These words appear in the act of 1907. They are also employed in the amendatory act of 1913. Manifestly the procedure there outlined applies, not only to lands which the county bought in at sales held before the act of 1907, but as well to lands acquired since then. Having in mind, then, that we are dealing with lands to which the county acquired title by purchase at its own foreclo-

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sure sale, we look to the statute for the effect of a sale by the county of its own lands thus acquired. It is said in section 3717, L. O. L., as amended by chapter 184, Laws 1913:

"No parcel of land shall be sold more than once, and the sale of any parcel shall be construed to pass all of the right, title and interest of the county or other municipality to which the same has been sold by virtue of the taxes for which the same was sold, and any subsequent taxes advanced by such county or municipal corporation, and also all delinquent taxes, excepting the taxes for the current year, and the lien of subsequent tax certificates to individuals."

Remembering the conditions disclosed by the record before us, we note that the county had bought in the land for the taxes of 1909. There had been issued to it from time to time annually certificates of delinquency for the taxes of succeeding years. Applying to this situation the provisions of the section last above quoted, the sale to the plaintiff passed all the right, title, and interest of the county which it had by virtue of the taxes for 1909. More than that, it also passed the interest of the county by virtue of all the subsequent taxes, which interest was represented by the subsequent certificates of delinquency. Still further, it passed the interest of the county as to all delinquent taxes, without other exception than the taxes for the current year, which must mean the taxes for 1916, that being the year in which the sale was made to the plaintiff, and the further exception of any subsequent delinquent tax certificate issued to some individual. It was possible that for any of the years subsequent to 1909 any individual might have applied for a certificate of delinquency on the realty involved. Upon him would have rested the obligation of paying all manner of taxes under the provision of section 3704, L. O. L. as amended by the act of 1913. But no such certificate appears in the record, and hence the only exception in derogation of the title passed to the purchaser by the sale by the county of the lands which it had obtained at its own foreclosure sale is the tax current for the year in which the sale was made to the plaintiff.

The same effect is reiterated in section 3718, L. O. L., as amended, where it is said of deeds given to purchasers of land from the county:

"Such deeds shall vest in the purchasers title in fee thereto, and such title shall be superior to any lien, claim or charge whatever against such lands, except the lien of tax certificate of delinquency issued to an individual, subsequent to that for which the land was sold, and the taxes for the current year."

Referring again to the language of section 3717, we note that "no parcel of land shall be sold more than once." If the contention of the county is to prevail, it could sell its land as many times as it has certificates of sale, and the purchaser could not be certain whether he would acquire title or not. If the county would obtain money enough to cover the taxes for all the years of delinquency, it should in its order for sale under section 3717 fix an upset price at which the bidding must be started, and which is equal to the aggregate of all its demands. It seems not to have done so in the present instance, and hence the title passed to the plaintiff at the price which he offered. It is manifest, also, that the sale by the county of lands which it had acquired at its own foreclosure sale must carry the full title, because it is provided in section 3713, already quoted, that the proceeds of the sale of such property shall be apportioned to the different funds existing at the date of sale, according to the tax levies of the year last in process of collection. In other words, the different funds will partake in the proceeds of the sale pro rata, not according to the ratio existing at the time the certificate of delinquency was issued or the sale made to the county, but according to the latest tax levy in process of collection.

Considering, therefore, that there can be but one sale of land bid in by the county, that it passes all title of the county which it holds, not only by virtue of the sale to it, but by virtue of all certificates of delinquency issued to it, and that it cancels all taxes at the time the deed is issued, with the exceptions noted, it is obvious that the plaintiff took title to the land to the exclusion of all tax claims whatsoever, except those current at the date of his deed.

The decree of the circuit court is affirmed.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

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(92 Or. 378)

KIRCHOFF v. BERNSTEIN et al.

(Supreme Court of Oregon. May 27, 1919.)

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1. ATTORNEY AND CLIENT ⟸123(1) — SPECIAL TRUST—FAIR DEALING.

The law requires that the conduct of an attorney, when dealing with his client, shall be characterized by fairness, honesty, and good faith.

2. ATTORNEY AND CLIENT ⟸129(2)—DEALINGS—BURDEN OF PROOF.

When a client challenges the fairness of a contract made with his attorney, the attorney has the burden of showing, not only that he used no undue influence, but also that he gave to his client all the information and advice which it would have been his duty to give, if he himself had not been interested, and that the transaction was as beneficial to the client as if the latter had dealt with a stranger.

3. ATTORNEY AND CLIENT ⟸143 — CONTRACTS FOR COMPENSATION.

A client is ordinarily not entitled to relief from an agreement concerning compensation to be paid his attorney, unless he has suffered injury through an abuse of confidence on the part of the attorney.

4. EXECUTORS AND ADMINISTRATORS ⟸111(6)—ATTORNEY'S FEES—AMOUNT.

An attorney's fee of $3,500, allowed by the county court for services rendered to executors of an estate worth $98,886, *held* reasonable.

5. ATTORNEY AND CLIENT ⟸127—ACCOUNTING—EVIDENCE.

In an action for an accounting, by the administrator of a deceased beneficiary under another's will against attorneys who represented such beneficiary in procuring his share under the will, evidence *held* to show that defendants, in securing a compromise of a bona fide contest of the will, acted in good faith and in accordance with instructions from the beneficiary.

6. ATTORNEY AND CLIENT ⟸127—ACCOUNTING—EVIDENCE.

In an action for an accounting, by an administrator of the estate of a beneficiary under another's will against attorneys who had represented such beneficiary in securing his share under the will, evidence *held* to show that the beneficiary was not deceived about defendants acting as attorneys for the executors of the will, as well as for such beneficiary.

7. ATTORNEY AND CLIENT ⟸141—VALUE OF SERVICES—SERVICES TO BENEFICIARY OF ESTATE.

Where attorneys for a foreign beneficiary kept him informed of the proceedings in the estate, and appeared in and settled a bona fide contest of the will, and forwarded him his share, amounting to over $50,000, in an action by the beneficiary's administrator against such attorneys for an accounting, the contention that valuable services were not performed by defendants for the beneficiary individually, although they were also attorneys for the estate's executors, cannot be sustained, and for such services a fee of $3,500, which was approved by the beneficiary, was reasonable.

Bennett, J., dissenting.

In Banc.

Appeal from Circuit Court, Multnomah County; George R. Bagley, Judge.

Suit by Fritz Kirchoff, as administrator of Samuel Kunkel, deceased, against Alexander Bernstein and another. Judgment for plaintiff, and defendants appeal. Reversed and dismissed.

Daniel Kunkel died on January 17, 1914. He left an estate consisting of real and personal property of the aggregate value of $98,886.08. The real property embraced three lots located in Portland. Two of these lots were worth $25,000, and the third lot was valued at $4,500. The personal property included cash in bank amounting to $41,265.28, a secured promissory note which was worth $27,500, its face value, and other items amounting to $620.80.

Daniel Kunkel executed a will on December 2, 1912, by the terms of which he named Edward Schiller and Peter Wagner as executors. He devised one-third of his real property to his wife, Anna Kunkel, and the remainder of his estate he gave to his brother, Samuel Kunkel, who resided in Germany. On January 21, 1914, a petition was filed in the county court of Multnomah county for the probate of the will and on January 24 the court admitted it to probate. The defendants Alexander Bernstein and D. Solis Cohen, copartners as Bernstein & Cohen, became the attorneys for the executors.

Alexander Bernstein had for more than 20 years acted as attorney for Daniel Kunkel. During this period Bernstein drew several wills for him, including the one which was admitted to probate. When Bernstein prepared the will of December 2, Daniel Kunkel gave him the address of his brother and requested Bernstein, in case of his death, to communicate to his brother, Samuel Kunkel, the fact of his death and the fact that the will named Samuel Kunkel as a beneficiary. In compliance with the request of Daniel Kunkel, the defendants, on January 17, 1914, addressed a letter to Samuel Kunkel, informing him of the death of his brother and that he was named in the will as one of the beneficiaries. The letter explained that the defendants were conveying this information in conformity with a request made by Daniel Kunkel at the time of the execution of the will. Inclosed with the letter was an instrument which the defendants had prepared for the purpose of enabling Samuel Kunkel to appoint Alexander Bernstein as his attorney in fact. After referring to this instrument, the defendants, in their letter, requested Samuel Kunkel to execute the power of

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attorney and to secure the acknowledgment of the nearest American consul if he desired Alexander Bernstein to act as his attorney in fact. Under date of February 5, 1914, Samuel Kunkel acknowledged receipt of the letter of January 17, and a few days afterwards he forwarded the power of attorney to the defendants, who received it on or about March 3.

On August 5, 1914, Anna Kunkel commenced a contest against the will. Negotiations for a compromise of the contest resulted in a settlement, under the terms of which Anna Kunkel received all the real property freed from incumbrances and all claims whatsoever and the sum of $1,500 for her attorneys, and the remainder of the estate, less taxes and expenses of administration, became the property of Samuel Kunkel.

The contest having been disposed of, the county court, on November 18, 1914, approved the final account of the executors, including an item of $3,500 allowed as compensation for services rendered to the executors by their attorneys, the defendants. After paying all the claims against the estate, taxes, and the expense of administration, there remained for Samuel Kunkel, as his share of the estate, the sum of $27,589.02 in cash and also a secured promissory note for $27,500; and hence the aggregate value of his portion of the estate then remaining was $55,089.02, plus whatever interest may have been due on the note. Besides this aggregate amount of $55,089.02 distributed at the close of the administration of the estate, the sum of $1,000 had been sent to Samuel Kunkel on May 7, and consequently his portion of the estate amounted to $56,089.02.

When Anna Kunkel commenced the proceeding to contest the will, Frank C. Hesse, an attorney who had studied in Germany and possessed a thorough and accurate knowledge of the German language, was retained to assist the defendants. On November 19, 1914, the defendants wrote to Samuel Kunkel, telling him that the final account of the executors had been approved, and that Alexander Bernstein had received from the executors for Samuel Kunkel the sum of $27,589.02 in cash. This letter also informed Samuel Kunkel that "for the professional services of Messrs. Bernstein & Cohen, which have been rendered for you to date," the defendants charged $3,500, and that "for Mr. Hesse's services" Alexander Bernstein had paid $1,000, leaving $20,089.02 in the hands of Alexander Bernstein, after deducting the further sum of $3,000 which the defendants remitted by means of a draft accompanying this letter. In explanation of the fact that only $3,000 was at this time remitted, it is proper to say that in response to a letter written by the defendants on October 1, asking Samuel Kunkel to say "in what manner and how" he wished his money sent to him, the latter, by a letter dated October 23, directed Bernstein to send him "from $2,000 to $3,000 the same way as the first $1,000, and the rest not until after termination of the war." However, Samuel Kunkel subsequently changed his instructions, and under date of November 26 wrote to the defendant as follows:

"Regarding the cash money, I am very much tormented by the children, and therefore request you, after deduction of the advance and charges of every nature, and after you have deducted for yourself the further sum of $1,000 for a Christmas present, to send, in the same manner as the $1,000 draft theretofore remitted to me, in May, everything."

The directions concerning remittances were again altered by a letter dated December 14, and the defendants were ordered to remit in small amounts and at intervals.

Samuel Kunkel died on July 12, 1915. In September, 1916, Fritz Kirchoff, who was at that time the consul in charge of the German consulate in Portland, Or., was appointed administrator of the estate of Samuel Kunkel, deceased; and afterwards, on January 27, 1917, Fritz Kirchoff, as such administrator, brought this suit against the defendants Alexander Bernstein and D. Solis Cohen for an accounting.

The complaint is drawn upon the theory that the legal services performed for the benefit of the executors of the estate were not reasonably worth more than $1,500, and that therefore, for the reasons specified in the complaint, the defendants should be required to pay back $7,500. The complaint avers that, with the intent to take a corrupt advantage of Samuel Kunkel and for the purpose of placing himself in a position to charge and to collect excessive fees, the defendants (a) represented to Samuel Kunkel that it was necessary and proper to employ them and to appoint Alexander Bernstein as his attorney in fact and solicited him to do so; (b) advised him "to have no communication with the resident American consul in Germany" concerning the estate; and (c) concealed from him, "so long as they were able, the amount of said estate, and understated the amount" of the estate. It is also averred that, after having learned of the death of his brother Daniel, Samuel Kunkel, who was a citizen and inhabitant of the empire of Germany, communicated with the German consulate in Portland, Or., "for advice and for the protection of his interests"; that Samuel Kunkel was advised by the German consulate "that it would be wise not to intrust the representation of his interests in the matter of said estate to the defendants herein, whose duties and interests, as attorneys for the executors and in the matter of attorney's fees to be allowed for the transaction of the

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estate business for the executors, might conflict with the duties of the said defendants in the representation of the interests of the said Samuel Kunkel"; that Samuel Kunkel wrote to the defendants, telling them of the advice given him by the consulate; that the defendants, corruptly intending to take advantage of Samuel Kunkel and for the purpose of protecting their own rather than his interests, wrote to Samuel Kunkel and "falsely represented to him that the object of the German consulate in giving said advice was to get charge of the said business in order to make for itself fees"; that Samuel Kunkel believed the representations of the defendants, left the defendants in charge of his business and interests in connection with the estate, and "took no other or further counsel in relation thereto."

The complaint recites that Anna Kunkel began the contest proceeding on August 5, 1914, and it is then alleged that the defendants immediately began urging a compromise by (a) falsely advising Samuel Kunkel that, even if Anna Kunkel lost the contest, she would, during her lifetime, as the widow of Daniel Kunkel, be entitled to one-half of the income from the two-thirds interest in the real property devised to Samuel Kunkel; (b) falsely advising him that the widow would be entitled to an allowance of $250 per month "so long as the estate should remain unsettled"; and (c) exaggerating, in divers ways, the dangers and difficulties of the will contest, "whereas, in truth and in fact, the said defendants well knew that the said Daniel Kunkel was of sound and disposing mind and memory at the time he had made the said will, and that he had not acted in any wise under undue influence of the said Samuel Kunkel, or of any other person, and that the said contest was sham and pretended, and that by said representations, and not otherwise, the said Samuel Kunkel was induced and consented to a compromise of the said litigation. * * *"

The complaint charges that $3,500 was an unreasonable fee for the services rendered by the defendants to the executors, and in support of this charge the plaintiff attacks the compromise, claiming that the portion of the estate awarded to Anna Kunkel should have borne a part of the taxes and expenses of administration, and criticises the defendants for having consented to a compromise which provided for the payment of all the taxes and expenses of administration out of funds in the hands of the executors. In further support of his attack upon the fee allowed by the county court for legal services performed for the executors, the plaintiff says that there was a large amount of cash in bank, only a few claims of creditors, no proceedings for the sale of real property, and no complications, and that the professional services rendered by the defendants were brief and simple in character, and that $1,500 would have been a liberal allowance for those services.

The complaint assails the $3,500 fee which the defendants charged and retained out of Samuel Kunkel's share of the estate by alleging: (a) That defendants did not furnish Samuel Kunkel with a copy of the final account, or of any of the accounts filed by the executors during the administration of the estate; (b) that the defendants responded to inquiries of Samuel Kunkel by furnishing him with "indefinite and uncertain statements in general terms as to the condition, amount, and value of the properties of said estate"; (c) that the defendants concealed from Samuel Kunkel and never communicated to him the fact that they had received $3,500 for the services performed by them for the executors; and (d) that Samuel Kunkel was "very aged," and was broken in mind and health, and that the defendants, in their correspondence with Samuel Kunkel, flattered and cajoled him, and "misadvised him, in order to bring about such proceedings as would be most to their own advantage"; and that thus the defendants secured the acquiescence of Samuel Kunkel in the deduction of $3,500 from the moneys which the defendants had received from the executors as Samuel Kunkel's share of the estate.

Besides denials of the accusatory allegations found in the complaint, the answer contains affirmative matter, avowing the good faith of the defendants, proclaiming their honesty of purpose, asserting their loyalty to the interests of Samuel Kunkel, and asseverating that the fees charged and collected by them were fair, reasonable, and just. All the communications between the defendants and Samuel Kunkel were in writing, and, for the purpose of explaining the charges made against the defendants, much of this correspondence is pleaded in and made a part of the answer.

The reply reinforces the complaint with denials, affirmative averments, and a recital of considerable of the correspondence between defendants and Samuel Kunkel.

The decree, from which the defendants appealed, declares that the plaintiff is entitled to recover $3,500, on the theory that the $3,500 retained out of Samuel Kunkel's share of the estate was kept by the defendants without making a full disclosure to him, and that the $3,500 allowance made by the probate court was intended to be and was in full settlement of all the services rendered for the executors and for Samuel Kunkel individually. There was no cross-appeal by the plaintiff, and hence it may be inferred that he was satisfied with the decree of the circuit court.

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Alexander Bernstein and Martin L. Pipes, both of Portland (Martin L. Pipes, John M. Pipes, and George A. Pipes, all of Portland, on the brief), for appellants.

John McCourt and A. L. Veazie, both of Portland (Veazie, McCourt & Veazie, of Portland, on the brief), for respondent.

HARRIS, J. (after stating the facts as above). [1-3] The rules which define the duties of an attorney when dealing with his client are well established. The relation between an attorney and client has always been treated as one of special trust and confidence, and for that reason the law requires that the conduct of an attorney, when dealing with his client, shall be characterized by fairness, honesty, and good faith. Indeed, so strict is the injunction not to take advantage of the client that, when a client challenges the fairness of a contract made with his attorney, the latter has the burden of showing, not only that he used no undue influence, but also that he gave to his client all the information and advice which it would have been his duty to give, if he himself had not been interested, and that the transaction was as beneficial to the client as it would have been if the latter had dealt with a stranger. The attorney, however, has a right to contract with his client for his compensation, and while courts will closely scrutinize a contract which a client claims to have been brought about by fraud or by undue advantage, nevertheless a contract between an attorney and client will be upheld when it appears to be fair and honest. Stated in broad terms, the client ordinarily is not entitled to relief from an agreement concerning compensation to be paid to his attorney, unless he has suffered injury through an abuse of confidence on the part of the attorney. Hamilton v. Holmes, 48 Or. 453, 459, 87 Pac. 154; Phipps v. Willis, 53 Or. 190, 194, 96 Pac. 866, 99 Pac. 985, 18 Ann. Cas. 119; 6 C. J. 686.

It must be remembered, however, that the value of services performed by an attorney cannot always be measured with the same degree of exactitude as can a bushel of wheat or a ton of coal. Education, experience, skill, judgment, and knowledge are important factors. Nor can a just appraisal be placed upon the worth of professional services, if the time actually employed in the rendition of those services is taken as the sole gauge. An experienced and trained attorney might accomplish in a very short time what another could not do in a much longer time, or perchance might not be able to do at all. The responsibility involved is always a considerable item and ordinarily the greater the amount involved the greater the responsibility.

Attention will now be directed to the evidence for the purpose of determining whether the conduct of the defendants measured up to or fell short of the high standard fixed for attorneys when dealing with their clients. Letters written by the defendants and by Samuel Kunkel and by others form a large part of the record, and it will, of course, be impracticable to recite more than occasional excerpts from such correspondence, or to record more than some of the most important facts disclosed by the testimony of witnesses.

The fee paid to Frank C. Hesse and the Christmas present given to the defendants may first be eliminated from the discussion. On August 5, 1914, the defendants wrote a lengthy letter to Samuel Kunkel, informing him that Anna Kunkel had commenced a proceeding to contest the will. This letter advised Samuel Kunkel that the defendants had "retained the professional service" of Frank C. Hesse, an attorney and a German scholar, "who should, on account of his complete knowledge of the German language, be of great service to you." The letter explains that Mr. Hesse "was born at Leipzig, studied at Leipzig, Hallee in Paris, and because of correspondence between you and your brother would be drawn in question, his services as interpreter and expert will be indispensable, likewise would his services as attorney be of great assistance." Under date of August 28, Samuel Kunkel replied, saying, "Regarding the lawsuit, it is very good that you took Mr. Hesse to your assistance;" and again on September 15 Samuel Kunkel wrote the defendants, saying, "I also approve of the employment of Mr. Hesse, whom you took as an assistant." On November 19 the defendants wrote to Samuel Kunkel, advising him that "for Mr. Hesse's services I disbursed the sum of $1,000, for which I hold receipt." Samuel Kunkel acknowledged receipt of the letter which the defendants had written on November 19, and while he made no specific mention of the disbursement to Hesse, he must be deemed to have approved it, for the reason that he stated, "With your balance I am completely agreed and satisfied." On November 26 Samuel Kunkel addressed to the defendants a letter which contains the following:

"Regarding the cash money: I am very much tormented by the children, and therefore request you, after deduction of the advance and charges of every nature, and after you have deducted for yourself the further sum of $1,000 for a Christmas present, to send, in the same manner as the $1,000 draft heretofore remitted to me, everything."

The propriety of the employment of Mr. Hesse cannot be seriously questioned, especially in view of the fact that Samuel Kunkel was fully informed concerning the reasons for the employment, and, with full knowledge of all the facts, approved not only the payment of a fee, but also the amount actually paid. Moreover, in his first letter to the defendants, under date of February 5, 1914, Samuel Kunkel requested them to "correspond in German, as I have difficulty to understand the English language." The money

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which was paid to Hesse was paid for services which he himself performed, and not for services rendered by the defendants, and hence the money paid to Hesse should not be taken into account or charged against the defendants, when ascertaining how much they were entitled to ask for their services.

The Christmas present was a voluntary gift. Samuel Kunkel knew what he was doing when he gave the defendants this Christmas present, and there is no adequate reason suggested in the record for compelling the defendants to return the gift. The amount of this gift must be left out of the calculation when figuring the compensation which the defendants were entitled to ask for their services. If the Christmas present, either in whole or in part, is taken into consideration when calculating the amount which the defendants were reasonably entitled to charge for their services, then to the extent that the Christmas present is so taken into consideration it ceases to be a gift, and from a Christmas present is transformed into compensation.

[4] The fee which the county court allowed for services rendered to the executors by the defendants was not an unreasonable allowance. That T. J. Cleeton, the judge to whom the final account was submitted, was temperamentally cautious and possibly overcareful when passing upon claims for attorney's fees, is evidenced by his testimony, which reads as follows:

"I think at least 70 per cent. of the fees that I allowed were probably reduced from what the attorney asked for."

Besides his experience as a practitioner, Judge Cleeton had had several years of experience on the bench. The following is an excerpt from his testimony:

"Ordinarily an estate of that size, that proceeded without contest and in the usual way, the attorney's fees should be something like about $2,500, from $2,500 to $3,000, and I estimated that to represent and provide a defense against a contest of an estate of that value it would be worth from $500 to $1,000, and I fixed the fee accordingly at $3,500, which I thought was a reasonable fee."

Lionel R. Webster, who was a distinguished lawyer and had served on the bench for about 15 years, including 7 years as county judge of Multnomah county, gave it as his opinion that $3,500 or $4,000 would have been a reasonable allowance. W. M. Cake, who served as county judge of Multnomah county from 1898 to 1902, and who acted as an attorney for Anna Kunkel in the proceeding to contest the will, stated that $2,000 would have been a reasonable allowance if there had been no contest, and that, if the services rendered to the executors in connection with the contest are also taken into account, $3,500 would be a reasonable fee. The compensation allowed by the probate court was not disproportionate to the compensation allowed in another large estate referred to in the record, and upon the whole the fee which was fixed for the services performed for the executors by the defendants was a moderate and reasonable sum.

The only question now remaining for consideration is whether the defendants were entitled to collect any fee at all from Samuel Kunkel, and, if they were, then whether the sum retained by them was excessive. Besides the allegations relating to the contest, it will be recalled that the complaint avers that the defendants planned to charge and collect excessive fees and to take advantage of Samuel Kunkel by procuring a power of attorney from him, advising him not to communicate with the American consul in Germany, concealing the amount of the estate, representing that the German consulate in Oregon was trying to get the business in order to make for itself fees, failing to furnish copies of the accounts filed by the executors during the administration of the estate, responding to inquiries for definite facts with general and indefinite statements, failing to communicate to Samuel Kunkel the fact that the defendants had received $3,500 from the executors, and taking advantage of the condition of Samuel Kunkel by cajoling and flattering him.

The defendants performed services for the executors, and they also performed services for Samuel Kunkel. The county court possessed authority to allow the executors to pay the defendants for services rendered to the executors; but that tribunal was without power to allow the executors to pay the defendants for services rendered to Samuel Kunkel as an individual. The county court exercised its conceded authority and made an allowance for services rendered to the executors; but that court did not pretend to allow the defendants compensation for services rendered to Samuel Kunkel as an individual. The allowance made by the county court was for services rendered to the executors, and to them only. The county court considered only the services performed for the executors. The county court had no jurisdiction over the private business of Samuel Kunkel. Moreover, the county court neither exceeded nor attempted to exceed its jurisdiction; for when passing upon the final account of the executors the court considered only the value of the services performed by the defendants for the executors. The court neither knew nor inquired as to what services the defendants performed for Samuel Kunkel or as to the value of those services. The allowance made by the county court was a reasonable allowance for services rendered to the executors; and since such an allowance could not have lawfully included, and in fact did not include, compensation for services rendered to Samuel Kunkel as an individual, we shall now confine our attention to a consideration

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of the fee which the defendants charged Samuel Kunkel.

The letter of January 17 was written by the defendants in compliance with the request which Daniel Kunkel had made on December 2, 1912, when he executed the will. The will was placed in a safety deposit box, and neither of the defendants had seen the instrument since the date of its execution. When the defendants wrote this letter, they were without assurance that they would be retained as attorneys for the executors; and, while they probably hoped to be employed, yet there was some reason for them to think that the executors would seek other attorneys, for the defendants had previously opposed one of the executors in litigation in which he had been interested.

In the letter of January 17 the defendants advised Samuel Kunkel to cause the American consul "to put his acknowledgment" on the power of attorney. On February 5 Samuel Kunkel wrote, saying:

"I have communicated with the American consul and hope shortly to be able to send you the power of attorney."

And on February 23 the defendants acknowledged receipt of Samuel Kunkel's letter of February 2, and, among other things, said:

"In our opinion you acted very judiciously in communicating with the American consul, inasmuch as his official attestations of legal documents are entitled to full faith and credit in all American courts and by all American officials.

"In our opinion it would not be wise for the best of your own interests to inform the American consul of the exact amount of your expected inheritance, since he will charge you a fee, which is based on a certain percentage of your inheritance. The larger the inheritance the larger his fee. Outside of a few official attestations, he cannot do anything for you in the matter, and would charge you just the same a certain fixed percentage for his mediation. Your inheritance you will receive without his intervention, and for that reason it is useless to pay him a fee for nothing."

It may be that the defendants were misinformed as to the fees charged by the American consul. The defendants knew, however, that the German consulate in Oregon made a percentage charge on moneys collected and sent to Germany; and there is nothing to show that the defendants knew or believed that the fees charged by the American consul in Germany were other than as represented in their letter. Assuming that the fees charged by the American consul were in proportion to the amount of the inheritance, then the advice given by the defendants was to the best interests of Samuel Kunkel.

In their letter of January 17 the defendants told Samuel Kunkel that Daniel Kunkel had requested them to advise Samuel Kunkel that he "would receive a substantial share of" Daniel's property, and in their letter of February 23 the defendants wrote as follows:

"In our opinion, your share ought to be worth about 200,000 marks."

While Samuel Kunkel's share of the estate amounted to more than 200,000 marks, yet it is apparent that the defendants were not attempting to do more than to give a conservative estimate, because they neither knew nor had any means of knowing at that time the exact amount of the claims which might be presented against the estate. Indeed, the attorneys for the German consulate, when called upon at some time prior to June to advise the consulate concerning the condition of the estate, were properly prudent and careful when they stated:

"There is a possibility that the estate will have to pay debts which are not known to us at the present."

It cannot, however, be seriously contended that Samuel Kunkel was deceived or misled as to the affairs of the estate or as to the value of the property. On February 21 Cake & Cake, as attorneys for Anna Kunkel, wrote to Samuel Kunkel, and in their letter they informed him that the real estate was valued at "substantially $29,000," and that the personal property, consisting of notes, cash and stock, "was valued at substantially $75,000." Ida Kunkel, who resided in Germany and was the widow of a deceased nephew of Daniel Kunkel, wrote to the German consulate, and on April 11 Samuel Kunkel also wrote to the German consulate, inquiring about the condition of the estate of Daniel Kunkel, and Samuel Kunkel afterwards learned from the German consulate the exact condition of the estate as it appeared from the inventory and appraisement. On March 3 the defendants sent to Samuel Kunkel copies of the will, one in German and one in English. On April 28 the defendants wrote a letter to Samuel Kunkel, explaining to him that they had fixed 200,000 marks as "a conservative estimate of your share of the inheritance." And again on July 2 the defendants wrote to Samuel Kunkel, telling him that the value of the estate was $98,886.08 and that—

"You must deduct the costs of the administration of the estate, as well as the inheritance taxes, yearly taxes, etc., etc., which sums are not yet known to us. Nevertheless, we believe that you may count with safety on your share amounting to at least 200,000 marks. For further explanations on this point, we refer you to our former letters."

Samuel Kunkel knew the terms of the will, he knew what the estate consisted of, he knew the appraised value of the property owned by the estate, and consequently he was not and could not have been deceived

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either as to the property comprising the estate, or as to its value, or as to the worth of his share.

On June 15 Samuel Kunkel wrote to the defendants, and with his communication he inclosed a copy of a letter which the attorneys for the German consulate had written to the consulate, and which the latter had forwarded in response to inquiries previously made by Ida Kunkel and Samuel Kunkel. The letter received by Samuel Kunkel from the German consulate referred to the defendants and concluded thus:

"We do not consider it advisable for foreign heirs to intrust the representation of their interests to the same attorneys who are representing the executors, and with whom an accounting must be made, and who most probably are representing conflicting interests."

The communication of June 15 was acknowledged by the defendants on July 2, and in their letter they stated in substance that Samuel Kunkel would be obliged to pay fees if his interests were placed in the hands of the German consulate, and that the consulate was apparently interested in securing the business on account of the fees which it would be entitled to charge. While not the slightest criticism can be placed upon the letter which Samuel Kunkel received through the German consulate, yet it is evident that the defendants treated the letter as an attempt to cause Samuel Kunkel to withdraw his business from the defendants; and, viewing the letter in that light, they accordingly wrote to Samuel Kunkel on July 2, as already explained. It may appropriately be said here that it is admitted by all the parties that fees would have been charged if the interests of Samuel Kunkel had been turned over to the German consulate.

[5] As soon as the will was opened and its contents made known, Anna Kunkel indicated her dissatisfaction with the terms of the instrument. She promptly consulted her attorneys, Cake & Cake, who wrote to Samuel Kunkel on February 21 and made it plain to him that he could expect the will to be contested by Anna Kunkel. On March 14 Samuel Kunkel wrote to the defendants and inclosed a copy of the communication received by him from Cake & Cake. Samuel Kunkel was about 78 years old, his wife was sick, and apparently he was in need of funds because in one of his letters he speaks of himself as a pensioned teacher and complains because his government had not paid his pension. In this letter of March 14 Samuel Kunkel writes to the defendants thus:

"If in truth there can result a long and expensive litigation, which I prefer to avoid, it would be better to bring about a fair compromise, if the same is advantageous to me and if I do not lose much thereby, and I entreat you to have the goodness to exert yourself in my behalf with this end in mind. Inasmuch as I am 2½ years older than my deceased brother Daniel, there is a probability of my never living long enough to see the end of such a lawsuit. Therefore much depends upon putting me in the possession of my share as soon as possible. I assume that you have mailed already a copy of the last will, though I have not received the same as yet. Have the goodness to inform me of current developments, and please take care that the matter is brought to a conclusion as rapid as possible, for I do not live in such easy financial circumstances as my deceased brother Daniel, and would like to enjoy at least a few of my old days."

Under date of March 30, the defendants acknowledged receipt of Samuel Kunkel's communication of March 14, and in this letter the defendants tell Samuel that in their opinion "Mrs. Kunkel has not the slightest ground to overthrow the last will and testament of your deceased brother," and "though we have not the least doubt regarding a favorable ending of such a lawsuit, we must, on the other hand, admit that we cannot prevent Mrs. Kunkel from instituting such a contest. Furthermore, although you empower us in your power of attorney to compromise your interests if necessary, we would under no circumstances enter in such a compromise, should we not be empowered to that effect by you expressly." On April 21 the defendants wrote to Samuel Kunkel as follows:

"Should you prefer not to listen to a compromise, but to insist upon your full rights, we shall act in accordance with your wishes in the matter. Should you, however, prefer to pay Mrs. Kunkel a certain amount in a compromise, in order to get the matter out of the way, and in order to put you in possession of your share of inheritance quicker, please give us an approximate idea of the maximum amount, or if you intrust the matter entirely to our judgment, please advise us forthwith of your intention and we shall then do for you whatever is within our power. If you were not so advanced in years, we would positively advise you not to listen to a compromise, but under the existing circumstances a sensible and not too expensive compromise would probably be the best for you; but we leave the matter entirely to you and shall act entirely according to your wishes."

On May 8 Samuel Kunkel thanks the defendants for information regarding "the incontestability of the testament." On August 5 the defendants advised Samuel Kunkel that negotiations for a compromise "are still under way" and that the defendants were of the opinion that a compromise could be effected whereby Anna Kunkel would receive the real property and Samuel Kunkel would receive "all moneys remaining after payment of debts and claims against the estate, which ought to be approximately $25,000, as well as the mortgage for $27,500, which is as good as cash." On August

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17 the defendants wrote to Samuel Kunkel that they were "as positive as we can possibly be that a settlement as outlined to you before (referring to the letter of August 5) can be brought about," and they closed their letter with a suggestion that he telegraph his answer. On August 28 Samuel Kunkel wrote to the defendants, in reply to their letter of August 5, saying:

"Since I was in full accord with your advice regarding the offer of compromise, I sent forthwith to the telegraph office. Unfortunately my telegram was on account of the war not accepted."

Again in this letter Samuel Kunkel says:

"I express the hope that you may succeed to settle my affairs successfully."

Not having heard from Samuel Kunkel, the defendants on September 4 sent to him a copy of the answer to the contest filed by them in his behalf as well as for the executors, and in this letter the defendants advised and indeed urged the acceptance of the compromise; but, as appears from the excerpt taken from Samuel Kunkel's letter of August 28, he had already forwarded his acceptance, although it had not yet reached the defendants when they wrote their letter of September 4. On September 15 Samuel Kunkel wrote to the defendants in answer to their letter of August 17, saying:

"No answer thereto is really necessary, since I can only repeat to-day what I wrote you already in my letter of August 31 (August 28) that I accept the submitted compromise."

The contest, which Anna Kunkel began, was genuine. Anna Kunkel had lived with Daniel Kunkel for 25 years and had helped him to accumulate his fortune. There were no children. Daniel Kunkel and his wife, together with a niece of the former, made a trip to Germany in 1911, and visited Samuel Kunkel and other relatives. Anna Kunkel felt that during that trip she was "slighted" by her husband's relatives. Daniel Kunkel used intoxicants to excess. Shortly after returning to Portland, Daniel Kunkel expressed to Alexander Bernstein a desire to make another will and after some delay the instrument of December 2, 1914, was executed. All the wills which the testator had made prior to that time gave at least some of the personal property to Anna Kunkel. The will of December 2, in reality, only gave her one-tenth of the whole estate, while the remainder went to the aged brother, who had no unusual claims upon Daniel's bounty. Although the defendants, as attorneys for Samuel Kunkel, appeared to be confident of success in the event the contest against the will had been prosecuted to the end, and the attorneys for Anna Kunkel likewise seemed to have been very much encouraged over the prospects of finally breaking the will, yet it is not at all unlikely that by the time the compromise was made the attorneys for each litigant were just a little doubtful of the possible outcome of protracted litigation over the will.

The defendants made it plain to Samuel Kunkel, it is true, that the litigation would be long drawn out and they also suggested to him several contingencies, some of which might or might not have happened. Although the defendants caused a monthly allowance to be made for the widow, nevertheless they tried, but without success, to have the court cut off the allowance when Anna Kunkel commenced the contest against the will. The testimony of W. M. Cake is quite convincing that the contest was begun and maintained as a real lawsuit. Judge Cake vouched for the loyalty of the defendants to the cause of their client, when he testified that "Mr. Bernstein and Mr. Cohen got me down to the very lowest we would have possibly considered a settlement." Samuel Kunkel was at all times desirous of compromising, because he was old and wished to enjoy his "inheritance" before he died. The compromise enabled him to realize his desire. The defendants appear to have been earnest and faithful in their efforts to obtain the most that they possibly could for their client, Samuel Kunkel.

[6] Samuel Kunkel was never deceived about the defendants being attorneys for the executors. As early as February 23 the defendants wrote to Samuel Kunkel, telling him:

"Messrs. Peter Wagner and Edward Schiller are named in the testament as the executors, on account of their intimate and long-standing friendship with your deceased brother. Same have appointed us as their attorneys, and as a consequence we have been recognized as such by the county court."

On April 20 Samuel Kunkel wrote to the defendants, offering to sell to them his share of the estate for $50,000. On April 28 Samuel Kunkel was told that "all debts of the deceased, as well as inheritance tax, state taxes, funeral costs, fees of the executors, and attorneys' fees, costs of the monument, etc., must be paid," and that "the fees of the executors and of their attorneys are determined by the court." On May 7 the defendants acknowledged receipt of Samuel Kunkel's letter of April 20 and said to him:

"Your offer to sell your share in the estate for $50,000 to us we have to decline with thanks. Since we deem it our duty to realize out of the estate as much for you as possible, and our position of trust prohibits us to make a personal profit on you, excepting attorneys' fees, which we are allowed by the county court for the probating of the estate, and such fees which we shall charge you in establishing your share of inheritance and cashing the same."

The letter received from the German consul by Samuel Kunkel, and referred to by

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him in his letter of July 2 to the defendants, advised him that the defendants were attorneys for the executors. In their letter of August 5 the defendants say to Samuel Kunkel:

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"The executors lost no time to file the first report as required by law after the expiration of the six months' period, and the same shows expenditures in the amount of $3,357.93 for funeral expenses, doctor bills, etc., as well as unpaid claims in the amount of $1,950, payment of which the court ordered. This last amount does not include inheritance tax, state taxes, executors' fees, neither fees to be allowed to the attorneys of the executors for administration of the estate. Besides this, the court authorized a $500 monument."

On November 19 the defendants addressed a lengthy letter to Samuel Kunkel, advising him of the confirmation of the final account, and that they had received $27,600 (less certain specified costs) in cash, together with the note for $27,500, as his share of the estate. In this letter they also state that "for the professional services of Messrs. Bernstein & Cohen, which have been rendered for you to date, I charge the sum of $3,500." They refer to an inclosed draft for $3,000, and then say that there was left in their possession "a balance of $20,089.02 at your disposal." On December 14 Samuel Kunkel acknowledged receipt of the letter of November 19 and said: "With your balance I am completely agreed and satisfied." Thus it is seen that Samuel Kunkel was repeatedly told that the defendants were attorneys for the executors. This information came to him several times from the defendants and once from the German consulate. He was told, also, in plain and understandable language, not only that the defendants would be paid a fee to be allowed by the probate court for services rendered for the executors, but also that he himself would be expected to pay the defendants "such fees which we shall charge you in establishing your share of inheritance and cashing the same." Samuel Kunkel was told three several times that the defendants were acting as attorneys for the executors—twice by the defendants, and once by the German consulate. In their letter of February 23, which was the very next letter the defendants wrote after the one dated January 17, they informed Samuel Kunkel that they had been selected as attorneys for the executors. On May 7 the defendants again told Samuel Kunkel that they were acting as attorneys for the executors. In addition to the two letters received from the defendants, Samuel Kunkel received one from the German consulate, telling him that the defendants were attorneys for the executors; and the fact of such employment was emphasized and written in large letters before the eyes of Samuel Kunkel when he was told through the consulate:

"We do not consider it advisable for foreign heirs to intrust the representation of their interests to the same attorneys who are representing the executors."

Three different times the defendants advised Samuel Kunkel that they would be paid for services rendered by them to the executors—on April 28, on May 7, and on August 5. Samuel Kunkel was advised in unmistakable language that the defendants would charge him a fee for services rendered to him, and in this same letter, which was dated May 7, the defendants told him that, in addition to the fee which they would charge him, they would be paid a fee for services performed for the executors, and that the latter fee would be fixed by the county court. The letter of May 7 tells Samuel Kunkel that the defendants cannot "make a personal profit on you, excepting attorney's fees, which we are allowed by the county court for the probating of the estate, and such fees which we shall charge you in establishing your share of inheritance and cashing the same." In this letter of May 7 Samuel Kunkel was advised of two things: (1) That the defendants would be paid a fee to be fixed by the county court for services rendered to the executors; and (2) that the defendants would charge Samuel Kunkel a fee, for they say "we shall charge you."

It must be remembered that Samuel Kunkel was a teacher; he was not an ignorant or an uneducated man; he knew the meaning of words; and consequently, since he was an educated man, with a thorough understanding of the German language, we must presume that he understood the meaning of the words found in the letters received by him. With the exception of the letter of January 17, all the letters signed by the defendants were written in the German language, and consequently we must assume that Samuel Kunkel understood the letters, which told him in the plainest language that the defendants were attorneys for the executors and that they would be paid a fee, to be fixed by the county court, for the services performed for the executors, and that the defendants would also charge Samuel Kunkel a fee for services performed for him. To say that Samuel Kunkel did not know that the defendants were attorneys for the executors, or that he did not know that the defendants were to be paid for services rendered by them for the executors, or that he did not know that the defendants expected to charge him for services to be rendered for him individually, is to say that Samuel Kunkel did not know the meaning of plain and unambiguous words. When the defendants made known to Samuel Kunkel the amount of their bill, he had been previously informed that the defendants were attorneys for the executors, and that they would be paid for such services a fee to be allowed by the coun-

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ty court; and Samuel Kunkel approved the bill rendered by the defendants with this knowledge, and also with a knowledge of the property owned by the estate, the value of it, the amount of the moneys disbursed by the executors and the net value of his "inheritance." He continued to correspond regularly with the defendants up until the time of his death, and in none of his letters, following his approval by the letter of November 19, is there to be found the least suggestion or intimation of dissatisfaction; but, upon the contrary, Samuel Kunkel's letters manifest his unreserved and complete approval of the fee which the defendants charged him. Some attorneys might have sent to Samuel Kunkel complete copies of every paper filed in the estate, while other equally reputable attorneys might not have done so. Viewing the transactions in the retrospect, and in the light of what has subsequently occurred, it can, of course, now be said that it would have been more prudent if complete copies of all papers had been prepared and mailed to Samuel Kunkel.

[7] It is true that it was the duty of the executors to support the will, and it is likewise true that it was to the interest of Samuel Kunkel that the will be sustained; and hence in that particular there was a unity, rather than a conflict, of interest between the executors and Samuel Kunkel. The only possible conflict of interest that could have arisen was when the county judge fixed the attorney's fees for services rendered to the executors; but Samuel Kunkel knew that the defendants were to be paid a fee to be fixed by the court, and Kunkel had a right to consent to it, as he did.

Samuel Kunkel was a necessary party to a settlement of the contest. 40 Cyc. 1262. If the will stood, he received nine-tenths of all the property of the testator. If the will had been broken, then he lost all. The executors could not without his consent make a settlement of the contest, which would take from him his interest in the real property and transfer it to Anna Kunkel. His approval of the compromise was necessary. In view of the fact that Samuel Kunkel was the only person who could be affected by a compromise, which decreased his share of the estate and correspondingly increased the portion of Anna Kunkel, it can readily be seen that there was much room for the rendition of services which were peculiarly personal to Samuel Kunkel alone. The services rendered by the defendants were assuredly of value to Samuel Kunkel. Indeed, if he had turned his interests over to the German consulate, he would have been required, and properly so, to pay for the services performed for him in looking after his interests; and, furthermore, it appears from the evidence in the record that the fees which the consulate would have charged for its services and for the services of its attorneys probably would have aggregated about $3,900. In other words, in addition to whatever fees might have been paid out of the estate to the attorneys for the executors, Samuel Kunkel would have been required to pay fees for services rendered for him individually, if he had turned his business over to the German consulate. It cannot fairly be said that no valuable service was performed by the defendants for Samuel Kunkel individually. If the measure which was used by the German consulate in like cases is adopted as the standard, then the fee retained by the defendants can be said to be within the limits of that measure. Moreover, Samuel Kunkel approved the fee, and never at any time questioned the propriety or the amount of it.

The decree appealed from should be reversed, and the suit dismissed, without costs.

JOHNS, J. (concurring specially). In legal effect the trial court affirmed the action of the county court in allowing the defendants $3,500 as attorney's fees on settlement of the final account of the estate, and found that it was "in full payment for all services the defendants had rendered both to the executors and to Samuel Kunkel in connection with the settlement of said estate and the will contest, and that the amount so allowed constituted a reasonable remuneration for the said services." The plaintiff did not appeal. Samuel Kunkel was not only made a party to the contest of the will, but he was a necessary party.

"All persons who may be injuriously affected by the judgment or decree sought should be made defendants. Thus the beneficiaries in the will, heirs at law, and next of kin, as well as the executor, if he has qualified as such, are usually deemed necessary parties." 40 Cyc. 1262, and authorities there cited.

As a matter of fact, the executors were nominal parties, and Samuel Kunkel was the only real party in interest. While it was the duty of the executors to uphold and defend the will, and for that purpose they filed an answer, as such executors they would not and did not have any legal right to appear for Samuel Kunkel, or to represent his interests otherwise than as executors, and could not make or enter into any valid, binding agreement of settlement or compromise without his express authorization and approval. If Samuel Kunkel had employed other attorneys than the defendants to represent his personal interests, the county court would not have any right to determine the amount which such attorneys should receive for their services. So, in this case, the only authority which the county court had was to ascertain and allow the amount of fees which the defendants should have for legal services rendered to the executors as such, in the will contest; and it did not have any authority to fix or determine the amount of attorney's

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fees which Samuel Kunkel personally should pay the defendants for services which they rendered him in the contest personally, as distinguished from the services which they rendered the executors. Nor is there any conflict in the character of such services. Any services which the defendants rendered in the compromise or settlement were personal to Samuel Kunkel. Hence the only question to be determined is their reasonable value.

It is conceded that Cake & Cake received $1,500 for their services in the matter of the contest only, and their client was a resident of Portland. The defendants' client was a resident of Germany, aged and burdened with disease, to whom a settlement was very important, and for whom the defendants rendered much additional service. On this theory there is abundant testimony in the record that $3,500 is a reasonable fee for the personal services which the defendants rendered Samuel Kunkel, and for such reasons I concur in the opinion of Mr. Justice HARRIS.

BENNETT, J. (dissenting). The object of this suit is to recover from the defendants, a firm of attorneys, certain sums, retained by them out of the estate of one Daniel Kunkel, for their fees as attorneys for the executors, and also as attorneys for the chief beneficiary of the estate, whose interests were also represented by the defendants herein.

Daniel Kunkel, in the matter of whose estate the services in question were performed, died in Portland, Or., on January 17, 1914, leaving an estate of the approximate value of $100,000, about $30,000 of which was in real property, and the balance in money and secured notes. Mr. Kunkel had resided in Portland for many years. He left no lineal descendants, but was survived by his wife, to whom he had been married about 25 years. The latter years of their married life had apparently not been very happy, and when Daniel Kunkel died he left a will by which he bequeathed one-third of the real property to his wife, and the balance of the real property and all of the personal property to Samuel Kunkel, a brother living in Germany. The defendants herein had been the attorneys for Daniel Kunkel for several years and had drawn the will under which Samuel Kunkel claimed. After the death of Daniel Kunkel, the defendants notified his brother Samuel of Daniel's death, and that Samuel was a beneficiary under the will. Afterwards the executors named in the will were appointed by the court and proceeded to administer the estate. The defendants appeared as attorneys for the executors, and also represented the interests of Samuel Kunkel. The widow, naturally, being dissatisfied with the will, threatened, and finally actually commenced, a contest, in which an answer was filed on behalf of the executors, and on behalf of Samuel Kunkel, by the defendants, but the case never went to trial. A compromise was arranged, to which all parties consented, and by which the wife received the real property absolutely, and also received out of the estate $1,500 to pay her attorney's fees and expenses in the contest proceedings, and the balance of the estate went to Samuel Kunkel under the will. After paying the expenses of administration, some small debts, the inheritance taxes, attorney's fees, etc., there was turned over to Samuel Kunkel, and to his estate after his death, the sum of about $24,089 and an uncollected promissory note for $27,500. The defendants did the necessary legal work for the administration of the estate, represented the executors in the contest proceedings, and also negotiated for and with Samuel Kunkel, and between him and the widow, in arranging the settlement, and they received from the executors his share of the money and transmitted the same, according to his direction, to him in Germany.

The defendants presented their claim for fees for their services to the executors in the sum of $3,500, which was allowed by the county court. They also made a charge directly against Samuel Kunkel for another $3,500 for their services to him. In addition to this, Kunkel, at one time—having received from the defendants an installment on his inheritance, and being generously minded—authorized them to take out $1,000 from his share of the estate as a Christmas present for them, which they did. They also employed one Hesse, a German attorney in Portland, to assist them as attorneys, and especially in the translation of German letters and papers, for which they agreed to pay him $1,000. This, they reported to Kunkel, and he approved the same.

Kunkel was informed of their charge for $3,500 for their services to him individually, and it is claimed he assented thereto; but he was not informed that they had also charged up and received from the executors another $3,500 for their services to the estate, including the contest; and it is claimed on behalf of respondent that his assent to the payment of the last $3,500 was obtained and procured by the willful suppression of the fact that they had already been paid for these services by the estate.

Before the estate was finally settled, Samuel Kunkel also died, and the plaintiff herein brings this proceeding as his administrator, claiming that the fee paid to the defendants, as attorneys for the executors, was exorbitant, and should not have exceeded $1,500; that said amount should have covered their entire services, both for the estate and for Samuel Kunkel individually, and also for the services of Hesse; and that the gift from the client to the attorneys of the $1,000 should not be permitted to stand.

The court below allowed the defendants the $3,500 as attorneys for the executors, the $1,000 for the services of Hesse, and the $1,-

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000 as a gift, but refused to allow the $3,500 charged for direct services to Samuel Kunkel. From this decree the defendants appeal.

From the opinion of the majority of the court I am compelled to dissent. Measured by the value of the services performed by the appellants for Mr. Kunkel, and for which they were not otherwise recompensed, their charge of $3,500 seems to me exorbitant and unconscionable; and, as I view it, Mr. Kunkel's approval of that fee was obtained by such an important and unfair suppression of fact as to prevent the defendants from gaining any advantage by such alleged approval, under the rule governing the relation of attorney and client, as stated in the majority opinion.

With the rule governing the duty of an attorney toward his client, as stated in that opinion, I am entirely satisfied. I quote again from the language of the opinion, taking the liberty of italicizing the portions which seem to me to have more particularly concrete application to this case:

"The relation between an attorney and client has always been treated as one of special trust and confidence; and for that reason the law requires that the conduct of an attorney, when dealing with his client, shall be characterized by *fairness*, honesty, and good faith. Indeed, so strict is the injunction not to take advantage of the client that, when a client challenges the fairness of a contract made with his attorney, the latter *has the burden of showing* not only that he used no undue influence, *but also that he gave to his client all the information* and advice which it would have been his duty to give if he himself had not been interested, and that the transaction was as beneficial to the client as it would have been if the latter had dealt with a stranger."

These are brave, strong words, and with every syllable of them I entirely concur. They fix the duty of an attorney toward his client at a high standard, but not too high, when we consider the peculiarly confidential relation which an attorney enjoys, and the fact that those with whom he deals are oftentimes helpless from infancy or old age, and are generally ignorant of the law, and of their legal rights, and practically at the mercy of the lawyer who represents them. Such a declaration of the principles which govern attorneys will be an inspiration to the lawyer who cares deeply for his profession and for its honor.

When it becomes generally known that this is the standard which governs the conduct of attorneys, and that the courts unflinchingly carry the principles so declared into execution, there will be an end of that unjust belief, unfortunately now so general among laymen, that lawyers are mercenary and unscrupulous grafters, and that the courts, being composed of lawyers promoted, look with complacent tolerance and winking eye upon the unjust greed and rapacity of their erstwhile associates. If I would add anything to the words of the majority opinion in this regard, it would be in the language of Mr. Thornton in his excellent new work on Attorneys:

"Attorneys, in entering into contracts of employment with clients, are required to exercise the *highest order of good faith*, not only in advising the client, but also in disclosing *all* information in their possession as to facts which *would* or *might influence him*, either in entering into or refusing to execute the contract. The failure to do so renders the contract *presumptively void*. * * * The burden is *on the attorney* to show that the client was advised and informed." 2 Thornton on Attorneys, § 429, p. 743.

Keeping in view, then, the rule in such cases, let us attempt to apply it in this case, and see whether or not the conduct of the defendants in the case measures up to these high standards; for if it does not, and we, directly or tacitly, approve of their action, and help them to reap the profits of the transaction, then, as it seems to me, our fine words had far better never have been said. They will be "like dead sea apples, pleasant to the sight, but ashes to the touch."

I assume—as there is no appeal by the plaintiff from that part of the decree which favored the defendants—that the only question before us which we can readjudicate is the claim for the last $3,500 for the services alleged to have been rendered by the appellants to Mr. Kunkel individually. However, it does not follow that we should not consider the other sums received by the appellants, in so far as they affect the fairness and justice of the charge of the last $3,500, which is before the court—for instance, if the sum of $3,500 received by the appellants from the executors was for the same services, or part of the same services, for which they are now trying to charge Kunkel individually, then, having once received compensation therefor, it would be utterly unjust to permit them to again collect from Mr. Kunkel for the same service. No court of equity would permit so unjust a result, and, if it would, it would cease then and there to be a "court of equity."

The same suggestions apply to the $1,000 collected by the appellants and turned over to Hesse, for assisting in doing whatever was done, in the matter of Mr. Kunkel's individual interest. If he performed part of the services and was paid by Mr. Kunkel, that reduces the work left to be done by the defendants in the same matter; and it would be obviously unjust for them, having induced Kunkel to pay the $1,000 to Hesse, to then charge him again in their own behalf for that part of the work which he had already paid Hesse for doing. It becomes necessary, then, in analyzing the case, and finding out whether this last charge of $3,500 to Mr. Kunkel individually, was just or unjust, to separate the work for which they have already been paid by the executors, and the

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part of the work of taking care of Mr. Kunkel's interests performed by Hesse, from the remainder of the services performed, so that we can see what services are left, and what, if any, fair relation they bear to the large sum charged.

In considering this question we must remember constantly that all the amounts received by the appellants came, directly or indirectly, out of Mr. Kunkel's pocket. The $3,500 paid to the defendants by the executors was really paid by Mr. Kunkel, for he was the residuary legatee, and everything left from the estate belonged to him. At the time when these fees were allowed by the executors, it had been agreed exactly what Daniel Kunkel's wife was to receive, and the defendants, and every one else who had any relation to the case, knew full well that whatever came out of the estate in the way of executors' or attorney's fees came out of funds otherwise belonging to Samuel Kunkel. Indeed, there was no longer any real necessity or reason for separating the fees, unless it would be, by this manipulation, "to make two fees grow where one had grown before."

Of course, in determining the services which the defendants had a right to charge up as an individual charge against Samuel Kunkel, I think it will at once be conceded that they had no right to charge for any services in overseeing the final settlement and protecting his interests, in the matter of the executors' fees and their own attorney's fees, for the simple reason that they did nothing, and could do nothing, in that regard; for in that the defendants had put themselves in an impossible and inconsistent position. They were attempting to represent the executors, who were interested in getting the largest possible fees, and they were also interested in getting the maximum fees for themselves; and at the same time they were supposed to be representing the interests of Mr. Kunkel, whose interests were to have the executors' and attorney's fees reduced to the smallest possible margin. The result was that no one really represented Mr. Kunkel before the county court at all. There were no objections whatever filed to the executors' fees; neither was there any objection made to the fees demanded by the attorneys.

In practice, the arrangement worked out beautifully. The executors and attorneys, apparently, resolved themselves into sort of a mutual approval society. The executors came in and demanded their fees. They demanded the statutory fee, not only on the personal property, which passed through their hands, but also upon the $30,000 worth of real property, for which they did not account at all; and in addition to this they demanded their fees on the whole estate, as erroneously appraised at $108,000, although $10,000 of that was an obvious double appraisement, and the estate really totaled only $98,000. Nevertheless these fees were apparently approved by the defendants. Indeed, we may safely assume that the report of the executors, asking for these executors' fees, was written by the defendants as their attorneys.

Again the executors, with equal complacence, included in their report a request—in addition to their own fees—for $3,500 for the attorneys, although it appears from the evidence that the fees fixed by the rules of the Bar Association for acting as attorneys in such an administration would only have been about $1,000 or $1,100, and to these attorney's fees again there was, of course, no objection, and Mr. Kunkel's interests again were not represented. The county court, finding that there was no objection whatever on behalf of Mr. Kunkel's attorneys, and that the executors' claim for fees was approved by the attorneys, and that the attorneys' claim for fees was approved by the executors, allowed each of them the full amount claimed.

It is obvious that the appellants' supposed representation of the individual interest of Mr. Kunkel was, in this particular, really of no value whatever. They did nothing for him, and in the very nature of things could do nothing for him. They were trying to perform two inconsistent duties—to ride two horses going in different directions. It goes without saying that attorneys cannot properly act for both parties under such circumstances, even with their consent.

"Even by the consent of the parties, an attorney is not permitted to act on both sides of a cause." Weeks on Attorneys, § 120.

"It is a well-settled general rule that an attorney cannot represent conflicting interests, or undertake the discharge of inconsistent duties." Thornton on Attorneys at Law, vol. 1, § 174.

"So an attorney for the executors of an estate is disqualified to represent the heirs for the purpose of supervising the proceedings of the executors with reference to distribution." Id., § 175.

Now, let us see how much of the services performed by the defendants in the whole transaction were paid for by the $3,500 received from Mr. Kunkel's funds, through the executors, and therefore not fairly chargeable to him again, as an individual. That this fee paid through the executors was intended to and did cover practically the entire services in the matter of the contest seems entirely plain. Judge Cleeton, who presided in the county court and allowed the fee, and therefore must be presumed to know, being called by the defendants, testified:

"The matter came up in regular order and in due course of the administration, after the settlement had been reached by the attorneys representing the respective contesting parties, and after it had been approved by the court, it came on then for fixing the fees for the attorneys. It came on without a contest and without any objections being filed. Mr. Bernstein presented the claim for attorneys' fees, and stated the at-

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torneys claimed for their services $3,500, representing the executors of the estate."

"Ordinarily an estate of that size, that proceeded without contest and in the usual way, the attorney's fees should be something like about $2,500 to $3,000, and I estimated that, to represent and provide a defense against a contest of an estate of that value, it would be worth from $500 to $1,000, and I fixed the fee accordingly at $3,500."

On cross-examination he testified:

"Q. Mr. Bernstein, himself, asked that the fees should be as much as $3,500, did he not, when he presented it to you? A. Yes; he made application for his fee as is customary by attorneys.

"Q. That was fixed before the account was filed, was it not? A. I think he put his claim in—he made an oral statement of the matter to me that he had asked for an attorney's fee of $3,500."

Again in his cross-examination:

"Q. In connection with his application to you to fix the fee, Mr. Bernstein always called attention to the fact that the attorneys, himself and Mr. Cohen, had handled the contest matter and made the compromise, did they not? A. Yes; I understood that. I understood that.

"Q. You took that into consideration in fixing the fee? A. Yes, sir.

"Q. Do you know what the Bar Association rule is [as to fixing attorney's fees for executors]? A. No, I think they allow the attorney about one-half of what the administrator is supposed to get. * * *

"Q. Also in this case, there were no probate sales, were there? A. I don't remember that there were—I think not.

"Q. And there was, I believe, only one account—the final account? A. Yes; that would leave only the final account in that case.

"Q. The final account itself was a very brief document, was it not? A. I think, from the nature of the estate, the final account was not a complex or comprehensive document.

"Q. You were taking into consideration the services rendered, I believe you have already said, in connection with the handling of the contest and the compromise of it in fixing these fees? A. Yes, sir."

Judge Cake, who was also called as a witness for the defendants, in his deposition testified:

"Well, I didn't take any part in the matter at all. Mr. Bernstein suggested to the court the work of the attorneys, referring to this case [the contest], and I didn't remember what the fees were fixed at. The court considered the matter talked over with Mr. Bernstein and asked questions concerning the situation, and it was fixed in the immediate light of the litigation which had just been concluded. * * *

"Q. At the time the court made the order allowing the attorney's fee of $3,500, the court's attention was particularly brought to the matter of this litigation, as I understand it? A. To the what, you say?

"Q. Was particularly drawn by Mr. Bernstein to the matter of this will contest and the services that had been rendered in that connection? A. That was brought up. I stood there at the end of the bench, and Mr. Bernstein stood in front of the court, and he told him the circumstances under which the litigation had been brought, and the other conditions with which the administration of the estate was affected.

"Q. The allowance of the attorney's fees was based upon Mr. Bernstein's statement that was thus submitted, as I understand? A. Why, of course; now I could not tell you about that, but the history of the case and the history of the estate would, of course, be well known to Judge Cleeton.

"Q. Yes, but attention was drawn to the fact that the attorneys for the executors had attended to the will contest and also to the settlement that had been made? A. Yes; yes.

"Q. Those items were brought in for the court's consideration? A. Yes; oh, yes."

And again the same witness testified:

"A. Yes; about the way I figure that, Mr. Veazie, is this: Even if this suit had not been in there, if there had not been any suit there, and had been the administration of the estate, a couple of thousand dollars for the ordinary estate of a hundred thousand dollars should be charged.

"Q. You figure that, if there had not been the litigation over the will, $2,000 would have been a fair fee? A. If there had not been any litigation at all, yes; $2,000 would have been a very fair fee for the executors.

"Q. And there ought to have been an allowance of $1,500 more for the conduct of the will contest? A. Yes, yes; very, very reasonably so; very reasonably so."

Indeed, the large fee of $3,500 for the attorneys in this simple estate could not possibly have been sustained upon any other theory. Every witness called for the defendants, who testified that the $3,500 was reasonable, based their testimony upon the fact that the contest, and all the work of the contest, was included, and not one of them ventured to say that $3,500 would have been a fair fee for the administration alone; while the witnesses for the plaintiff place the value of the services, including both administration and contest, at a much less sum. It appears that the rules fixed by the Bar Association placed the attorney's fees at one-half of the amount allowed the executors. Judge Cleeton himself testified:

"Q. Do you know what the Bar Association rule is [as to fixing attorney's fees for executors]? A. No; I think they allowed the attorney about one-half of what the administrator is supposed to get."

As the Bar Association is composed entirely of lawyers, I think we may safely assume that the fee fixed by them is a reasonable one, and not too low. It is true that some of the attorneys, who were witnesses, were disposed to quarrel with the schedule fixed by the Bar Association—basing their judgment upon the ground that such a division was unfair, because the attorney generally did all the work. This may be true

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as between the attorney and the executor, but that is no reason why the estate should suffer a double charge. If the executor puts the work that properly belongs to him onto the attorney, and the attorney does it, the executor should pay for such services out of his fees, and not out of the estate. The law allows the executor so much for the performance of his duties; and it would be exceedingly unjust to permit him to collect the whole amount of his fees for performing such duties, and then turn the work over to an attorney, and let the attorney charge up the estate again therefor. The attorney should only be allowed for merely legal services.

In this case the estate was a very simple one. It was nearly all in money and real estate, except one large note. The real estate was not sold. The note was not sued upon for recovery. Outside of the contest with the widow, there were no complications whatever. There was no more work about the administration than there would be about the ordinary $500 estate. There was nothing that required any particular or special skill or unusual ability. There was no responsibility for the investigation of title or the sale of property. There were only the petitions to draw, and one or two accounts and the final account to prepare, and perhaps a few other incidental services. The entire work of settling the estate, if put together, would not have taken two weeks of the time of any attorney. Under such conditions the fees fixed by the Bar Association would seem to be entirely ample, and, as I have said, it seems impossible to have reasonably stretched those small services to cover the $3,500 charge, without including the entire services in the contest matter, and, as we have seen from the testimony, as a matter of fact they were included.

It has been urged that this contest was the individual matter of Mr. Kunkel, and that therefore the services of the defendants in that regard were not properly chargeable to the estate. This seems an exceedingly narrow and technical view, and I do not think it can be sustained. The very right of the executors to be executors at all was involved in the contest, and as attorneys for the executors, and on behalf of the estate, the attorneys were bound to do everything that could be done, and make every exertion in their power, to sustain the will. But in any event it does not lie in the mouths of the defendants to say now that their services in that contest were not for the estate, and properly paid for by the estate. According to the testimony of both Judge Cleeton and Judge Cake, already quoted, they went before the county court and asked to be allowed this fee for their services as attorneys in the contest, and it was allowed to them upon their own solicitations and representations.

Indeed, it appears that the final report of the executors, which we may assume was prepared by the defendants, contains the following representations in regard to the services which the fee was to cover:

"In addition to which the executors have employed the firm of Bernstein & Cohen as their attorneys, who have acted as such since the probate of the will, and also have given special and additional services in the contest filed by the widow of deceased, and the settlement of the same, for which services they request that the attorney's fees be fixed at $3,500."

They ought not now be permitted to come back and say the fee was not properly allowed in the county court, and, having got it down in their pockets, ask to collect it again, directly from Mr. Kunkel, who has already paid it once indirectly.

The only remaining question, then, upon this branch of the case, is whether the comparatively small services that were left, after taking out the contest and the estate already paid for, were fairly worth so large a sum as $3,500. No doubt there were some services performed by the defendants for Mr. Kunkel individually and which were not paid for through the executors. Such services were the correspondence, the transmitting of the money, and the formal appearance for him in the contest. To say that such services were worth so large a sum as $3,500 seems to me so startlingly unjust as to be almost absurd.

Then it must be remembered that even these services are to be divided, because Hesse was employed by the defendants themselves, to perform part, if not all, of the same; and for this they paid him $1,000, not out of their own, but out of Mr. Kunkel's, funds. It must be presumed that he performed at least a part of the work involved in the correspondence, and whatever else there was to do. Mr. Bernstein himself, in one of his letters to Kunkel, says "that Hesse was employed to assist in the correspondence and as an attorney in the case," so that, in ascertaining what was the value of the services performed for Mr. Kunkel, we must take out that portion presumably performed by Mr. Hesse. To allow the defendants to collect for the same services, once for Hesse and again for themselves, would be manifestly unjust. To my mind, therefore, a fee of $3,500, to be collected by the defendants from Kunkel, in addition to the $3,500 already received through the executors, and the $1,000 collected by them for Hesse, is clearly unreasonable.

In arriving at this conclusion I have said nothing about the $1,000 gift. That stands a little different from the other matters already considered. Nevertheless it had some bearing upon the general relations of the parties. No doubt it was intended as in

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some sense a partial remuneration for the services performed by the defendants. Mr. Kunkel does not seem to have known the defendants at all, and there was no reason why he should have given them a $1,000 Christmas present, except that he had so intended it. The defendants in their letters to him had constantly asserted and protested their unselfish and undying devotion to his interest. In the letter of March 3, 1914, Mr. Bernstein says:

"You can rest assured we shall look after your interest to the best of our ability, and that it shall always be our aim to represent your welfare and interest most energetically."

In the letter of March 30th, ensuing, he says again:

"Rest assured that we shall look after your interests to the best of our ability, and that we understand your position perfectly."

In the letter of February 23d:

"You can rest assured that we shall keep you forthwith informed as to all developments in this estate, which concern your personal interests."

In the letter of July 2d:

"On account of the intimate friendship always existing between your brother and us for a lifetime, and on account of the exceptional confidence which we employed, it will be to a certain extent our duty to your deceased brother to see to it that his estate is administered," etc.

If Mr. Kunkel had been a reader of our own Shakespeare, he might have thought with old Falstaff, that the defendants "did protest too much"; but, as it was, he seems to have been very much impressed by those protestations, and he evidently thought that such unselfish and professed devotion to his interest deserved some special reward. Perhaps he had read of the old-time English law, when an attorney could charge no fee, and intended this $1,000 as a sort of honorarium. Perhaps he thought, if he was generous with the defendants, they would at least be fair with him. Perhaps in his innocence he thought he could "bribe" them to do what was fair and right.

At any rate, it is perfectly plain that, while he called the $1,000 a gift, he really intended that it should be some sort of a reward for the services which he hoped to receive from the defendants. As I have already said, it seems to me that from any viewpoint the charge of $3,500 for the small services which the defendants performed individually for Kunkel, and for which they had not been paid, after already receiving $3,500 from the executors, is exorbitant and unfair.

It is urged in the brief by the learned attorneys for appellants that, if this money had been collected and transmitted through the German consulate, the charges for consulate fees and attorney's fees would have been as large as those made by the defendants for the same services. It seems a poor defense to a bad act, or an exorbitant fee, that some one else would have committed as great a wrong or charged as unjust a fee. But since it throws a sidelight on this transaction, let us inquire. In the brief of appellants a calculation is made from which it is figured that the charges of 2 per cent. by the consul and 5 per cent. for attorney's fees would have amounted to something over $3,900, and the result of this calculation seems to have been accepted bodily in the majority opinion.

But this conclusion, as it seems to me, can only be reached by disregarding the evidence, and figuring the percentage on the amount of the promissory note, which was transmitted without collection, as well as the money collected and transmitted. As a matter of fact the evidence shows this would not have been done. Mr. F. H. Ritters, secretary to the German consulate, testified in regard to the official tariffs for the remittance of money from this country to Germany as follows:

"Q. Will you kindly state what the official tariff of fees for the remittance of money in the states is at the present, and what the preceding tariff was, if there has been a change, and to what years it applies? A. Since January 1, 1911, we are charging 2 per cent.; yes, sir, 2 per cent. of the money forwarded to the heirs. That means 2 per cent. of the moneys collected, and after the attorney's fees are deducted.

"Q. Before that, what was the schedule? A. One and two-thirds per cent. of the first $500 and one-third per cent. of each additional $100.

"Q. How far back did that schedule apply? A. From 1872."

Mr. Veazie, who was attorney for the German consulate at that time, testified:

"Yes, sir; there are fees charged for the transmittal of money, for the actual money transmitted.

"Q. For the money actually transmitted? A. Yes, sir.

"Q. Do you know what that fee is approximately? A. Two per cent. on the money actually transmitted.

"Q. And the consul, did he get anything out of these estates, or any of them? The consul here? A. Not a cent; no, sir. The consul here was an honorary consul, serving absolutely without pay or fees. * * *

"Q. Would these charges of fees in a case of this kind, for instance, where there was $25,000 or $26,000 in cash, and $27,000, or such a matter, in securities, would that fee be charged on the securities as well as on the cash? A. No; no fee is charged, excepting on the cash actually transmitted."

And he testified further in regard to the attorney's fees:

"A. The standard fee charged in cases where we have handled the business of an estate, in-

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cluding attention to it during administration and drawing the necessary proofs and documents in the case, and doing all that is necessary, is 10 per cent. on the first $1,000 and 5 per cent. on the balance. * * * But in cases where there is a will, and no proofs are required, and no special services are needed, we usually have made a much lower charge than that, varying with the amount of services required."

This is the only testimony in the case upon this point; so it is perfectly clear that the charges of 2 per cent. for consulate fees, and 5 per cent. for attorney's fees, would only have been on the cash transmitted, which amounts in this case in round numbers to $28,600, including what was retained by the attorneys. The note was never collected, and there was nothing to be done in regard to it, and nothing could be done, except to receive it from the executors, and put it in a letter directed to Samuel Kunkel, and deposit it either in the post office or in the express office.

To suppose that either the German consul, or the attorneys for him, or any other reputable attorney, would charge 2 per cent. or 5 per cent. on the amount of a note for $27,500 for the nominal service of taking it to the post office is as contrary to every presumption of honesty and fair dealing, as it is to the positive testimony in the case. So, as a matter of fact, the maximum charge, if this matter had gone through the hands of the German consul, instead of defendants, both for consulate fees and attorney's fees, would have been figured like this:

Consulate fees of 2 per cent. on $27,600.00	$ 552 00
Attorney's fees of 10 per cent. on first $1,000.00	100 00
Attorney's fees of 5 per cent. on remaining $27,600.00	1,380 00
Total	$2,032 00

Even this charge would have seemed an exorbitant one for the services performed; and, indeed, as we have seen, Mr. Veazie testified that, in cases where there is a will, there was usually a much lower charge. But when we consider that these services would have covered everything the defendants did for Mr. Kunkel, that they were not paid for through the executors, and that it would also have covered the services for which the defendants paid Hesse $1,000, it is apparent that the defendants' charge for doing the same work, for themselves and Hesse was more than double what Mr. Kunkel would have paid, if the matter had been attended to through the regular official channels. So the comparison stands, in round numbers, $4,500 against $2,000.

Also, it must be remembered, the attorneys thus acting for Mr. Kunkel would not have been tied up with the executors and would have (presuming that they were honest), in addition to all the services performed by the defendants, gone before the county court and objected to the fees charged by the executors on the false appraisement and on the real property that was never sold, and it may fairly be presumed would have succeeded in reducing the charges of the executors by at least $200.

Again, they probably would have succeeded in reducing the attorney's fees to some approximation of the standard fixed by the Bar Association. So that Mr. Kunkel, besides the difference of $2,500 in the amount of fees, which he would have had to pay directly, would also, in all reasonable probability, have saved from $200 to $1,200, by reason of having independent attorneys who would have represented him before the county court in the matter of the final account.

The only remaining question is whether or not the defendants, having driven a hard bargain with Kunkel, and induced him to tacitly, at least, assent to this charge, can now successfully "demand their pound of flesh," and insist upon their hard bargain because of that assent. Here we are met by the principle enunciated in the beginning of the majority opinion, and in the quotation from Thornton on Attorneys, already alluded to.

The defendants were attorneys. They were dealing with a client, and a client who, by reason of age and distance, was more than ordinarily helpless and at their mercy—more than ordinarily dependent upon them for good faith, fair dealing, information, and advice. Then, if we are to follow the accepted and announced rule governing the relation of attorney and client, the defendants, in obtaining Kunkel's assent and approval of their fee and his agreement thereto, should have exercised the utmost fairness and good faith, and should, in the language of Judge Thornton, have disclosed "all information in their possession as to facts which would or might influence him," and, if they did not do so, his supposed assent falls to the ground and comes to naught.

The question then is: Did they deal with him with the highest degree of fairness? Did they disclose to him fully all information which was in their possession, which would or might influence him? Did they communicate to him all the information which they would and should have communicated to him, if they had been strangers to a transaction between him and third parties, and about which he was consulting them? We think the contrary is clear to all. The very day before they wrote to him, asking for his assent to the charge against him individually of $3,500, they had received from funds belonging to him, through the executors, another $3,500 for their supposed services in his behalf, through the estate. This matter was then fresh in their minds. They could not have forgotten it. Yet they do not say in their letter to him one word, or inform

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him in any way, in regard to the previous charge. Neither did they tell him that they had claimed from the executors, and been paid by them, for their services in the contest matter. Why this silence, about a matter so nearly and vitally touching Mr. Kunkel's interests, and so inseparably related to the fairness of the additional fee they were asking him to agree to? Was it not a matter about which he had a right to know? Was he to be kept in complete ignorance of what had become of so large a sum of his money?

We may find an excuse, perhaps, if we will, for their failure to send him a copy of the different accounts, showing just how the estate stood, and dismiss it as merely "imprudent." But here was a single large item amounting in one disbursement to thousands of dollars. And it was paid to and received by them. Can any one excuse their failure to inform their principal in relation to such a charge, under such circumstances? Even if they had not been asking for another and further fee, it would surely have been their duty, as attorneys and agents of Mr. Kunkel, to give him information of so large a charge against him. And was it not all the more their duty when they were asking him to agree to a still further fee? They had solemnly promised in their letter of February 23d:

"You can rest assured that we shall keep you forthwith informed of all developments in this estate, which concern your interests."

Independent of the promise, it was their bounden duty to give the information, or else all our fair words about the duties of an attorney go for naught. Was it "fair" to Kunkel to get him to agree to another fee of $3,500, without first telling him that they had already received, the day before, a big fee of a like amount, paid through the executors and also, out of his funds, and that this fee covered their services in the contest with Mrs. Kunkel, and in the settlement of that contest? Was there a compliance with the rule announced by this court that "the conduct of an attorney, when dealing with his client, shall be characterized by fairness," and that the burden "is on the attorney to show such fairness"? Was this giving him "all the information" which it would have been their duty to give, if they themselves had not been interested?

Was this a compliance with the rule stated by Mr. Thornton, already quoted, that attorneys are required in such matters to "exercise the highest order of good faith in disclosing all information which would or might innuence" the client? Can any one logically say that it would not and might not, have influenced old Mr. Kunkel in concluding whether he would assent to this large fee, if he had been informed that the defendants had already received from his funds another fee equally large? Do not the conditions and circumstances drive one irresistibly to the conclusion that the very reason why the appellants did not inform their client of the first $3,500 fee was because they feared that the old gentleman would take it into consideration, and would not be so willing to pay them the second $3,500, and the $1,000 for Hesse, if he was informed that they had received the first fee?

It must be remembered that the defendants were just as careful, apparently, to not inform the county court, when they were asking for a fee from it, that they expected another fee from Kunkel for the same services, or that part of the services were to be performed by Hesse at Kunkel's expense, as they were not to inform Kunkel of the fee received from the county court. It must be conceded by every one that, rightly or wrongly, justly or unjustly, legitimately or illegitimately, the appellants had their hands down deep in both Mr. Kunkel's pockets. With one hand they were taking $3,500 from one pocket through the executors, and with the other they were extracting $3,500—yes, $4,500—through the individual charge. And they were carefully obeying the Biblical injunction, "Do not let thy right hand know what thy left hand doeth."

It is urged in the brief on behalf of defendants that the court should assume that these facts were actually known to Kunkel, at the time he assented to the $3,500 individual fee, through other sources; but I cannot assent to this view. The burden was upon the defendants to show definitely that Kunkel did know these facts. The evidence tends strongly to show affirmatively that he did not have such knowledge. In the letter of December 14, 1914, in which he assents to the $3,500, he says:

"With your balance I am completely agreed and satisfied. Have the executors been paid, or do both gentlemen live in such good circumstances that they do not request any administrators' fees?"

So it is apparent that Mr. Kunkel did not know at that time that fees had been allowed, even to the executors, and it is not to be supposed that he knew of the $3,500 allowed to the executors for their attorneys, because, had he known, he would certainly have mentioned it in that letter. Under these circumstances it was natural that he should suppose the $3,500, which he was paying, covered the entire services of the defendants, in the absence of any statement from them that they were getting any other pay. I think his assent under these conditions to the payment of the additional $3,500 should be disregarded.

While it is practically admitted that the defendants did not inform Kunkel that a fee of $3,500 had been allowed and paid by the executors, or that this fee covered their serv-

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ices in the contest proceeding, yet it is strongly urged that because the defendants had, in letters to Kunkel some months before the final settlement, informed him that there would be a fee from the executors, that that was a sufficient fulfillment of their duty to give him full and complete information of everything within their knowledge, and that it was therefore unnecessary for them to inform him that the fee had actually been allowed, or of its large amount, or that it covered the services in the contest and compromise.

But, even if we assume that old Mr. Kunkel carried all the details of the voluminous correspondence of months before in his mind, and therefore remembered, when he received the letter of November 19th and answered the same, that a fee as attorneys for the executors had been mentioned, yet it did not give him the slightest knowledge of the important things, the large size of the fee already received, and the fact that it covered defendants' services in the contest and settlement, and therefore made any second charge to him for these matters a double charge. Allowing for every item of information the defendants had given him, and assuming that he remembered it with the utmost clearness, it would only tell him that the defendants expected to receive some fee from the executors. Whether that fee would be $100 or $500, and whether it would be confined to the conventional details of the estate, or would include their services in the contest and settlement, he was in no way informed.

If he had been acquainted with the practice of lawyers in this country and the rules of our Bar Association, he would probably have figured that such a fee in the estate matter would be about $1,000. But he had no knowledge of such things, and, if he thought about it at all, he would probably expect it to be a much smaller sum. Certainly he would never imagine it would be so vast a sum as $3,500, in addition to the $3,500 they were charging him directly for services in the same matter. When they had written him the previous letters, they did not know and could not state the amount of their fees from the executors, although they might have given an approximation; but when they wrote the letter of November 19th they knew exactly what they had received, and that it covered the contest and settlement.

Why, then, did they not communicate that information to their client, when they were asking him for this other large fee? Was not theirs, at best, a poor and shabby pretense of performance of the duty, which we have just declared rested upon them as attorneys, to fully inform their client of every fact in their possession which might influence his judgment?

If Kunkel and the defendants had been strangers, dealing at arm's length, such fragments of information might possibly be accepted as giving Kunkel notice that some fee was to be charged. But here they were not dealing at arm's length. They were dealing with an old man, thousands of miles away, and he was their client. He was utterly dependent upon their good faith. If that were possible, they had added to their duty as attorneys by frequently protesting their entire devotion to his interests. By their promises and assurances they had won his complete confidence. Under such circumstances, they should not now be permitted to stand upon any technical doctrine of "notice," or upon any half disclosures, which left their client in the dark as to the most important elements.

It is said the defendants told Kunkel three times in the course of their long correspondence that they would charge him "some fee" through the executors. But they did not tell him once that such fee had been actually received. They did not tell him once that it amounted or would amount to thousands of dollars. They did not tell him once that it covered the contest and settlement.

It is also urged that Mr. Kunkel knew the amount of the estate, and knew the amount he was to receive, and that, therefore, he could figure out in some way the things which he had a right to know; and it is suggested that he was a "schoolmaster," and therefore must be presumed capable to do this figuring and protect himself. But it must be remembered that, while he had been a teacher, he was at the time of these events a superannuated one. He was an old man, and apparently childish, as one at such an age would naturally be. He had reached the age of 78 years—had passed the three score and ten allotted to man, and was approaching close to the four score which some men reach by reason of their great strength. He was suffering with the troubles and afflictions of such great age. He had lost his wife and was sick himself, during the very happening of these events.

It is true that "schoolmasters" are presumptively intelligent, but they are not all like Goldsmith's village teacher, who amazed the gazing rustics "that one small head could carry all he knew." Generally, they lead simple lives, and come in contact mostly with children and inexperienced youth; generally they know little of business affairs, and especially of lawsuits, and the settlement of estates. Kunkel, in particular, knew nothing of American lawyers, or their charges, or of the methods here of probating estates. In these matters he would have been no even matcher of wits with the defendants, even at his best. At his advanced age he was as helpless in their hands, in such matters, as they would have been, no doubt, in a discussion with him over Greek verbs or Latin translations.

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Besides, he would have had to be possessed of the uncanny deductive powers of a Sherlock Holmes to have reached any conclusion from the information he had as to whether or not the defendants had actually received a fee from the executors, or how much it was, if they had received one, or that it covered the services in the contest and settlement. It is true he knew (from others) the appraised assets of the estate, and that he might have been able, from the information which had been given him, to figure the total amount that had been disbursed. But that gave him no light upon the justice or injustice of the fee the defendants were then demanding. He was not informed, and he could not tell, how much of this total disbursement had gone for taxes or inheritance taxes, or for other legitimate purposes, or whether any part of it had gone to defendants for a fee.

The defendants, being his attorneys, and having won his confidence by their repeated assurances, he naturally assumed that all of the disbursements were legitimate. He had absolutely no way of calculating that $3,500 of the total disbursements had already gone into the defendants' pockets, when they were asking him for another fee of like amount and $1,000 more for Hesse. The language of the defendants in making the charge for the additional fee was indefinite and equivocal:

"For the professional services of Messrs. Bernstein & Cohen, which have been rendered for you to date, I charge the sum of $3,500."

There was nothing in this language to indicate what services they were charging for, or whether or not they were charging him for the contest and settlement—nothing to distinguish between the services performed for him directly, and those performed for him through the estate. It must be remembered that everything they did in any capacity (except fixing the fees for themselves and the executors) was "rendered for him," since he was the only one to benefit, and it was all to be paid for out of his funds.

It did not make the slightest difference to Kunkel, or from his standpoint, whether the fees came in the shape of one fee or two, provided that the total was reasonable and just. He knew that whatever the defendants received would come out of his pocket anyway, whether they were paid directly or through the executors. When he received their bill in this indefinite shape—without any reference to any other charge—he would, naturally, from his standpoint, suppose that their bill had been consolidated, and covered all their services. The large amount of their charge, which must have seemed to him ample to cover their entire services, would naturally strengthen that supposition. That he did so conclude is plain from his answering letter, in which he says nothing about any other fee to them, but wonders and inquires why the executors are not charging any fee:

"Do the two gentlemen, Mr. Scheller and Mr. Wagner, live in such good circumstances that they do not claim any executors' fees?"

The old man had a perfect right to assume that if the defendants had already received a fee—certainly if they had received a large fee—out of funds belonging to him, that they would inform him of the fact and to infer that they had not, when he received no such information. How easy—and how natural—it would have been, if Mr. Bernstein wanted to be entirely fair, for him to have written, instead of the indefinite and equivocal letter he did write, something like this:

"For the professional services of Messrs. Bernstein & Cohen to you individually I charge the sum of $3,500. This does not include our services to the estate, nor in the contest and settlement with Mrs. Kunkel, for which we yesterday received, through the executors, an additional $3,500."

If they had done this, or anything similar, they would have been fair—and no more than fair—with their client. Kunkel could then have intelligently assented to or rejected their proposition. They would then have complied with the rule laid down by this court in the majority opinion, and observed that "high degree of fairness" which is said to rest upon attorneys, and under which, before they deal with a client, they must fully disclose every fact which might enter into his decision.

The services performed by the defendant for Mr. Kunkel individually, and for which the defendants have not been paid, as I view it, are the transmitting of the money, the correspondence with Kunkel, and the formal appearance for him in the contest proceeding. These services were not exceedingly great, and I think $1,000, in addition to the $1,000 received by Hesse, would be full and ample compensation therefor. I think the judgment of the court below should be modified, by allowing defendants for the value of such services, and, as thus modified, affirmed. This is the only conclusion which seems to me possible from a close analysis of the case.

It is suggested that this conclusion would be in the nature of a compromise, and therefore should not be entertained; but I do not see that it involves a compromise in any obnoxious sense. The compromise abhorred by the law, as I understand it, is one that attempts to split the difference between right and wrong, and run the line of cleavage half way between justice and injustice. The line of real justice does not always

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measure the extreme claim of either party, but lies quite as often somewhere between the two. And when this is so, and that just line can be ascertained, there is no impropriety in there fixing our decision, even although it may be in some broad sense in the nature of a compromise.

Here the defendants are justly entitled to the reasonable value of the services actually performed for Mr. Kunkel, and for which they have not been compensated; but, as I view it, they are not entitled to a dollar more, on account of the letter of a hard agreement, which they have obtained by suppression, either willful or negligent. When the whole transaction is taken up by the four corners and looked at from a broader view, the injustice of allowing the appellants the entire amount for which they ask seems to me just as apparent as when closely analyzed. This estate was, as we have seen, a very simple one. There were no sales of real property, and no recovery of money through litigation. The estate was in process of settlement for eight or nine months, but could have occupied only a few weeks of actual time. The only money really handled by the defendants was the $41,000 in the bank when Daniel Kunkel died. By the time this reached Samuel Kunkel it had shrunken in one way and another to about $23,000. Of this difference the defendants, and their associate, Hesse, have absorbed and are attempting to absorb, in one way and another, as compensation for their services, the sum of about $9,000. This is no small sum. It is a moderate fortune; as much as the average attorney earns in years; more than the average layman accumulates in a lifetime. To my mind this great sum is out of all proportion to the small services performed.

An attorney ought not to expect to get rich off from one client for so little work and in so simple a transaction; and, if he does, his methods in the matter ought to be so fair and open as to be above reproach. It may be true that there is no absolute standard by which we can measure the value of an attorney's services, as we would a bushel of wheat. But this is true of personal services in all walks of life. It is just as true of the services of an architect, or a physician, or a mechanic, as it is of a lawyer. Yet we have to measure the value of such services whenever they come up to us. We all have an approximate idea of what is reasonable, and what is unreasonable, for an attorney's services in any given case.

I concur with that portion of the majority opinion which approves the settlement with Mrs. Kunkel and finds that the defendants acted with entire good faith in that matter. I also agree that there is nothing to censure in their general management of the estate, except when it touched the fees of themselves and the executors.

It has been suggested that Mr. Kunkel might have approved of defendants' proposed fee, even if he had been informed of the previous one. It may possibly be true that, in the old man's improvident eagerness to secure a portion of his inheritance, he would have consented, even to that. We can never know; he is dead, and cannot speak; but it is the fault of the defendants that we do not know. If they had done their duty, and informed him of the first fee when they asked for the second, we would have known what his attitude would have been. It is not in the mouths of the defendants to urge the doubt that results from their own wrong or neglect. Under such circumstances, as we have already seen, the burden is upon them.

There are a number of reasons why I should like to concur in the majority opinion, if I could see my way clear to do so, without violation of just principles; but I cannot, and I therefore dissent.

(66 Colo. 336)

DUNSTAN v. JOHNSON et al. (No. 9157.)

(Supreme Court of Colorado. June 2, 1919.)

WATERS AND WATER COURSES ⟸140—ADJUDICATION OF PRIORITIES—ORDER OF PROOF.

In determining priority of water rights where all parties appear and are heard, the oldest in point of time is entitled to priority notwithstanding order of proof.

Error to District Court, Routt County; John C. Shumate, Judge.

Petition for adjudication of water right priorities by Thomas Dunstan. From decree adjudicating his priority subrogated to that of Margaret E. Johnson and others, petitioner brings error. Reversed and remanded.

F. R. Carpenter, of Hayden, and Malcolm Lindsey and L. H. Larwill, both of Denver, for plaintiff in error.

BAILEY, J. Plaintiff in error Thomas Dunstan seeks to modify a decree of the district court awarding priorities of water from Second Creek, in District Number 44, Irrigation District Number 5, Routt County, Colorado. In the proceedings in which the decree was rendered Dunstan entered appearance claiming an interest in the waters of that creek by an appropriation through the Dick Dunstan Ditch. He was unable then to file a statement of claim or make proof, on ac-

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count of the absence of essential testimony. However formal objection was entered to the award of any priority senior to his on that stream. By decree the Johnson Ditch was given a priority as of date June 1, 1896.

At the following term of court some ten months later, Dunstan filed his formal petition and statement of claim for an adjudication of his right to Second Creek water, through the Dick Dunstan Ditch, claiming a priority of date June 1, 1893. The court after full hearing, in which all parties in interest participated, found the Dick Dunstan Ditch entitled to a priority of June 1, 1893, specifically holding, however, that such priority was subordinate to that of the Johnson Ditch, with a priority of June 1, 1896, only.

It conclusively appears that the decree is wrong, and inconsistent with and contrary to the rights of the parties, and the findings of fact of the court. The Dick Dunstan Ditch, with its priority three years senior to the Johnson Ditch, cannot as matter of fact or law be junior and subject to the rights of the latter. The proceedings herein constitute but a single adjudication in which all parties had a right to appear and be heard, and in which they did appear and were heard. No one could get a priority superior to another on the ground that the one offering first proof got the preference, which seems to have been the theory upon which the court acted.

The judgment of the trial court is reversed and the cause remanded with instructions to enter a decree giving the Dick Dunstan Ditch an unconditional priority out of Second Creek dated June 1, 1893, for the amount of water to which it is entitled as shown by the original decree.

Judgment reversed and cause remanded with instructions.

GARRIGUES, C. J., and ALLEN, J., concur.

(66 Colo. 302)

DOWD v. HERCULES POWDER CO.
(No. 9244.)

(Supreme Court of Colorado. June 2, 1919.)

1. APPEAL AND ERROR ⟸901—REVIEW—INSUFFICIENCY OF EVIDENCE—BURDEN.

It is incumbent on plaintiff in error to show wherein the evidence is insufficient to support the judgment.

2. APPEAL AND ERROR ⟸930(1)—REVIEW—PRESUMPTION—SUFFICIENCY OF EVIDENCE.

Where plaintiff in error has failed to sustain the burden upon him of showing wherein the evidence is insufficient to support the judgment, it will be presumed that the evidence does in fact support the judgment.

3. APPEAL AND ERROR ⟸930(1)—REVIEW—CONSTRUCTION OF RECORD.

What appears in the record as to matters of fact on appeal or error is to be viewed in the light most favorable to the successful party.

4. SALES ⟸71(4)—CONSTRUCTION OF CONTRACT—AMOUNT REQUIRED FOR PURCHASER'S NEEDS.

A contract for the sale of blasting materials which provides that the seller is to furnish to the buyer so much material as may be required by the buyer during the term of the contract for his own consumption, or in the conduct of his own business, does not require the seller to furnish material above the requirements of the buyer's needs to enable him to speculate on its resale.

Department 3.

Error to District Court, Eagle County; Charles Cavender, Judge.

Action by the Hercules Powder Company against J. W. Dowd, with cross-complaint by defendant. Judgment for plaintiff and against defendant on the counterclaim, and defendant brings error. Affirmed.

Hogan & Bonner, of Leadville, and H. Riddell, of Denver, for plaintiff in error.

Dana, Blount & Silverstein and Richard A. Smith, all of Denver, for defendant in error.

ALLEN, J. This is an action brought by the Hercules Powder Company, hereinafter designated as the plaintiff, against J. W. Dowd, defendant, to recover the price of certain goods sold and delivered. The defendant filed a cross-complaint for damages for an alleged breach of contract. Issues were joined and upon trial the court found for the plaintiff. The defendant was denied any recovery upon his counterclaim.

The cause is brought here for review by the defendant, and the matters complained of, or presented for our consideration, relate only to the defendant's counterclaim for damages and the trial court's denial of the same.

The contract, upon which the defendant relies, was entered into on January 6, 1914, and continued in effect for a period of two years from that date. The contract was made between the defendant, designated therein as "purchaser," and the Independent Powder Company, described as "vendor." The plaintiff is the successor to the last-named company, and now stands in its place under the contract.

Paragraph 2 of the contract reads as follows:

"2. Witnesseth: That, in consideration of all the business of the purchaser, the vendor hereby agrees to sell to the purchaser, and the purchaser, in consideration of the prices and terms hereinafter stated, hereby agrees to buy from

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the vendor all the dynamite and other blasting supplies which may be required by the said purchaser during the term of this contract, for his own consumption or in the conduct of his own business at Red Cliff, Colorado, district."

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The defendant alleged in his cross-complaint that "within and during the life of this contract he placed with said plaintiff orders for goods to an amount of 250,000 caps, 100 cases of White Monarch fuse, and one carload of powder; * * *" that plaintiff refused to furnish the goods; and that by such act of the plaintiff the defendant was damaged.

The plaintiff interposed several defenses to the defendant's counterclaim, one of which appears from the following allegations:

"That if defendant ordered * * * the caps, fuse and powder referred to, * * * such merchandise was not required by defendant during the term of said contract for his own consumption or in the conduct of his own business, * * * and was ordered by defendant, * * * in quantities, which as he then well knew, were far beyond the requirements of himself or his business, and for the purpose of obtaining such merchandise at cheap prices and selling it during the years 1916 and 1917, and thereafter at such advanced prices as he would then be able to obtain."

[1-3] At the trial, evidence relevant to this defense was received by the court. It is incumbent upon the plaintiff in error to show wherein the evidence is insufficient to support the judgment. Dailey v. Aspen Pub. Co., 46 Colo. 145, 150, 103 Pac. 308. In our opinion, the plaintiff in error has failed to do this. The presumption therefore obtains that the evidence supports the judgment. 4 C. J. 786. What appears in the record as to matters of fact is to be viewed in the light most favorable to the successful party. Sebold v. Rieger, 26 Colo. App. 209, 142 Pac. 201.

Reviewing the record in the light of the principles above stated, we find that the evidence fairly sustains the defense above mentioned, and that the trial court would have been warranted in finding the issue, in this respect, for the plaintiff, and for that reason denying defendant any recovery upon his counterclaim.

[4] The term of the contract expired January 6, 1916. The order for goods, given by the defendant, and which the plaintiff refused to fill, was made on January 1, 1916, at a time when the defendant knew that the period fixed by the contract for furnishing goods was about to expire. The evidence also warrants the inference that the defendant knew that if the order was filled by the plaintiff, the goods could not be delivered until after the expiration of the term fixed by the contract. At the time the order was given the defendant already had on hand a reasonable quantity of material of the kind ordered. The evidence shows that the single order of January 1, 1916, was for more material than had been ordered during the previous month, and that the December, 1915, and January, 1916, orders together amounted to more material than the defendant had ordered during the entire remainder of the two-year term of the contract. The record appears to uphold the contention of the plaintiff, to the effect that the testimony fails to show that the defendant required the dynamite and blasting materials, ordered January 1, 1916, to meet the demands of his business during the term of the contract, and that the order was given as an attempt to use the terms of the contract for the purpose of speculating on the advanced and rising market price of the materials. The contract in question does not require or provide that the plaintiff furnish all the material sought by defendant, but only so much "as may be required by the said purchaser (the defendant) during the term of this contract, for his own consumption or in the conduct of his own business." The contract does not permit the defendant to stock up, to an undue extent, with goods just before the term of the contract should terminate.

In our opinion the evidence is sufficient and of such a character to uphold the judgment of the trial court, and the same is therefore affirmed.

Affirmed.

GARRIGUES, C. J., and BAILEY, J., concur.

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(180 Cal. 454)

RICHMAN v. SAN FRANCISCO, N. & C. RY. (S. F. 7563.)

(Supreme Court of California. May 31, 1919. Rehearing Denied June 30, 1919.)

1. APPEAL AND ERROR ⟨⟹781(6)—DISMISSAL OF APPEAL—MOOT QUESTIONS.

Where, after judgment for plaintiff in a personal injury action, plaintiff assigned an undivided one-half interest therein to his attorney, and thereafter compromised with defendant without the attorney's consent, whereupon the judgment was satisfied of record, which satisfaction was subsequently vacated at the attorney's request, an appeal by defendant will not be dismissed on the ground that the controversy had been compromised and the questions were moot, since at least as to one-half of the judgment the case was not moot.

2. MASTER AND SERVANT ⟨⟹267(1) — INJURIES TO SERVANT—EVIDENCE—RELEVANCY.

In a railroad employé's action for injuries in a collision, testimony concerning the stopping of the watch of one of the passengers on the wrecked train to show the time of the collision was relevant; its weight being for the jury.

3. WITNESSES ⟨⟹290 — REDIRECT EXAMINATION—REPETITION.

In a railway conductor's action for personal injuries sustained in a wreck of his train, an objection to a question on redirect examination of defendant's expert witness, whether he would consider it safe to have in his employ an elevator man or a locomotive engineer who had had syphilis for a long period of time, was properly sustained, where the witness had already gone into the general subject of such disease exhaustively.

4. APPEAL AND ERROR ⟨⟹1046(5)—REVIEW—CURE OF ERROR.

In a railway conductor's action for injuries sustained in a wreck, wherein it was claimed that the physical condition of plaintiff precluded him from properly fulfilling his duties, a remark by the court that he would rather take a wife's testimony as to the peculiar conditions of her husband than that of all the physicians, if prejudicial, was cured by subsequent admonitory instructions.

5. DAMAGES ⟨⟹216(7) — INJURIES TO SERVANT — INSTRUCTIONS — FUTURE PAIN AND SUFFERING.

In a railway conductor's action for injuries in a collision, an instruction that the jury might allow compensation for such disability and suffering as the evidence shows is "reasonably probable" will result in the future was erroneous, as being in contravention of Civ. Code, § 3283, allowing compensation for damages "certain to result in the future."

6. EVIDENCE ⟨⟹472(1) — OPINION — QUESTION FOR COURT—INJURIES TO SERVANT—RULES—INTERPRETATION.

In an action by a conductor for injuries in a collision, opinion evidence as to the interpretation and application of the company's printed operating rules, objected to as invading province of court and jury, was erroneous, for, if the rules required elucidation, it was the duty of the court to interpret them in view of Code Civ. Proc. § 2102.

7. EVIDENCE ⟨⟹501(1)—INJURY TO SERVANT—RULES—BASIS OF OPINION.

In an action by the conductor of an electric interurban train for personal injuries sustained in a collision, opinion of a witness as to the meaning of defendant's rules, based upon standard rules governing the operation of trains, which were different from those of defendant, was erroneous.

8. APPEAL AND ERROR ⟨⟹1053(3)—REVIEW—CURE OF ERROR.

In an action by a conductor of an electric interurban train for injuries sustained in a collision, error in admitting expert evidence as to meaning and application of the operating rules *held* not cured by an instruction that if plaintiff failed to call up the train dispatcher before leaving the terminal, and such failure was the proximate cause of the accident, he could not recover.

In Bank.

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by Horace G. Richman against the San Francisco, Napa & Calistoga Railway. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

Myrick & Deering, of San Francisco (James Walter Scott, of San Francisco, of counsel), for appellant.

Theodore A. Bell, of San Francisco, and E. S. Bell, of Napa, for respondent.

LAWLOR, J. This is an action brought to recover damages for personal injuries alleged to have been sustained by plaintiff in a railroad wreck, when two trains of the defendant company collided between Collins and Hatch, stations situated on the line of its railroad, in Napa county. The jury found a verdict for plaintiff in the sum of $15,000. The defendant has appealed from the judgment entered thereon, and from an order denying a new trial.

[1] Before considering the points relied upon for a reversal of the judgment and order denying a new trial, we will dispose of the motion to dismiss the appeal. The motion was made on the ground that, the controversy having been compromised, the questions presented were moot. After judgment the plaintiff assigned an undivided one-half interest therein to his attorney, E. S. Bell. It appeared that before the opening brief of the appellant was filed an agreement to compromise the controversy was entered into between the parties; James Irvine, the president of the company, representing the defendant, without the participation of its

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counsel, and the plaintiff acting for himself, without the consent of his counsel, and satisfaction of judgment was accordingly entered in the office of the county clerk of Napa county. Mr. Bell thereupon brought an action to vacate and set aside the satisfaction of judgment, so far as it related to his undivided one-half interest. Plaintiff and the defendant company were both made parties to the suit, and upon the trial it was decreed that Bell was the owner of the interest claimed, the satisfaction of judgment was annulled and set aside, and the judgment was thereupon restored, and entered by the clerk in favor of Bell against defendant, in the sum of $7,658.25. This action, resulting in favor of Bell, was based upon the fact that notice of the assignment had been given to representatives of the defendant company prior to the settlement with plaintiff. The trial court found that the defendant company had such notice, and that it wrongfully conspired with the plaintiff to cheat and defraud Bell of his interest in the judgment. No appeal was taken from this judgment, and it has become final. It is apparent from the foregoing that there is no compromise as to half of the judgment at least, and the case is not moot. The motion to dismiss the appeal on the ground of a compromise, therefore, cannot be sustained.

The defendant is a common carrier of passengers and freight, and operates a single line electric railway between the towns of Vallejo and Calistoga. For the purpose of controlling the movement of its trains the company employs train dispatchers at its depot at Napa City, and maintains a telephone line connecting with all its main stations, including Vallejo and Collins. On the morning of June 19, 1913, plaintiff was operating one of defendant's trains in the capacity of conductor. His train was known as No. 6, and was due to leave Vallejo at about 9 o'clock, and to arrive at Collins some 16 minutes later. At this station, according to schedule, train No. 6 was to meet train No. 5, south-bound. This latter train reached Collins on schedule time, but No. 6 was late. The conductor of No. 5 called up the train dispatcher from Collins and asked for orders. He was directed to take orders, and after the dispatcher called up the agent at Vallejo, and ascertained that No. 6 was still there, received orders to meet No. 6 at Hatch. The latter train started for Collins, and at a point south thereof the two trains met in a head-on collision, were telescoped, 13 persons were killed, and many others were injured, among whom was the plaintiff. The cause of action was based upon the claim that the company was responsible for the collision because the dispatcher ordered train No. 5 out of Collins without first giving notice to train No. 6. The company contended that the plaintiff was not entitled to recover, because he took train No. 6 out of Vallejo without first calling up the dispatcher. The other facts pertinent to this appeal will appear in the discussion of the points relied upon for reversal. There are many assignments of error, but for the purposes of this opinion it will not be necessary to mention all of them.

[2] 1. The admission of testimony concerning the stopping of the watch of Tracy Fay, one of the passengers on the wrecked train, for the purpose of showing the time of the collision, is assigned as error. This testimony was to the effect that the witness discovered that, when he returned to the scene of the accident at noon, his watch had stopped at 9:30 a. m. We think criticism might more properly be addressed to the weight, rather than to the admissibility, of the testimony. The testimony was relevant for the purpose, and it was for the jury to determine the weight to be given to it. Moreover, we do not perceive that the exact time of the collision had any particular materiality.

[3] 2. Appellant assigns error to the refusal by the court to allow certain testimony concerning the effect of syphilis. It was claimed by appellant that plaintiff had been a syphilitic since he was 14 years of age. Dr. W. G. Alvarez, called by the defendant, testified at great length as to the effect of this disease on the mind and body. When being examined on redirect the following occurred:

"Q. Would you consider it safe for example to have in your employment an elevator man, or to have in your employ a locomotive engineer, who had syphilis for some long period of time?

"Mr. Bell: We object to it as incompetent, irrelevant, immaterial, and not proper redirect.

"The Court: Sustained."

The witness had already gone into the general subject of syphilis and its effects so exhaustively that we cannot say that the ruling was erroneous, even though the inquiry was relevant and the question properly framed.

[4] 3. Error is assigned because of the following remark by the court with regard to the testimony of the wife of plaintiff concerning his physical condition:

"I think a wife can beat all the physicians on earth telling about the peculiar conditions of her husband. I would rather take the wife's testimony than all the physicians as to the physical condition of her husband."

This remark was addressed to counsel in the presence of the jury touching a question of fact, and of course should not have been made. But we think that any prejudicial effect the remark may have caused at the time was cured by an admonitory instruction, that—

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"You will not consider for any purpose in this case * * * any comments of the court made to counsel during the trial upon testimony, or the relative weight of the testimony of any witness, or of any class of witnesses. * * *"

4. An exception was taken to an instruction of the court upon future damages; the portion objected to reading as follows:

"If you further find that the plaintiff's injuries are permanent, and will to some extent disable him in the future, and cause him pain and suffering hereafter, you should also allow him such further sum as, paid now in advance, will reasonably compensate him for such further disability, pain, and suffering as the evidence shows is reasonably probable will result to him in the future, not to exceed in all the amount alleged in plaintiff's complaint."

It is urged in support of the objection that the court committed prejudicial error by the use of the phrase in the instruction, "reasonably probable will result," in contravention of section 3283 of the Civil Code, which reads:

"Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future."

The question of damages for future detriment was gone into at great length at the trial and the record shows that the defendant was entitled to have the jury instructed on the subject. It was testified by plaintiff and his wife that, because of the injuries to the head and back and the leg of the plaintiff, he would be incapacitated in the future; that his memory was no longer reliable; that at times his mind becomes blank and that he cannot think connectedly; that he is affected by dizziness, is deprived of sufficient sleep, and suffers continually from headache; that he has lost his hearing on the left side; and that the slightest jar to the head causes the blood to rush to it.

The meaning of section 3283, Civil Code, has been considered in a number of cases. In Melone v. Sierra Ry. Co., 151 Cal. 113, 91 Pac. 522, an instruction was given to the jury that an element of damage was "such reasonable sum as the jury shall award him on account of the pain and anxiety that he has suffered or may suffer by reason of his injuries," and further that "in estimating the damages to be awarded you may take into consideration * * * how far his injuries are permanent in their character and results, as well as the physical and mental suffering he may have sustained or may undergo in the future by reason of the injuries," and it was said that—

"These instructions were erroneous in permitting the jury to estimate prospective damages upon what they believed might be the plaintiff's future suffering. * * * It is true that in a succeeding instruction the court declared that plaintiff was entitled to recover not only such damages as he may have suffered, but also 'such damages as by the evidence it is reasonably certain he will suffer in the future.' Herein is a declaration of the true rule, but none the less the instructions upon the matter are conflicting, and it cannot be said by which the jury was guided."

The phrase "reasonably probable" was used in an instruction considered in Hersperger v. Pacific Lumber Co., 4 Cal. App. 460, 88 Pac. 587, 591. The instruction is as follows:

"In this action the plaintiff, if he has shown himself entitled to recover, is entitled to recover for all damages which he has suffered up to the time of the trial and for all damages that it is reasonably probable that he will sustain in the future, not exceeding the sum claimed in the complaint. In estimating the compensatory damages in cases of this character, all the consequences of the injury, future as well as past, are to be taken into consideration, including the bodily and physical pain and suffering which is shown by the proof to be reasonably certain to have naturally resulted from the injury."

The court said:

"The mere reading of the whole instruction is sufficient to show there is no error in it."

That case is cited with approval in Lonnergan v. Stansbury, 164 Cal. 488, 129 Pac. 770; the court holding that the instruction given in both cases was identical. The court further declared:

"The phrase 'reasonably probable' may well be omitted from all such instructions and the statutory requirement of the Civil Code (section 3283) strictly adhered to. * * * But the instruction here in question, while using the unhappy phrase 'reasonably probable,' sums up its declaration of the law with the pronouncement of the correct rule."

In other words, the two phrases "reasonably probable" and "reasonably certain" were both used, and the error in the former was cured by the latter. In the recent case of Wiley v. Young, 174 Pac. 316, it was held upon the authority of Melone v. Sierra Ry. Co., supra, that the expression "reasonably certain to result" is in accord with section 3283. The term "reasonably probable" was not used in Wiley v. Young, supra.

The instruction before us was given by the court of its own motion, and the basis of the award of future damages is not touched upon elsewhere in the charge, nor in any instruction proposed by either of the parties.

[5] The use of the expression "reasonably probable" was clearly erroneous, and might well have led the jury to believe it would be proper to allow damages for suffering or other injury which they believed the plaintiff would probably suffer in the future, instead of for such suffering and injury as they believed were certain to result. So

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much is left to the discretion of the jury in the determination of the amount of damages in cases of this character, it is of great importance that their attention should be called particularly to the basis upon which, and upon which only, an award must be founded for future detriment.

The respondent concedes that the phrase "reasonably probable" does not literally comply with section 3283, but urges that the defect is cured by another instruction which the court gave:

"I instruct you that, if plaintiff is entitled to recover, the measure of his recovery is what is termed compensatory damages; that is, such sum as will compensate him for the injuries he has sustained."

Stein v. U. R. R. Co., 159 Cal. 368, 113 Pac. 663, is cited in support of this contention. But that case uses language which expresses the view that the word "sustained" does not refer to future injury. It was said:

"True, if the sentence stood alone, it might be open to the objection urged against it; but its vice is nullified by the very next sentence, which limits the jury's award *to the injury 'sustained'—not to a future, contingent injury.*" (Italics ours.)

It will not be necessary to consider this point further, or to appraise the gravity of the error, in view of the conclusion we have reached on the next point.

5. The court, over objection, admitted the opinions and conclusions of certain witnesses in the interpretation of the printed operating rules of the company, the application of the rules, the duty of the train dispatcher under the rules, the priority of one rule over another, as to which of two trains was superior and the relative duties of the plaintiff and the train dispatcher. This, appellant claims, was prejudicially erroneous, and constituted an invasion of the province of both the trial court and of the jury. It is to be kept in mind that train No. 6 was at Vallejo awaiting the arrival of the boat of the Monticello Steamship Company to take on its passengers. The boat, as frequently happened, was late. No. 6 was due under time-table schedule to leave Vallejo at 9:02 a. m. and to arrive at Collins at 9:18 a. m., where it was to meet No. 5. The latter train arrived at the meeting point on schedule time. No. 6 not being in sight, B. E. Patten, the conductor of No. 5, called up the dispatcher at Napa and was told to take an order. The order given was to meet No. 6 at Hatch. Three minutes later No. 5 started for the latter point, and when about 1½ miles south of Collins the trains collided.

In the controversy over the question of liability, rules 268, 230, and 203, among others, were considered and admitted in evidence. Rule 268 reads as follows:

"When trains running in opposite directions are to be moved toward each other by train orders, the train whose rights are to be restricted must first receive the order and the complete before the order is given to the train to be moved against it or toward it."

Rule 230 provides in part:

"All regular trains, * * * when becoming ten minutes late, must report to the dispatcher, and will also report for each successive ten minutes lost."

Rule 203 declared:

"A train must not leave its initial station * * * without order or clearance, and until it is ascertained by asking the dispatcher whether all trains due have arrived or departed, mentioning particularly the last train due, giving the train number."

There was also a bulletin rule, of more recent adoption, to the effect that the conductor of a north-bound train at Vallejo must in every instance call up the dispatcher 5 minutes before the scheduled time for leaving.

It was admitted by plaintiff that he did not call up the dispatcher 5 minutes before the scheduled time to leave, nor when No. 6 was 10 minutes late. But he positively asserted that he telephoned the dispatcher just before leaving Vallejo, which he states was about 9:19 a. m. E. J. O'Leary, the dispatcher on duty when the collision occurred, called as a witness for the company, admitted that he did not give the restricting order to No. 6, but stated that he did call up the agent at Vallejo and learned that No. 6 was still there, loading Wells Fargo express, before he gave the order and complete to No. 5. The appellant has strongly contended that plaintiff took No. 6 out of Vallejo without calling up the dispatcher at all, and that this was the proximate cause of the collision. Plaintiff testified that he telephoned to the dispatcher, "No. 6 at Vallejo ready to leave the wharf," and that the answer came back, "No orders for No. 6," which meant that No. 6 should proceed to Collins to meet No. 5. F. M. Monning, whose wife left on No. 6, testified that the plaintiff entered the telephone booth, remained there about 2 minutes, and then came out and signaled the motorman to start the train. On the other hand, several other employés, who were listening on the telephone line when plaintiff declared he telephoned to O'Leary, flatly contradicted plaintiff on that point. Both sides agreed that the case turned on this question, for in the words of the appellant, "Around this point the trial centered." It was testified on behalf of the company that, owing to plaintiff's syphilitic condition, he might have entered the telephone booth to call up the dispatcher, but forgot to do so.

As an illustration of the objectionable testimony, we quote from the examination of W. J. Juarez, the motorman on No. 5, as to the application of rule 268 to the situation:

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"Q. Mr. Juarez, taking the circumstances as they existed while you were at Collins station on that morning, June 19, 1913, there as you say on time, north-bound No. 6 not there, but due, you receiving orders through your conductor, written orders to proceed to some other station for the purpose of meeting No. 6, what was the rule under those circumstances which governed, so far as notification of No. 6 was concerned, of the orders given you?"

To this the witness replied that all he had to do was to carry out his orders.

"Mr. Bell: I have not asked you about that. I have asked you now if you know, and you do, Mr. Juarez, don't you, what the company, under that rule and practice followed, had to do with No. 6 before they gave you the order to proceed? A. Well, I suppose they had to give that train No. 6 orders."

Juarez finally stated:

"I say, with respect to that rule 268, that I never have heard whether it applied to a train at a terminal or not."

Questions of similar import were asked of the witness Patten, who testified that rule 268 applied to a train lying at a terminal and that it was the duty of the dispatcher under rule 268 to transmit the restricting order to train No. 6 before giving the "complete" to No. 5, and that he had no right under the rule to order No. 5 out of Collins until this was done. Patten was allowed to give further testimony to the effect that, in the absence of a restricting order to No. 6, that train had the right of way over the track from Vallejo to Collins as against No. 5. Again, he was permitted to testify as to which was the superior train under the circumstances presented, and further that there was no priority between the rule which required the dispatcher to give the restricting order before letting the other train move against it and the rule which required the conductor of a train at an initial or a terminal point to call up the dispatcher in each case before leaving.

[6] The admission of this testimony was clearly error. If the printed rules required elucidation, it was the duty of the court to interpret them, and not for the witnesses to establish by their opinions and conclusions the meaning of the rules and the duties of plaintiff and the dispatcher thereunder. 26 Cyc. 1472; section 2102, Code Civ. Proc. Many of the objectionable questions and answers went directly to the very question of fact in controversy. For instance, it was testified that the dispatcher had no right to order No. 5 out of Collins until the clearance was given to No. 6, and that in the absence of orders No. 6 had the right to the track from Vallejo to Collins as against No. 5. These and similar propositions of fact involving an interpretation of the printed rules were freely testified to by these witnesses. Nor was the vice of the rulings relieved by the fact that Juarez and Patten on cross-examination weakened the probative force of their direct testimony by the admission, for instance, that they did not know whether rule 268 applied to No. 6.

[7] L. G. Eby, an agent of the Southern Pacific Company, called as an expert witness by the plaintiff, testified, over objection, as to the meaning of the operating rules of the defendant company, which, he admitted, he had merely glanced at and had not studied, as compared with the standard rules governing the operation of trains in parts of the United States, Canada, and Mexico. The objections to the testimony were that he was not qualified as an expert on the subject, because he was not acquainted with the rules in controversy, that the standard rules were irrelevant and immaterial, and that his testimony consisted of opinions and conclusions based upon rules that were not those of the defendant company. This testimony should not have been allowed, even if the standard rules referred to by him could properly be made the basis of interpretation of the printed rules of the defendant company.

[8] It is insisted by the respondent that, as this testimony came from witnesses experienced and versed in railway operation, it was not improperly admitted, for the reason that it did not "involve an interpretation of the abstract language of the rule, but simply went to the application of the rule in practice." With this we cannot agree. Practically every one of the questions contained such a phrase as "rule, custom, and practice." So that an affirmative answer carried the interpretation of the printed rule. The proper mode was for the witness to state *as a fact* the custom and practice, and, if necessary, for the court to interpret the meaning of the printed rules, and then for the jury to determine what rules governed the situation. But as conducted the inquiry was calculated to take from the jury the solution of the vital questions of fact in the case.

Respondent relies on 17 Cyc. 77, but we find nothing in that citation that supports the rulings complained of. It is contended that, even if these rulings were erroneous, the error was cured, for the reason that the pivotal question of fact in the case was whether plaintiff called up the dispatcher, and, the court having repeatedly instructed the jury that if the testimony of the plaintiff on this point were not true he could not recover, it must be implied from the verdict that the jury reached the conclusion that the plaintiff told the truth. Assuming that this reasoning is sound, yet it cannot be accepted, because the premise is false.

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The court did *not* instruct the jury that if it was found that the plaintiff did not call up the dispatcher *he could not recover*. If such an instruction had been given, there might be warrant for holding that, as the jury had found in favor of the plaintiff on the question of fact, the erroneous ruling would be immaterial. But the instructions that were given to the jury on this point were to the effect that if the plaintiff failed to call up the dispatcher, *and such failure was the proximate cause of the accident*, he could not recover. It cannot, therefore, be implied from the verdict that the jury, under the evidence and the instructions, may not have concluded that the plaintiff did not call up the dispatcher, yet that this dereliction of duty was not the proximate cause of the collision, but that, relying on the testimony complained of, the proximate cause was the giving by O'Leary of the order and the complete to No. 5 without restricting No. 6. For this reason, and because of what we shall say on the next point, it cannot be held that the error in the rulings was cured.

We have considered from another angle whether the admission of this testimony was prejudicial, and this involves the question whether the opinions and conclusions of the witnesses were in fact true, for, if so, the error in allowing the interpretation to come from the witnesses, instead of from the court, would not, perhaps, be material. We are convinced, however, that the interpretation by the witnesses was not correct. In our view, rule 268 had no application to a train at an initial or terminal point. It had reference only to trains already started on a trip. Hence we must conclude that, even if the court itself had held that rule 268 did apply, we would be called upon to reverse the judgment. Further, there was other testimony that the rule did apply, but that it was not always followed. William H. Howe, a witness for the plaintiff, and who, for 6 years prior to November, 1913, when he retired, had served as conductor and dispatcher for the defendant company, and at one time was in charge of train No. 6, testified, over objection, that rule 268 did apply, but that in a number of instances, when he was in charge of No. 6, train No. 5 arrived at Vallejo without the restricting order being given by the dispatcher to him as conductor of No. 6. O'Leary testified further that he was instructed by the chief dispatcher, who was also the assistant superintendent, that it was not the practice to give orders to No. 6 when that train was held at Vallejo, and No. 5 was given clearance. He stated further that—

"Under the settled practice of the company during the 6 months I was dispatcher and I was conductor, it was the uniform rule and custom that the conductor at Vallejo should receive his orders whether clearance or limiting —at the time he left the Vallejo wharf northbound, and not before. It was the practice, for example, if I wanted to move train 5 down south, because of the lateness of train 6 in departing from the terminal, simply to phone my order to Collins for that train to proceed, and to give my order to the north-bound train and its conductor later on, when the north-bound train called up, 'Ready to go.' That was the custom we worked under always. The first train called would get the order."

So here was testimony tending to prove, on the one hand, that rule 268 did apply, but that it was not always followed, and, on the other hand, that rule 268 had no bearing on a train at Vallejo. In fact, O'Leary testified that he did not know about rule 268 until after the collision. With such contrariety of testimony, as to the question of the applicability of rule 268 and the custom and practice, the admission of the opinion and conclusion testimony must have inevitably entered into the solution of the question of proximate cause and prejudicially affected the rights of appellant.

We think this is the rationale of the matter. The railway was operated in connection with a steamship line, and the steamers, on account of the action of the tides, were frequently late. The company, so far as the operation of the trains was concerned, would naturally seek, in order to minimize delay to passengers, especially those making a round trip to San Francisco and other points, to expedite south-bound trains, when the boat was behind time, and so it was made the duty of the dispatcher to make all possible headway with those trains when north-bound trains were late. To accomplish this expedition, with due regard to the safety of the traveling public and the company's employés, rules 230 and 203 were put in force. To further realize this object, the bulletin rule requiring northbound trains to call up the dispatcher 5 minutes before leaving time, was adopted. Thus under these rules the dispatcher would be left free to forward south-bound trains without being hampered by having to transmit restricting orders to north-bound trains at Vallejo. He could therefore move the south-bound trains from station to station without regard to north-bound trains until they were actually reported as being ready to leave Vallejo. Hence, if the plaintiff failed to call up the dispatcher, this was the proximate of the collision, for we entertain no doubt that the duty to establish communication with the dispatcher rested solely on the plaintiff; but if, on the other hand, he established communication with the dispatcher and received the response, "No orders for No. 6," instead of an order to meet No. 5 at Hatch, the proximate cause of the accident is traced to such erroneous order. We think that upon the entire record, including the evidence, the error in the rul-

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ings in question resulted in a miscarriage of justice. Section 4½, art. 6, Const.

Judgment and order reversed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; SHAW, J.; LENNON, J.; MELVIN, J.; WILBUR, J.

(177 Cal. 174)

HARPER v. SLOAN et al. (Sac. 2327.)

(Supreme Court of California. June 6, 1917.)

Department 2. Appeal from Superior Court, Sierra County; Stanley A. Smith, Judge.

Opinion in department, reversed in bank (177 Cal. 174, 169 Pac. 1043), but referred to by Melvin, J., in his dissenting opinion to the opinion of the court in bank.

Frank R. Wehe, of San Francisco, and W. I. Redding, of Downieville, for appellant.

Charles F. Hanlon, of San Francisco, for respondents.

MELVIN, J. Defendants' demurrer to plaintiff's amended complaint was sustained without leave to amend. From the judgment following such order, the plaintiff appeals.

The theory of the amended complaint is that the transactions described therein were such as created a mining partnership between plaintiff and defendants, that appellant held the property of said partnership in trust, and that he was entitled to a lien thereon for certain advances made by him. The complaint avers substantially the following facts:

McGregor and Lewis owned a certain described mining claim in Sierra county. This was and is an unpatented lode mining claim possessed by virtue of a location made in 1895 in accordance with the mining laws of the United States and the local rules then in force in that county. The claim was of such a nature that large sums of money were required for its development. On December 24, 1896, McGregor and Lewis entered into a written agreement with Harper, the plaintiff in this suit, whereby the said Harper was to work and develop the claim and deposit the gross yield therefrom with one Sayles, who was to deliver such deposit to the vendors in case Harper should fail to pay the purchase price of $6,000, one-half payable by November 1, 1899, and the balance on or before May 1, 1900. It was provided that upon full payment of the purchase price McGregor and Lewis would convey their title to Harper. Immediately following the execution of the contract Harper took possession of the claim, and on February 9, 1899, entered into a written agreement with the defendants, Sloan and Dwyer, whereby Harper promised to convey to them a two-thirds interest in his contract with McGregor and Lewis upon these terms: $4,000 on or before March 1, 1899, and $3,000 on or before June 1, 1899, "and if" (to quote directly from the agreement) "in the opinion of the parties of the second part [Sloan and Dwyer] it should be necessary, the further sum of three thousand (3,000) dollars, on or before the 1st day of September, 1899." It was stipulated that all of the money so paid, with the exception of Harper's expenses, should be used to pay for work on the claim under his direction and control. The contract further provided that if McGregor and Lewis should convey to Harper under the terms of their agreement the latter would, "within a reasonable time," make a conveyance to Sloan and Dwyer of a two-thirds interest in the mine, and that "thereafter" Harper should have management and control of the operating of the mine for which he should be paid "an adequate compensation." There was also a clause in this agreement providing as follows:

"If the development and working of the Diadem Quartz Claim should be permanently abandoned by the party of the first part [Harper] and any money paid by the parties of the second part should be unexpended, the party of the first part shall return the same to J. T. Sloan, one of the parties of the second part."

The pleading contains further averments that:

"Upon the making of said contract last set out plaintiff, on behalf of himself and said defendants Sloan and Dwyer, continued in the possession of the said property and actually engaged in working the same and commenced to extract the mineral therefrom, and that said plaintiff and said defendants Sloan and Dwyer then actually engaged in the working and development of said claim and extraction of the mineral therefrom, and ever since have continued in the actual working of said claim, and then became, and ever since have been, mining partners, and that said mining partnership has never been dissolved, except that said defendants Sloan and Dwyer have refused to contribute their proportion of the expenses of the said working of said property other than as hereinafter alleged."

Next follow allegations that defendants paid $7,000 according to the terms of their agreement; that all of this money was expended in actual mining operations; that it became necessary for the working of said property that the further sum of $3,000 should be paid on or before September 1, 1899; that plaintiff asked Sloan and Dwyer to pay such amount, but that they refused to do so. There are statements in the pleading that plaintiff and defendants continued in the possession of the claim, "said plaintiff managing and actually working the same for said partnership as aforesaid, and continued in the said working until he had expended upon the said claim all of the said sum of

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$7,000, and other sums of money, exceeding more than $2,000 advanced by himself." It is averred that after the expenditure of more than $9,000 the plaintiff Harper had extracted from the mine $8,000, out of which he paid the purchase price, $6,000, to McGregor and Lewis, who, on December 8, 1899, conveyed their interest in the property to Harper "in trust for himself and for said defendants Sloan and Dwyer as provided for in said contract, which said deed was recorded at page 143 et seq. of Book No. 15 of Deeds, Sierra County Records, to which reference is hereby had, and then and thereby said plaintiff and said Sloan and Dwyer became the owners of said mining claim in equal shares; that is to say, one-third each." We may remark, in passing, that this averment is in direct contradiction of the contracts which did not provide for a conveyance in trust by the vendors to Harper, and did not contemplate the ownership by the defendants of an interest in the claim until an actual conveyance should be made to them by Harper.

Plaintiff pleads the following excuses for not making a deed to Sloan and Dwyer of two-thirds interest in the mine: (a) Plaintiff was informed and believed that on July 17, 1899, Sloan conveyed a one-half interest in the mining property to Lord William Beresford. (b) Sloan instructed plaintiff to make no deed to any person of any portion of the mining claim until he (Sloan) should give further instructions. (c) On May 21, 1901, Dwyer conveyed all of his share in the property to Sloan. (d) Prior to July 2, 1901, Lord Beresford died and his widow, as executrix of his last will, reconveyed to Sloan. (e) Plaintiff, although always ready to execute a deed agreeably to the strict terms of his contract, was unable to ascertain to whom he should convey until further instructed by Sloan.

It is further pleaded that after the execution of the trust deed to Harper he and the defendants, as mining partners, continued to work the claim. This work was prosecuted until the end of December, 1900, but yielded no profit. Plaintiff called upon defendants to contribute to his expenses the $3,000 "as provided in the contract," but they refused to make further payments, although Sloan consented to the work and advised Harper to continue it. Acting upon said advice, and with Sloan's approval, plaintiff "continued the said work until said partnership became indebted in the sum of about $2,000, during the said year 1900." To pay this indebtedness Harper mortgaged the mine to Sayles for $1,377.84, and thereafter Sayles' assignee demanding payment and Sloan and Dwyer refusing to contribute to the settlement of said debt, Harper negotiated a loan from Sharon and executed a note and mortgage for $2,252.30 to pay the Sayles note and discharge the earlier mortgage. From December, 1901, plaintiff was unable to work the claim continuously, but each year, to and including 1913, he expended for the alleged partnership more than $100 for assessment work. Plaintiff sues for compensation for all of his time employed in the management and control of the property for more than one year and 6 months up to the end of December, 1900, and for one month of each of the following 13 years; also for the taxes paid by him until 1913, inclusive.

There are allegations that Dwyer departed from California about 4 months after entering into the contract with Harper, and did not return, and that Sloan departed at the same time, but returned to California in December, 1900, remaining but 5 months, during which time he was informed of the conditions of the mining property "and of its indebtedness, and he consented to the same and promised to pay and advance to the said partnership the whole thereof." It will be seen at once that appellant's claims against the defendants must depend upon the existence of a mining partnership as defined by section 2511 of the Civil Code, which is as follows:

"A mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom actually engage in working the same."

Examining the written instrument which is pleaded as the basis of the claims of Harper against defendants, we see at once that it is not a copartnership agreement whereby from its execution Harper, Sloan, and Dwyer were to work the claim as partners. The others advanced money for the purchase of Harper's interest in the mine in case he ever acquired any interest. There was no provision by which they were to share in the output or be responsible for Harper's expenses in the operation of the property until there should have been an actual conveyance of an interest to them by Harper after he should have acquired it from the original locators. Towards them Harper did not sustain the relation of a mining partner for he had not owned nor acquired the claim with them for the purpose of working it and extracting the mineral therefrom. He was in much the same position as was the plaintiff in Stuart v. Adams, 89 Cal. 367, 26 Pac. 970, who had contracted with the owners to work the mine, pay one-half the expenses thereof, and receive one-half of the product for his labor. Such an arrangement as this court decided does not make the parties to it mining partners. Harper's arrangement with his vendors differed only from the one discussed in the Adams Case in that he was to pay all of the expenses of working the mine and to place the product in escrow, meanwhile having nothing but an option to purchase the claim and the product within

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a certain time for a stated amount of money. Similarly the contract of Harper with the defendants gave the latter the right to a conveyance of part of Harper's interest if he ever should purchase, after which he should be entitled to an adequate consideration for "the management and control of the operating of said mine." We see no escape from the conclusion that there was to be no partnership until Sloan and Dwyer became part owners.

The excuses offered by plaintiff in his pleading for his failure to convey are not sufficient. Sloan's rumored conveyance to Lord Beresford surely was not sufficient reason for Harper to ignore the terms of his agreement with defendants. Nor did Sloan's instructions to delay conveyance justify a change in the written agreement, and, of course, such directions were of no effect in relation to Dwyer. Nor did Lady Beresford's reconveyance to Sloan operate to change the contract. Dwyer's conveyance to Sloan had no such effect either. Both of the transactions last mentioned occurred more than a year after plaintiff obtained title, and he never had created a mining partnership nor any other sort by making the conveyance prescribed by the written agreement to be made within a reasonable time after he should become the owner of the claim. The engagement of the defendants was to buy a two-thirds interest in a mine if it should be acquired. They paid $7,000 for such interest, but Harper worked the mine on his own account, and never carried out his promise to convey. Therefore he cannot take advantage of his own violation of the agreement of sale and at this late day seek to compel defendants to pay a mortgage placed by him upon his own property without their consent. Nor may he compel them to compensate him for work done upon his own claim without authorization from them. A contract to buy an interest in a mine is not a mining contract. Prince v. Lamb, 128 Cal. 120, 60 Pac. 689. An agreement to the effect that if A. should secure a paying mine through the efforts of B., said A. would, in addition to wages, give B. an interest in the mine, is not an agreement establishing a mining partnership. Berry v. Woodburn, 107 Cal. 504, 40 Pac. 802. An agreement that upon the happening of some contingent future event the parties to the contract will operate a mine does not constitute a mining partnership. Dorsey v. Newcomer, 121 Cal. 213–216, 53 Pac. 557.

The conveyance of the property to plaintiff in trust for him and the defendants did not create a mining partnership. Before they could be charged as partners they must have engaged in working the mine. Peterson v. Beggs, 26 Cal. App. 760, 148 Pac. 541. As there was no mining contract the whole fabric of appellant's argument is destroyed, and it follows that the superior court did not err in sustaining the demurrer.

Judgment affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(180 Cal. 409)

In re SHIRLEY'S ESTATE. (L. A. 5941.)

(Supreme Court of California. May 27, 1919.)

1. WILLS ⟸651—VALIDITY OF PROVISIONS—FORFEITURE IN CASE OF CONTEST.

Provision of will, "Should any one to whom I have made a bequest * * * undertake to break my Will I desire such persons bequest becomes void and be set aside," is a dispositive provision, and not a mere expression of wish or desire, addressed to no particular person, and is effective to bring about a forfeiture of legacy on violation of its terms.

2. WILLS ⟸639—CONDITIONS—SPECIFIC APPLICATION.

Where words in a will are used which dispose of property or impose a condition on a bequest given elsewhere in the will, they need not be addressed to any one, as it is enough that they show the intent and will of testatrix regarding property or legacy.

3. WILLS ⟸464—UNGRAMMATICAL EXPRESSION.

Civ. Code, § 1322, providing that a clear bequest cannot be affected by other words, not equally clear, in another part of the will, does not apply to a clause "Should any one to whom I have made a bequest * * * undertake to break my Will I desire such persons bequest becomes void and be set aside," though ungrammatical, since intention is clear.

Department 1.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

In the matter of the estate of Louise F. Shirley, deceased. Appeal by Lucy C. McKinney, legatee, from order denying her the right to participate in distribution of assets petitioned for by George Puterbaugh, executor. Order affirmed.

Henning & McGee and F. B. Andrews, all of San Diego, for appellant.

Johnson W. Puterbaugh and Eugene Daney, both of San Diego, for respondent.

SHAW, J. This is an appeal by Lucy C. McKinney, one of the legatees mentioned in the will of Louise F. Shirley, from an order and decree of the superior court made on September 19, 1918, granting the petition of the executor to partially distribute the assets of the estate, and denying the right of the appellant to participate in said distribution.

The appellant was a sister and one of the

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heirs at law of the testatrix. The will gave to Lucy C. McKinney a legacy of $1,000, and to 12 other persons legacies in different sums varying from $50 to $5,000, and the residue to two young sons of George H. Van Arnam. Following the residuary bequest she appointed George Puterbaugh as the executor of the will. Then follows the language which is responsible for the appeal, as follows:

"Should any one to whom I have made a bequest of any portion of my Estate undertake to break my Will I desire such persons bequest becomes void and be set aside."

The court found that Lucy C. McKinney did undertake to break the will by contesting probate thereof; that on the trial of said contest the decision was against her, and that said will was thereupon duly admitted to probate. It is obvious that this attempt brings her within the terms of the clause just quoted, and that if said clause constitutes a condition to the legacy in her favor she has violated the condition, and thereby forfeited her right to receive such legacy.

[1] The appellant contends that the clause above quoted is not a dispositive provision of the will, but a mere expression of a wish or desire, addressed to no particular person, and entirely ineffective to bring about a forfeiture of the legacy upon a violation of its terms. In support of this construction of the clause she relies on the decisions of this court in Estate of Marti, 132 Cal. 666, 61 Pac. 964, 64 Pac. 1071, Kauffman v. Gries, 141 Cal. 295, 74 Pac. 846, Estate of Mitchell, 160 Cal. 618, 117 Pac. 774, and Estate of Purcell, 167 Cal. 176, 138 Pac. 704. These decisions each involved the question whether or not a precatory trust was created by the terms of a will purporting to impose upon the devisee or legatee a duty to a third person with reference to the property devised or bequeathed. They are applications of the rule of interpretation governing words addressed to the devisee or legatee concerning the property devised or bequeathed to him, as distinguished from the interpretation of general or particular expressions of the testator's will not so addressed, or, as it is sometimes stated, "addressed to the executor." The distinction is thus stated in Estate of Marti (132 Cal. 671, 61 Pac. 965):

"While the desire of a testator for the disposition of his estate will be construed as a command when addressed to his executor, it will not, when addressed to his legatee, be construed as a limitation upon the estate or interest which he has given to him in absolute terms."

Appellant seizes upon the phrase "addressed to the executor" in the above passage, and therefrom draws the inference that when the word "desire" is used, and it is not in terms or expressly addressed to any person, it is not to be construed as indicating the intention of the testator to dispose of his estate or to effect a disposition thereof, but is a mere ineffective statement of his hope or wish. The phrase quoted was used in that case only as a convenient form of expression, and the passage is not to be taken as rigidly as the appellant claims. Other words have been held equally effective. In Board v. Culp, 151 Pa. 470, 25 Atl. 118, quoted with approval in Estate of Tooley, 170 Cal. 166, 149 Pac. 574, Ann. Cas. 1917B, 516, the rule is said to be that where words of request and the like "are used in direct reference to the estate, they are prima facie testamentary and imperative, and not precatory." In Estate of Tooley, the testatrix, after a positive gift of all her property to her daughter, followed it with the statement that if the daughter died without husband or children, "I desire that any property that may be left divided equally among my sisters and brother." The word "desire," so used, was held to be a word disposing of the estate and qualifying the preceeding gift thereof. The court said:

"The rule is practically universal that words in a will indicating the wish of the testatrix regarding the disposition to be made of her property by the law at her death are to be taken as a dispositive provision," and that, where "directed to the executor or to the law and not to a devisee or legatee," the word "desire" is sufficient "to declare a disposition of the property."

[2] The fact that the clause here involved is not formally addressed or directed to any person as one by whom the bequest should be set aside is of no importance. Where words are used which dispose of property or impose a condition upon a bequest given elsewhere in the will, they need not be addressed to any one. It is enough that they show the intent and will of the testatrix regarding the property or legacy. If they do this, the court and the law will carry it out by probating the will and distributing the estate as is provided therein.

[3] The appellant also invokes the rule that a clear and distinct bequest in a will cannot be affected by any other words, not equally clear and distinct, in another part of the will. Civ. Code, § 1322. The words of the qualifying clause first above quoted are not grammatical in form, but they are entirely clear and distinct as an expression of the will of the testatrix that, if any legatee or devisee shall undertake to contest the will, the legacy given to such person shall be thereby forfeited. The rule referred to does not apply to the case.

We are of the opinion that the court below correctly construed the will, and properly held that the appellant was not entitled to the legacy. Estate of Hite, 155 Cal. 436, 101 Pac. 443, 21 L. R. A. (N. S.) 953, 17 Ann. Cas. 993; Estate of Miller, 156 Cal. 119, 103 Pac. 842, 23 L. R. A. (N. S.) 868.

The order is affirmed.

We concur: OLNEY, J.; LAWLOR, J.

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(180 Cal. 443)

MILLIRON v. DITTMAN et al. (L. A. 4944.)

(Supreme Court of California. May 29, 1919.)

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1. PRINCIPAL AND SURETY ⟸59—LIABILITY OF SURETIES—EXTENT—PUBLIC BONDS.

The liability of sureties cannot be extended beyond a fair import of the express undertaking in the bond, unless the bond be given in pursuance of a governmental order or for a public purpose, in which case the law becomes a part of the bond.

2. PRINCIPAL AND SURETY ⟸59—EXTENT OF SURETY'S LIABILITY — LAW AS PART OF BOND.

The rule that the law under which a public bond is given is part of the bond has no application where its undoubted effect would be to impose a liability necessarily and absolutely inconsistent with the unequivocal intent of the parties as disclosed by the express terms of the bond itself.

3. MUNICIPAL CORPORATIONS ⟸703(1)—JITNEYS—BONDS — CONSTRUCTION—INCLUSION OF PROVISIONS OF ORDINANCE.

A bond given by a casualty company covering the operation of a jitney bus, not expressly obligating the insurer to pay to injured third persons damages for injuries resulting from the negligence of the insured, was properly construed to include the requirements of an ordinance that the bond be conditioned for payments directly to the damaged person or his duly authorized representative, so that the casualty company was properly joined with the insured in an action for injuries due to the negligent operation of the motorbus.

Department 2.

Appeal from the Superior Court of Los Angeles County; Frederick W. Houser, Judge.

Action by C. J. Milliron against F. G. Dittman, T. H. O'Neill, and the Pacific Coast Casualty Company. From a judgment for plaintiff against the two last-named defendants, the latter appeal. Affirmed.

V. J. Cobb and Chas. L. Evans, both of Los Angeles, for appellants.

Ward Chapman, L. M. Chapman, H. J. Fish, and Clyde R. Burr, all of Los Angeles, for respondent.

LENNON, J. This is an appeal from a judgment in favor of the plaintiff and against two of the defendants, O'Neill and Pacific Coast Casualty Company, in an action for personal injuries alleged to have been caused the plaintiff by the negligence of O'Neill. The negligence charged arose out of the operation by O'Neill of a jitney bus in which the plaintiff Milliron was riding as a passenger on July 8, 1915.

The casualty company was joined as a defendant in the action, because it had executed upon the application of the defendant O'Neill an indemnity bond pursuant to the requirements of an ordinance of the city of Los Angeles. This ordinance made it unlawful to operate a motorbus unless there should be given and kept on file in the office of the city clerk, and in full force and effect at all times during the operation of such bus, a good and sufficient bond or policy of insurance. The ordinance provided that this bond or policy of insurance should be conditioned for the payment of various specified sums of money for injury to or the death of one or more persons and for damage done to the property of others resulting from the operation of such motorbus. The ordinance further provided that—

"Said bond or policy of insurance shall be conditioned that said bond or policy of insurance shall inure to and be for the benefit and protection of any one who shall sustain any damage or injury, or to the heirs * * * of any such person who may be so damaged or injured or suffer death by reason of negligence or misconduct on the part of the driver or operator of any motorbus operated under any such permit or from the defective construction thereof. Such bond or policy of insurance shall be a continuing liability, notwithstanding any action or recovery thereon. Said bond or policy of insurance shall also be conditioned that payments required to be made thereunder shall be made in case of injury or damage, directly to the insured or damaged person or his duly authorized representative."

The bond in question, although covenanting to pay directly to the insured such sums as might be adjudged against him as damages for injuries resulting from the operation of his motorbus, did not expressly obligate the defendant company to pay to injured third persons such sums as they might be entitled to recover as damages for injuries resulting from the negligent operation of the motorbus. The bond in question, however, did provide that—

"In the event of a final judgment covering any loss or claim under this policy is rendered against the assured, the company guarantees the payment of said judgment direct to the plaintiff securing such judgment, provided that any action by the said plaintiff to recover under this clause is commenced within twelve months next after such final judgment shall have been rendered."

The trial court read into the bond the provision of the ordinance requiring the bond to be conditioned for its payments "directly to the * * * damaged person or his duly authorized representative." Accordingly it was held that the casualty company was properly joined as a defendant in the action and was liable to the plaintiff upon the bond. This holding is asserted to be error upon the theory that the liability of the defendant company could not be extended beyond the

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express words of the bond nor measured by anything outside of the bond.

[1] It is true, as the appellants contend, that the general rule is to the effect that the liability of sureties cannot be extended beyond the fair import of the express undertaking in the bond. There is, however, an exception to this general rule in the case of bonds given in pursuance of a governmental law for a public purpose. The exception is clearly and concisely stated in the case of State v. Nutter, 44 W. Va. 385, 30 S. E. 67, where it is said:

"The law in force at the date of a public bond, fixing a certain condition for it, and saying what its obligations shall be, is a part of it as effectually as if such obligations were in words inserted in it. * * * By signing the parties adopt the law as a part of the bond. If we do not so hold we frustrate the plain purpose of the statute."

To the same effect are Crawford v. Ozark Insurance Co., 97 Ark. 549, 134 S. W. 951; State, for U. S., etc., Co. v. McGuire, 46 W. Va. 328, 33 S. E. 313, 76 Am. St. Rep. 822; State v. Wotring, 56 W. Va. 394, 49 S. E. 365, and Macready v. Schenck, 41 La. Ann. 456, 6 South. 517.

[2, 3] Of course, this exception to the general rule would have no application where its undoubted effect would be to impose a liability necessarily and absolutely inconsistent with the unequivocal intent of the parties as disclosed by the express terms of the bond itself. Graeter v. De Wolf, 112 Ind. 1, 13 N. E. 111. There is no provision, however, in the bond in question which expressly excludes a direct right of recourse by the injured party against the bonding company. Moreover, the bond as it read at the date of the accident was a contract made not only for the protection of the operator of the motorbus, but also directly for the benefit of injured passengers in so far as it expressly promised to pay directly to an injured party any amount for which the operator of the bus might be adjudged liable. To read the statutory requirement into the bond, while it accords to the plaintiff the privilege of joining the casualty company in a suit against the operator of the bus, introduces no necessary inconsistency into the contract and leaves the substantial rights of the parties unimpaired. The only ground upon which it is suggested that the rights of the defendants might be injuriously affected is that a jury might be expected to return a larger verdict for the plaintiff in a suit in which the casualty company appears as a party defendant, because they would necessarily know that the operator of the bus, whose act actually caused the injury, was insured. The jury would presumably know in any event that the operator was insured, since the law requiring the filing of the bond was one of which all persons would be presumed to have knowledge. Nor can we doubt that the casualty company must be presumed to have taken the knowledge of the jury into account in fixing its charges for executing a bond or policy of insurance issued in assumed pursuance of an ordinance unequivocally prescribing that the bond should be enforceable in favor of the persons injured by the act of the operator of the motorbus.

It is not claimed that the judgment appealed from is erroneous as to the defendant O'Neill if it is to be sustained as to the defendant casualty company. The foregoing discussion disposes, therefore, of all of the issues presented in the case.

The judgment appealed from is affirmed.

We concur: WILBUR, J.; MELVIN, J.

(180 Cal. 348)

STANFORD HOTEL CO. v. M. SCHWIND CO. (S. F. 8250.)

(Supreme Court of California. May 9, 1919.)

1. ACTION ⟸27(2)—LANDLORD AND TENANT ⟸229(1)—RIGHT TO REMEDY—SUIT FOR LAND AGAINST TRANSFEREE OF TENANT CORPORATION.

An action by plaintiff to recover by attachment rent under a lease from a new corporation continuing the business of the lessee corporation, which had dissolved, is not an action ex delicto for fraud, but an action upon contract, express or implied, for the direct payment of money, and therefore, within Code Civ. Proc. § 537, subd. 1, an action in which an attachment may issue.

2. ATTACHMENT ⟸4—SCOPE OF REMEDY—LEGAL OR EQUITABLE ACTION.

It is not essential under Code Civ. Proc. § 537, providing that an attachment may issue in an action upon a contract, express or implied, for the direct payment of money, that such action be strictly legal or strictly equitable or partly legal and partly equitable, if its purpose is recovery upon such contract.

3. LANDLORD AND TENANT ⟸229(1)—RIGHT TO REMEDY—CAUSE OF ACTION—CONTRACTS—INVOKING EQUITABLE PRINCIPLES—EFFECT.

Where a lessor seeking to recover by attachment from a transferee of the lessee corporation money due as rent alleges facts showing not only that the transferee took the property as part of a scheme to defraud creditors, but that the transferee is in fact the original debtor under another name, it is entitled to an attachment under Code Civ. Proc. § 537, subd. 1, by virtue of suing for a recovery upon a contract; the fact that certain equitable principles are invoked not converting such action into one ex delicto.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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4. LANDLORD AND TENANT ⟸229(1)—NATURE OF CAUSE OF ACTION.

In a suit by the lessor against a new corporation, transferee of the lessee corporation, which had dissolved, where the complaint asked that it be decreed that defendant hold the property transferred to it charged with a certain sum, plaintiff's claim for rent, with interest and costs, and that the property be sold for payment thereof, a money judgment is asked for, and the complaint sufficiently states a cause of action upon an express contract for direct payment of money entitling plaintiff to an attachment under Code Civ. Proc. § 537, subd. 1.

5. CORPORATIONS ⟸579(1) — REORGANIZATION—LIABILITIES OF ORIGINAL CORPORATION—RENT.

Where a corporation operating several restaurants reorganized under a new name, but with practically the same stockholders and directors, assigned all of its assets to the new corporation except plaintiff's lease, and continued to carry on the same business, equity will regard the new corporation a continuation of the old and hold it liable for rent due plaintiff from the former corporation.

6. CORPORATIONS ⟸580—ACTION TO ENFORCE LIABILITY AGAINST REORGANIZED CORPORATION—PARTIES—JOINDER OF FORMER CORPORATION.

Where a suit is brought by the lessor under a lease with a former corporation against a new corporation having practically the same officers and stockholders and continuing the same business, and to whom all the former corporation's property had been assigned except plaintiff's lease, to recover by attachment rent due from such former corporation, it is not necessary to make the former corporation a party defendant.

7. ATTACHMENT ⟸111 — AFFIDAVIT —AVERMENTS—NONRESIDENCE OF DEFENDANT.

Where plaintiff, seeking to attach the property of a nonresident, states a cause of action coming under Code Civ. Proc. §§ 537, 538, subd. 1, it need not show the nonresidence of the defendant in the affidavit on attachment, the nature of the cause of action rather than defendant's residence being controlling, such showing being necessary only in causes arising under subdivisions 2 and 3.

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by the Stanford Hotel Company against M. Schwind Company, in which plaintiff prays for an attachment to issue. From an order denying defendant's motion to dissolve the attachment, defendant appeals. Order affirmed.

G. B. Benham and Edward Lande, both of San Francisco (Frank A. Duryea, of San Francisco, of counsel), for appellant.

W. W. Sanderson, of San Francisco, for respondent.

LAWLOR, J. This is an appeal from an order denying a motion to dissolve an attachment.

The Stanford Hotel Company is the lessor in a certain lease upon which the Maryland Dairy Lunch Company, a California corporation and the original debtor, is obligated in the sum of $3,617.60, as unpaid rent from March 1, 1916, to October, 1916; the monthly rental of the demised premises being $452.25. The lunch company, prior to January 26, 1916, carried on an extensive restaurant business in San Francisco in four locations, one of which was the premises leased from the plaintiff at 250 Kearny street. One M. Schwind was the president and a director of the lunch company and the owner of nine-tenths of the capital stock thereof. From the complaint it appears that the lunch company was solvent and meeting its ordinary and current liabilities, when, some time prior to January 26, 1916, the said Schwind and the other directors of the lunch company contrived a fraudulent scheme to evade the payment of the rent due to the plaintiff and to escape further liability upon its said lease. They organized a Nevada corporation, the M. Schwind Company, the defendant in the present action, with a perpetual charter permitting the carrying on of business elsewhere than in the state of Nevada, and also providing an exemption of stockholders' liability. 996 shares of 1,000 shares of said company were issued to M. Schwind, who became a director thereof; the other four directors holding but one share each. On January 25, 1916, this corporation duly complied with the laws of California and filed its articles of incorporation. Meanwhile the Maryland Dairy Lunch Company had deliberately refused and neglected to pay its license tax and franchise tax to the state of California, thereby forfeiting its charter on March 4, 1916. On January 26, 1916, the lunch company held a meeting of its board of directors and passed a resolution selling and transferring to the defendant corporation its three places of business with the leasehold rights of occupancy in the same, and in all its property. No mention of the business carried on at 250 Kearny street was made in this bill of sale, nor was the lease included therein. The bill of sale was not acknowledged and recorded until after the dissolution of the lunch company, namely, on March 24, 1916. The M. Schwind Company continued ostensibly to carry on business at 250 Kearny street after the bill of sale was made and delivered, but before it was acknowledged and recorded, that is, until March 14, 1916, when the premises were vacated and the lease abandoned by the lunch company. It is further alleged that the purpose and effect of this transaction was to eliminate the lunch company as a corporation, and as a result there was left

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no property whatever to come into the hands of its directors as trustees for its creditors, and that the transfer to the M. Schwind Company was entirely without consideration; the purpose of the deal being the continuation of the business of the lunch company under a new corporation which was in substance and effect but a continuation of the old, and owned substantially by the same stockholders, and carrying on its business without interruption or delay.

The complaint was filed on October 23, 1916. The prayer was for a temporary injunction restraining the defendant corporation until after a full hearing of this cause from selling or otherwise disposing of any of the property involved in the bill of sale; that the said sale be declared void and of no effect; that it be adjudged and decreed that the defendant holds the property charged with the payment of the plaintiff's claim for $3,617.60, with interest and costs; that the property be sold for the plaintiff's claim and costs; and for other further and proper relief. On the same day Isaac Harris, president of the Stanford Hotel Company, made affidavit for the attachment of the said property. The affidavit conforms strictly to the requirements of subdivisions 1 of section 537 and section 538 of the Code of Civil Procedure. Upon the filing of the affidavit and the undertaking the writ was issued. Whereupon the defendant, on October 28, 1916, without answering the complaint, moved to dissolve the attachment upon the grounds, briefly stated: (1) That the cause of action is not one in which a writ of attachment could issue; (2) that the writ was improperly issued; (3) that the writ was irregularly issued; (4) that the affidavit upon which the writ was issued is false in the statement therein that the defendant is indebted to the plaintiff in the sum of $3,617.60 over and above all legal set-offs or counterclaims upon an express contract for the direct payment of money, to wit, to pay rent under a lease of certain real property; (5) that the affidavit is false in the statement that the contract was made and is payable in this state. The only evidence taken on the hearing of the motion was that of Isaac Harris, the president of the plaintiff corporation. The motion to dissolve was denied; whereupon the defendant appealed.

[1] 1. Appellant relies chiefly on the contention that this is not an action in which an attachment may issue, in that it appears upon the face of the complaint that the suit is not one upon contract, but that it is an action ex delicto for fraud. Hallidie v. Enginger, 175 Cal. 505, 166 Pac. 1, cited by appellant in support of this contention, correctly states the law of this state that an attachment will not lie in an action ex delicto for fraud. The action in that case was held to be one of that character. But nothing declared in that case, nor in the cases therein cited, can be taken as authority supporting the contention of appellant that this is such an action. The action in Hallidie v. Enginger, supra, was brought by the plaintiff, as trustee for the stockholders of the corporation, which had forfeited its charter, to recover a sum of money received by the defendant from dividends and as proceeds from the sale of stock which the defunct corporation had been induced to sell to the defendant by his false representations. It was clearly and essentially an action grounded in fraud, and not one for the direct payment of money upon contract, express or implied. Whatever liability existed on the part of the defendant arose solely through his fraudulent representations, and consequently the gravamen of the action was fraud.

[2, 3] But such is not the case here. The recovery which is sought by the plaintiff is a definite sum of money, due on a contract of lease for the payment of rent. The question here is whether this action is one within the purview of subdivision 1 of section 537 of the Code of Civil Procedure. That subdivision does not contemplate the right of attachment in an action ex delicto for fraud. This statement is in accord with Hallidie v. Enginger, supra. The action must be one upon contract, express or implied, for the direct payment of money. If a recovery upon such a contract is the purpose of the suit, so far as the right of attachment is concerned, it is immaterial whether the action be regarded as strictly legal or strictly equitable, or partly legal and partly equitable. The subdivision does not in terms prescribe that the action must be one in law, or that it may not be one in equity, or that it may not be one of either law or equity, or of both. Hence it is not necessary in order to uphold the writ of attachment to establish the proposition that the action is either legal or equitable. What must be established is that the action is based upon contract, either express or implied, for the direct payment of money It is clear that this action addresses itself to both the legal and the equitable powers of the court. But that circumstance will not operate to deny the plaintiff a writ of attachment if he is seeking recovery upon the breach of such contract. It is to be kept in mind that there is no suggestion that fraud entered into the making of the contract. The respective obligations of the parties thereunder were for a time performed, and then one of them committed a breach of the contract. So the basis and essence of the action is an executed contract for the direct payment of money, and in order to have satisfied any judgment that may be recovered for such breach the plaintiff sues out a writ of attachment. In order to establish the proposition that the property attached should be responsive to such a judgment, the plain-

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tiff invokes certain well-recognized equitable principles. But this does not have the effect of converting the action on the express contract for the direct payment of money into one ex delicto for fraud. Consequently, even if such an action may properly be regarded as partially legal and partially equitable, it will make no difference. The plaintiff is nevertheless entitled to a writ of attachment by virtue of the fact that he is suing for a recovery upon the contract which is the gravamen of the action. In stating, as we have, that it does not matter that the relief sought partakes of both law and equity, we do not mean to be understood as holding that an attachment may be issued upon a creditors' bill to set aside transfers of property in fraud of creditors. In such a case the gravamen of the cause of action against the transferee is the fraud. But in the present action the facts alleged in the complaint make out not merely a case where the transferee took the property as part of a scheme to defraud creditors, but one where the transferee is in fact the original debtor masquerading under a different name. If the action were one against the tenant by name to recover the rent due, it could not be questioned but that it was one upon a contract for the direct payment of money. Yet that is what the present action really is.

[4] But the appellant argues in support of his contention that this is an action ex delicto for fraud that the plaintiff did not in his prayer to the complaint ask for a money judgment. The only direct reference to the claim in the prayer is in these words:

"That it be adjudged and decreed * * * that the said defendant holds said property * * * charged with the payment of the plaintiff's claim for $3,617.60, with interest and costs; that the said property be sold for the payment of plaintiff's claim and costs."

While the prayer does not in express terms ask for a money judgment, it is nevertheless plain that such a judgment was the purpose of the suit. However, the respondent stated in oral argument that a motion would be interposed in the court below to have the complaint amended in that regard. This may be done. It was said in Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741:

"Even on demurrer to the complaint the defendants cannot object to the prayer, and certainly, so long as the complaint contains every essential of an action upon contract, they cannot upon motion for an attachment accomplish what they could not upon demurrer; a motion to dissolve the attachment cannot reach the defects in the complaint."

It was further held in that case that a motion to dissolve an attachment could not be turned into a demurrer, but that on such motion we are—

"simply to determine whether: (1) The complaint showed the action to be founded upon contract, express or implied; (2) whether it states facts sufficient to constitute a cause of action against the defendants; and, if not (3) does it appear therefrom that it can be so amended as to state a cause of action upon contract."

The complaint sufficiently states a cause of action upon an express contract for the direct payment of money to satisfy the requirement of subdivision 1 of section 537.

[5, 6] 2. The appellant further contends that attachment will not lie herein because of lack of privity of contract between the plaintiff and the defendant corporation. This is equally without merit. It is true that the contract was entered into between the plaintiff and the Maryland Dairy Lunch Company, and that the lunch company assigned all of its assets to the defendant corporation except this lease with the plaintiff. As the lease was not included in the bill of sale, the law will not imply a promise on the part of the defendant corporation to pay the rent. 7 R. C. L. 183; 76 Am. St. Rep. 800, note. But it is well established in this state that under circumstances such as these, where a corporation reorganizes under a new name, but with practically the same stockholders and directors, and continues to carry on the same business, a court of equity will regard the new corporation as a continuation of the former corporation, and will hold it liable for the debts of the former corporation. Blanc v. Paymaster Mining Co., 95 Cal. 524, 30 Pac. 765, 29 Am. St. Rep. 149; Higgins v. Cal. Petroleum Co., 122 Cal. 373, 55 Pac. 155; Id., 147 Cal. 363, 81 Pac. 1070; Strahm v. Fraser, 32 Cal. App. 447, 163 Pac. 680. The allegations of the complaint as to the scheme to avoid fraudulently the payment of the plaintiff's rent go to the point of making out, as they do, that the defendant, by name the M. Schwind Company, is, in fact, the tenant formerly by name the Maryland Dairy Lunch Company. That equity will strip off the mask of a separate corporate identity, when it is but a mask, is amply sustained by these authorities. Nor is it necessary, as asserted by appellant, to make the former corporation a party defendant. Blanc v. Paymaster Mining Co., supra.

[7] 3. Objection is raised to the sufficiency of the affidavit to support the attachment on the ground that it does not state the fact that the defendant corporation is a nonresident. The question thus presented is whether, within the meaning of sections 537 and 538 of the Code of Civil Procedure, in every case of a nonresident defendant, the fact of nonresidence must be averred in the affidavit on attachment? We think not. Under subdivisions 1 it is the nature of the cause of action against a nonresident defendant rather than the fact of his residence that controls. Only in those cases wherein the cause of action is one contemplated by either sub-

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division 2 or 3 is it necessary to aver that the defendant is a nonresident. In the case at bar, while the defendant corporation is a nonresident, the cause of action comes within subdivisions 1, and, as already stated, the affidavit is in strict accord with those subdivisions. Subdivisions 1 do not mention the subject of the residence of the defendant. It is only in subdivisions 2 and 3 that the requirement appears. These latter subdivisions are drawn expressly for the benefit of those seeking to attach the property of nonresidents. It follows that in attaching property of a resident the affidavit must be drawn under subdivisions 1; but it does not follow, as claimed by appellant, that in seeking to attach the property of a nonresident the attachment cannot be sued out under subdivisions 1 without averring the fact of nonresidence. It is only when a plaintiff has a cause of action different from the kind contemplated by subdivisions 1 that advantage may be taken of the more liberal requirements of subdivisions 2 and 3. These apply only to nonresidents, and in every instance the fact of nonresidence must be averred. Where the cause of action comes under subdivisions 1 of these two sections, the residence of the defendant is immaterial. The affidavit is sufficient.

Order affirmed.

We concur: SHAW, J.; OLNEY, J.; WILBUR, J.; MELVIN, J.; LENNON, J.

(180 Cal. 423)

HYMAN BROS. BOX & LABEL CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 8890.)

(Supreme Court of California. May 29, 1919.)

1. MASTER AND SERVANT ⟸348—WORKMEN'S COMPENSATION ACT—STATUTE APPLICABLE.

The rights of an injured servant are measured by the Workmen's Compensation Act in force at the time of the injury.

2. MASTER AND SERVANT ⟸417(3) — WORKMEN'S COMPENSATION ACT—CERTIORARI—JURISDICTIONAL QUESTION.

Determination of question whether or not certain described actions of an employé amounted to willful misconduct within the Workmen's Compensation Act goes to the jurisdiction of the Industrial Accident Commission, and therefore is reviewable on certiorari.

3. MASTER AND SERVANT ⟸380—WORKMEN'S COMPENSATION ACT — "WILLFUL MISCONDUCT."

A 20-year old employé working at a press was not, as a matter of law, guilty of willful misconduct within the Workmen's Compensation Act in catching at certain falling or loose cards, so that his hand was caught between the bed and platen of the press, though he had been warned against the danger of so doing; the act being possibly instinctive.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Willful Misconduct.]

4. MASTER AND SERVANT ⟸385(11) — WORKMEN'S COMPENSATION ACT — COMPENSATION TO INJURED MINOR—"AFTER."

Under Workmen's Compensation Act 1913, § 17c, as amended by St. 1915, p. 1066, § 6, in case of injury to an employé in his twentieth year, the Industrial Accident Commission had no power to compute compensation on basis of probable wages which employé might obtain long after reaching his majority; "after," as used in the section in relation to the average weekly earnings of a minor employé being the weekly sum he would probably be able to earn "after" attaining the age of 21 years, meaning "at."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, After.]

In Bank.

Certiorari by the Hyman Bros. Box & Label Company and the Ætna Life Insurance Company, to review an award of the Industrial Accident Commission under the Workmen's Compensation Act in favor of Fred Weiss, a minor, represented by Mathiew Weiss, his guardian ad litem and trustee. Award annulled, and matter remanded to commission.

E. L. Stockwell and Redman & Alexander, all of San Francisco, for petitioners.

Christopher M. Bradley and Warren H. Pillsbury, both of San Francisco, for respondent.

MELVIN, J. Certiorari to review the award of the Industrial Accident Commission in favor of Fred Weiss, who was injured by having his hand caught in a printing press to which he was "feeding" pieces of pasteboard that were cut by the machinery into proper shape for use in the making of pasteboard boxes.

[1] The injury was suffered by the applicant for compensation in the month of December, 1917, and his rights must be measured by the Workmen's Compensation Act of 1913, as amended in 1915 (St. 1915, p. 1079), which was then in force.

The applicant was 20 years of age at the time of the injury. He had worked for the Hyman Bros. Box & Label Company, generally as a "press feeder," three times, his terms of employment aggregating about 19 months. He had worked for another corporation, also as a press feeder, for 2 years and 2 months. It thus appears that he was an experienced workman almost of the age of majority.

The press at which Mr. Weiss was working when he was injured was equipped with

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a stationary upright plate called the "bed" and a plate called the "platen," which repeatedly opened and closed against the "bed." In operating the press he stood in front of it, removing the cut pasteboard with his left hand and inserting the uncut sheets with his right hand. Sometimes a cardboard sheet would slip off the bed of the press and fall into the body of the press, and sometimes some of the uncut pieces would fall into the press from the "feed board" upon which the operator kept a supply. In such case the press could be stopped at once by moving a lever, and the card or cards could be removed without danger. The injury to the applicant occurred while he was reaching into the body of the moving press for a sheet or sheets which had fallen. Asked by the examiner if that was a proper thing for him to do, he said, "Well, it might not have been," and to the question "Why not?" he replied as follows:

"When I first came to Hyman Bros. Box & Label Company, I was told not to grab any sheets, when I first came there. That was 3 or 3½ or 4 years ago. Then I left Hyman Bros. again and came back, after feeding that many years, and, being that I was experienced in feeding, I was not told that any more."

Following this statement the questions and answers were as follows:

"You knew then that that instruction had been given you, and you knew it was not a proper thing to do? A. Yes.

"Q. Had anybody ever seen you do that before, any of the foremen? A. I don't know. I couldn't tell you that.

"Q. You had done it two or three times before? A. Yes, sir.

"Q. And you did it this time? A. Yes, sir."

At another place in the return to the writ his testimony is reported as follows:

"Q. Mr. Weiss, if you were reaching into that machine to take out loose cards that had fallen in there while the machine was in motion, you were doing something you knew was not exactly proper, weren't you? A. The loose ones, you mean?

"Q. Yes. A. Yes, sir.

"Q. But nobody had said anything to you in the last year or two about doing that? A. No, sir.

"Q. But when you first came there, as I understand you, you were instructed never to reach into the machine? A. When I first started to learn. That was the first place I fed. I was just starting to learn to feed at that time.

"Q. What did they say to you? A. They told me, 'You don't want to put your hand into the machine if any sheets fall down, because you can get more sheets than you can hands.'

"Q. What would have been the right thing to have done if those sheets had fallen in there? A. Stop the machine. It didn't do any harm, and you could still keep running."

In his application to the Industrial Accident Commission for compensation Mr. Weiss had described the occasion of the injury as follows:

"Some sheets of box board dropped from the feed board into the press, and applicant reached with his left hand to catch them; the left hand and arm being caught between bed and platen."

[2] The Industrial Accident Commission found that in attempting to catch the card "the employé acted instinctively without reflection, and such act did not constitute willful misconduct, and that therefore said injury was not caused by willful misconduct of the employé." Petitioners attack this finding as contrary to the evidence. This they say, is the case of an employé who, with full appreciation of the danger, violated specific instructions given him for his own protection. The question before us, therefore, is whether or not the described actions of the employé amounted to willful misconduct. That an answer to such a problem goes to the jurisdiction of the Industrial Accident Commission is settled by decisions of this court. Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 Pac. 35; Fidelity & Deposit Co. v. Industrial Accident Commission, 171 Cal. 728, 154 Pac. 834, L. R. A. 1916D, 903.

[3] The doctrine that an unpremeditated and impulsive act in violation of orders may not be willful misconduct finds some support in the authorities but usually nonage is an element of the decisions in which such doctrine has been upheld. It seems to us, however, that the age of the person injured does not necessarily make a material difference. The tendency to recover something falling from a machine; to reach for a hat blown off the head by a sudden gust of wind; to apply the brakes to a "skidding" automobile —in short to perform acts of many sorts upon the impulse of the moment, is not the failing of youth alone. The true tests to be applied have reference to the nature of the work being performed and the circumstances of each particular case. This court has been at pains more than once to define "willful misconduct." Perhaps the best definition (and, incidentally, the one cited by both parties to this controversy) is the one found in the opinion in Great Western Power Co. v. Industrial Accident Commission, 170 Cal. 180, at page 189, 149 Pac. 35, 40. The court used this language:

"Willful misconduct means something more than negligence. It does not include every violation or disregard of a rule. Casey v. Humphreys (1913) 6 B. W. C. C. 520. But it cannot be doubted that a workman who violates a reasonable rule made for his own protection from serious bodily injury or death is guilty of misconduct, and that where the workman deliberately violates the rule, with knowledge of its existence and of the dangers accompanying its violation, he is guilty of willful misconduct. Brooker v. Warner, 23 L. T. R. 201."

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In that case (known in the profession as the "Mayfield Case"), the applicant had entered upon the duty of handling wires used for the transmission of high tension electric current, without putting on the nonconducting gloves which the rules of his employer, well understood by him, required him to wear at such times. From the very nature of the act it was one which involved deliberation and a willful disobedience of a salutary rule. There was no room for the application of the doctrine of sudden impulse. The facts of the present case are vastly different. Admittedly, the petitioner Weiss knew the rule. Admittedly, he did something in apparent violation of the rule, which, if it had been the result of deliberate intention, would have amounted to willful misconduct; but the circumstances were such that any person, experienced or not, might have impulsively put himself in jeopardy as this young man did, without any intent to violate a known rule. There is evidence to support the conclusion reached by the Industrial Accident Commission, and we are of the opinion that upon this branch of the case a correct conclusion was reached. At the rate of the running of the press, the feeder was given at most a little more than one second for the entire operation of removing each cut piece of cardboard and inserting one that was uncut. Upon seeing a card fall into the machinery he was given but the smallest degree of time for deliberation and for determining whether or not he should reach for the pasteboard. It needs no argument to convince a court that a person in such a situation will not be judged by the same standards as one who breaks a rule by means involving time for reflection and excluding the possibility of sudden impulse. It is doubtless true that such an accident might come under the doctrine of the "Mayfield Case," as, for example, where an operative habitually and intentionally ignored the rule; and if the commissioners had believed the testimony of one witness who stated that after the injury Weiss admitted reaching into the moving press for fallen cards hundreds of times before, a finding of willful misconduct would have resulted. But the applicant denied the interview and the alleged statements attributed to him. Therefore we cannot disturb the finding made by the triers of facts.

The authorities sustain the views expressed above. In Whitehead v. Reader, [1901] 2 K. B. 48, it was held that where a man tried to replace a belt which had slipped from the machinery, such act may be regarded as venial, and not willful misconduct on his part. In McNicholas v. Dawson, [1899] 1 Q. B. 773, it was announced that each case must depend upon its own peculiar facts, and that the breaking of rules does not necessarily constitute serious misconduct. In Peru Basket Co. v. Kuntz (Ind. App.) 122 N. E. 349, it was held that an employé with defective eyesight, who inadvertently placed his hand contrary to directions in a place where it was caught by a cutting machine, was not guilty of willful disobedience.

Petitioners have cited many authorities to the effect that where a servant goes outside of the scope of his authority, although still upon the employer's premises, he may not recover for any injury. Typical of such decisions is Williamson v. Industrial Accident Commission, 171 Pac. 797. The facts there disclosed were these: The applicant for compensation had gratuitously undertaken to clean a light well. She was injured while performing this task, but it was held that as she was not engaged to do that sort of work she was not entitled to compensation for her injuries. Undoubtedly that and similar authorities announce a correct rule, but one having no application to the facts now before us. Not one of them involves the conduct of an employé confronted with a sudden and unexpected situation furnishing almost irresistible occasion for impulsive action.

[4] Petitioners' only other objection is to the amount of the award which, it is asserted, was in excess of that which the commission was empowered to give. With this view we agree.

Section 17c of the Workmen's Compensation Act is in its essential parts as follows:

"If the injured employé is under twenty-one years of age, * * * his average weekly earnings shall be deemed * * * to be the weekly sum, that under ordinary circumstances he would probably be able to earn after attaining the age of twenty-one years, in the occupation in which he was employed at the time of the injury, or the occupation to which he would reasonably have been promoted, if he had not been injured." St. 1915, p. 1086, § 6.

The Industrial Accident Commission made the award upon the assumption that "after attaining the age of twenty-one years" means a reasonable time after majority. It was the theory that if the wages being earned at the time of injury were essentially "boy's wages," then the commission might base the amount of compensation upon "the adult's wages which the same individual would be expected to reach within the few months, or perhaps even a few years after passing the age of twenty-one."

With this view of the law we cannot agree. The infirmity of the rule must be apparent when we remember that there is no rule by which the exact difference between "boy's wages" and "man's wages" may be computed. This applicant was in his twenty-first year at the time of the injury. Under the statute quoted above the commission was bound to find his probable earnings at the age of 21 years. Such an interpretation of the word

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"after" is fully in accord with sound reason and authority. For example, bequests to take effect "after death" vest at death. In re Swinburne, 16 R. I. 208, 14 Atl. 850; Downing v. Wherrin, 19 N. H. 9, 49 Am. Dec. 139; Atwell's Executors v. Barney, Dud. (Ga.) 207. In 2 C. J. 395, among the definitions of "after" given are "as soon as; at or immediately after; on; simultaneously; upon." That the framers of the Compensation Act intended the word "after" to mean "at" is obvious when we have in mind that different parts of a statute are to be so construed as to make them consistent and harmonious, giving proper effect to each of them. If the young man had been 21 years and 1 day old when he was injured, the commission would have been under the necessity of fixing his compensation in accordance with his wages at that time. To hold that because he was a few months under the age of 21 a much more flexible rule should apply would be an interpretation of the statute in a manner out of harmony with the part having reference to adults. Therefore we must hold that the Industrial Accident Commission had no power to compute the compensation upon the basis of probable wages which appellant might obtain long after reaching the age of 21 years.

The award is annulled, and the matter is remanded to the Industrial Accident Commission, to the end that such proceedings may be taken as are not inconsistent with the views herein expressed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; OLNEY, J.; WILBUR, J.; LAWLOR, J.

(180 Cal. 416)

WESTERN PAC. R. CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (S. F. 8959.)

(Supreme Court of California. May 29, 1919.)

1. MASTER AND SERVANT ⟸380—WORKMEN'S COMPENSATION ACT—INTENTIONAL DISOBEDIENCE.

Where a young man of 18 operating a drill with an upright shaft, which machine carried the warning sign, "Stop before repairing, oiling," etc., on seeing a stream of grease running down the framework made a dive with a cloth at it, so that his hand was drawn into the machine, it was not as a matter of law intentional and willful disobedience to exclude him from recovering compensation under the compensation act, but the commission could find he was not so disobedient.

2. MASTER AND SERVANT ⟸385(11) — WORKMEN'S COMPENSATION ACT—MINOR EMPLOYÉ —AMOUNT OF COMPENSATION.

The Workmen's Compensation Act in case of injury to a minor employé justifies a finding of compensation based on the probable wage of the employé when he shall reach 21, not on that which he would be likely to earn within a reasonable time after attaining such age.

In Bank.

Certiorari by the Western Pacific Railroad Company to review the action of the Industrial Accident Commission in awarding compensation under the Workmen's Compensation Act (St. 1915, p. 1079) to Earle Dean, a minor, represented by J. L. Dean, his guardian ad litem, and trustee. Award annulled, and matter remanded to the commission.

Henley C. Booth, of San Francisco, for petitioner.

Christopher M. Bradley, of San Francisco, for respondents.

MELVIN, J. A writ of certiorari was issued for the purpose of reviewing the action of the Industrial Accident Commission in awarding compensation to Earle Dean. The questions involved are very similar to those discussed and decided in Hyman Bros. Box & Label Co. and Ætna Life Insurance Co. v. Industrial Accident Commission, S. F. No. 8890, 181 Pac. 784, this day decided. In this proceeding, as in that one, the two contentions made by the petitioner were: (1) That the injury suffered was caused by the young man's serious and willful misconduct; and (2) that the commission exceeded its jurisdiction in fixing the basis for computing the average annual earnings of the injured minor.

The facts as disclosed by the testimony, which supports the findings, are in brief as follows:

Earle Dean was an intelligent young fellow, nearly 18 years of age. He had been set to operating a drill press, to which was affixed a metallic sign bearing words of warning.

The machine consisted of a drill with an upright shaft meshed into gearings upon a horizontal shaft. In an opinion filed by two of the members of the Industrial Accident Commission the injury and its cause are discussed as follows:

"The vertical shaft at the time of the injury was revolving slowly, and it was easier to wipe it while in motion than when still. While applicant was wiping it he saw a stream of grease running down the framework of the machine from the upper shaft, and, without thinking about the consequences likely to flow from his act, made a dive with his cloth at this stream of grease. The gearing caught the cloth and drew his hand into it, resulting in the loss of two fingers.

"It is clear that the sign warning against wiping the machine while in motion was intended to cover just such unforeseen and unlikely injuries as this.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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"It follows, therefore, that if the warning sign, 'Stop this Machine before Repairing, Oiling, Adjusting or Wiping' constituted a safety order and regulation prescribed by the employer, the wiping of the machine by the employé, with full knowledge of the existence of the order, and of the consequences likely to result from its violation, constituted willful misconduct.

"There is no question that applicant knew of the existence of this warning sign, but it is in evidence that he did not know of the consequences likely to result from disobeying it. The reaching for the stream of oil going down the frame of the machine was in obedience to an impulse, thoughtless of danger. He knew better than to try to wipe the gearings while the machine was in motion, and had never done so. Neither the employer's superintendent nor the young man in whose custody applicant was placed had explained to him the risk attendant upon such wiping. Therefore one of the factors of willfulness as laid down by our Supreme Court in the Mayfield Case (Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 Pac. 35, 1 I. A. C. 669), to wit, 'Knowledge of the consequences likely to result from disobedience,' was wanting."

[1] It was held accordingly that—

"Neither of the acts of cleaning said drill nor wiping said shaft was intentionally and deliberately disobedient; that neither of said acts was an act of serious and willful misconduct, and the said injury was not caused by the serious and willful misconduct of the employé."

We cannot say that this finding was not justified by the evidence. It is true that wiping the drill while it was slowly revolving was in violation of the printed warning, but that act did not cause the injury. If the applicant had been holding a cloth in his hand for any purpose and had done the same impulsive act, he would have been entitled to compensation under the authority of the Hyman Case and the cases cited in the opinion therein. The real cause of the injury was the unpremeditated effort to arrest the sudden stream of grease.

[2] The finding with reference to the amount of compensation was based not upon the probable wage of the applicant at the time he should reach the age of 21 years, but upon that which he would be likely to earn "within a reasonable time after attaining the age of 21 years." This was a computation not justified by the statute. Upon the authority of Hyman Bros. Box & Label Co. and Ætna Life Insurance Co. v. Industrial Accident Commission, supra, it necessitates the granting of petitioner's prayer.

The award is annulled and the matter is remanded to the Industrial Accident Commission, to the end that such proceedings may be taken as are not inconsistent with the views herein expressed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; WILBUR, J.; LAWLOR, J.

OLNEY, J., deeming himself disqualified, did not participate in the foregoing decision.

(180 Cal. 497)

PERRY v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

PACIFIC GAS & ELECTRIC CO. v. SAME.

(S. F. 8918, 8910.)

(Supreme Court of California. June 5, 1919.)

1. MASTER AND SERVANT ⟸417(7) — WORKMEN'S COMPENSATION — PROCEEDINGS — WEIGHT OF HEARSAY EVIDENCE.

In workmen's compensation case the weight to be given hearsay evidence made admissible by St. 1917, p. 871, § 60a, is for the Industrial Accident Commission.

2. MASTER AND SERVANT ⟸404—WORKMEN'S COMPENSATION — EVIDENCE—TRANSACTION WITH DECEASED.

In workmen's compensation case, testimony by employer and his wife as to statements by deceased employé is admissible under the statute, though inadmissible at common law, because of their interest in the controversy.

3. MASTER AND SERVANT ⟸417(7) — WORKMEN'S COMPENSATION — REVIEW — CONCLUSIVENESS OF FINDING.

Industrial Accident Commission's finding that the relation of employer and employé existed is conclusive upon Supreme Court upon petition to review the commission's order.

4. MASTER AND SERVANT ⟸347—WORKMEN'S COMPENSATION — CONSTITUTIONALITY OF STATUTE.

Workmen's Compensation Act of 1917, § 25, relating to liability of "principal employers and contracting employers, general or intermediate, for compensation under this act when other than the immediate employer of injured employé," is unconstitutional in so far as it attempts to authorize awarding of compensation against a third person not an employer, notwithstanding Const. art. 20, § 21, as amended October, 1911, and November, 1918, and article 20, § 17½, as amended November, 1914.

5. CONSTITUTIONAL LAW ⟸20 — CONSTRUCTION—LEGISLATIVE DEFINITION.

Meaning of terms of constitutional amendment must be construed in the light of their meaning at the time of the adoption of the amendment, and cannot be extended by legislative definition; for such extension would, in effect, be an amendment of the Constitution if accepted as authoritative.

In Bank.

Proceedings under Workmen's Compensation Act by Louise Kendall for compensation for death of Robert E. Kendall, opposed by C. E. Perry, immediate employer, and the

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Pacific Gas & Electric Company, as principal employer. Award made by Industrial Accident Commission, and the employers file petitions for writ of review. Order awarding compensation against C. E. Perry affirmed, and that portion of order awarding compensation against the Pacific Gas & Electric Company reversed.

William B. Bosley, of San Francisco, and John Coghlan, of Madera, for petitioner Pacific Gas & Electric Co.

Gilbert D. Ferrell, of San Francisco, for petitioner Perry.

Christopher M. Bradley, of San Francisco, for respondents.

WILBUR, J. Two petitions are filed to review the same order of the Industrial Accident Commission, awarding compensation for the death of Robert E. Kendall. The award was made under the provisions of section 25 of the Workmen's Compensation, Insurance and Safety Act of 1917 (Stats. 1917, p. 831), against C. E. Perry as the immediate employer, and against the Pacific Gas & Electric Company as the principal employer.

Both petitioners claim that the evidence is insufficient to show that the relation of employer and employé existed between Perry and the deceased. The only question of fact in the case is whether the relation between Perry and the deceased was that of employer and employé, or that of a copartnership. It appears from the evidence that Perry, as an independent contractor, entered into a contract with the petitioner Pacific Gas & Electric Company to furnish for $20 a day, a five-ton road roller, with a man and necessary gasoline and supplies, for the purpose of rolling the earth that had been filled into a trench in which the gas mains of the petitioning company had been laid. After the making of this contract Perry entered into an arrangement with the deceased by which the deceased operated the roller in question. The deceased was crushed between a heavy automobile truck and the road roller while so engaged, and so injured that he died. In the absence of other evidence the law would imply a contract of employment. That a proposition was made by Perry to the deceased by which the latter was to operate the road roller upon a "fifty-fifty basis" is established by the testimony of Perry and others, and is found by the commission to be a fact. The commission also found that the proposition was never accepted, but was still under consideration at the time of the fatal accident. Perry and his wife testified to conversations with the deceased tending to show an acceptance of Perry's proposition. To rebut this evidence the testimony of decedent's wife, his sister, and other witnesses was received to prove declarations of the deceased made from time to time and up to the day before the accident, to the effect that the deal between Perry and himself had not been consummated. This was hearsay, and petitioner Perry, conceding its admissibility under the express provisions of the statute (Stats. 1917, § 60a), states:

"It may be said that it is for the commission alone to say as to the weight or credibility to be given to this evidence. If so, then the commission may, arbitrarily or otherwise, as in the present case, disregard in toto all evidence heretofore considered by the law and the courts as admissible and entitled to any consideration at all, and base its findings on the sandy foundations of some hearsay evidence, giving to such hearsay as great or greater weight than it would be entitled if it were concededly of the most competent character, without limitation on the commission of any sort, or redress on the part of one aggrieved thereby."

[1] It being granted that the testimony was admissible, it follows, of course, that the weight of the evidence is to be determined by the commission. It is true that, when we depart from well-recognized principles of law concerning the admissibility of evidence, we embark upon a sea of difficulty. This was pointed out in August, 1915, in Englebretson v. Industrial Accident Commission, 170 Cal. 793, 151 Pac. 421, concerning hearsay evidence. The Legislature, however, has since expressly provided that neither the commission nor its referees—

"shall be bound by the common law or statutory rules of evidence or procedure, * * * nor shall any order, award, rule or regulation be invalidated because of the admission into the record, and use as proof of any fact in dispute, of any evidence not admissible under the said common law or statutory rules of evidence and procedure." Stats. 1917, p. 871, § 60a.

Similar provisions of the law of 1915 have been considered by this court and upheld. Stats. 1915, p. 1102, § 77a; Western Indemnity Co. v. Industrial Accident Com'n, 174 Cal. 315, 163 Pac. 60; Employers' Liability Ass'n Co. v. Industrial Accident Com'n, 177 Pac. 273.

[2, 3] It may be remarked, however, in this connection that the testimony of both Perry and his wife upon which he relies to establish the fact of acceptance by deceased, although permitted by our statute, was inadmissible under the common law, on the ground of their interest in the controversy. 1 Greenleaf on Ev., §§ 326, 328c, 333b, 334, 335, 341; Dawley v. Ayers, 23 Cal. 108. The finding of the commission that the relationship between Perry and the deceased was that of employer and employé is binding upon this court.

[4, 5] The Pacific Gas & Electric Company asks for a review on the additional ground that section 25 of the act of 1917 is unconstitutional, and that therefore the commission had no jurisdiction to entertain the proceeding or to make the award against it. It

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has been held that the state Constitution did not contemplate a law authorizing an award of compensation by the Industrial Accident Commission against some person other than the employer. Carstens v. Pillsbury, 172 Cal. 572, 158 Pac. 218; Sturdivant v. Pillsbury, 172 Cal. 581, 158 Pac. 222; Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 156 Pac. 491, Ann. Cas. 1917E, 390. It was therefore held that section 30 of the Workmen's Compensation, etc., Act of 1913 (Stats. 1913, c. 176, p. 294) was violative of article 20, § 21, of the Constitution. The Workmen's Compensation, etc., Act of 1917 changes the language of the corresponding section (25), so that instead of using the word "principals" the words "principal employers" are used, and instead of the word "contractors" the words "contracting employers, general or intermediate," are used (section 30, Stats. 1917, p. 853); but the change does not meet the constitutional difficulty, for the reason that the terms "employers," "employés" and "employment," as used in section 21, art. 20, of the Constitution, as amended in October, 1911, must be construed in the light of their meaning at the time of the adoption of the amendment, and cannot be extended by legislative definition, for such extension would, in effect, be an amendment of the Constitution, if accepted as authoritative. See Employers' Liability Assurance Co. v. Industrial Accident Com'n, 177 Pac. 273, and cases there cited. It would follow, therefore, that the reasons for holding section 30 of the Workmen's Compensation Act of 1913 unconstitutional would apply with equal force to section 25 of the act of 1917. Carstens v. Pillsbury and other cases supra. Respondent, however, contends that the legislative power was enlarged by the addition of section 17½, art. 20, to the Constitution by an amendment adopted November 3, 1914, and that such amendment authorizes the legislation in question. This amendment was in force at the time of the decision in Carstens v. Pillsbury, supra, decided in 1916, and no contention was then made by respondents that it authorized the legislation in question. It provides that:

"The Legislature may, by appropriate legislation, provide for the establishment of a minimum wage for women and minors and may provide for the comfort, health, safety and general welfare of any and all employés. No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon any commission now or hereafter created, such power and authority as the Legislature may deem requisite to carry out the provisions of this section."

It is contended that the language "and may provide for the comfort, health, safety and general welfare of any and all employés" and the last sentence of the amendment "gives unlimited scope to the Legislature in conferring jurisdiction upon respondent commission." The Workmen's Compensation Act of 1917 provides in section 1:

"This act and each and every part thereof is an expression of the police power and is also intended to make effective and apply to a complete system of workmen's compensation the provisions of section seventeen and one-half of article twenty and section twenty-one of article twenty of the Constitution of the state of California. A complete system of workmen's compensation includes adequate provision for the comfort, health, safety and general welfare of any and all employés and those dependent upon them for support to the extent of relieving from the consequences of any injury incurred by employés in the course of their employment, irrespective of the fault of any party," etc.

These recitals in the legislative act by which it is sought to designate the source of constitutional power to enact the statute have no weight other than as an expression of the legislative opinion that the law is constitutional—an inference which arises with equal force from the fact of its enactment. It is sufficient for the purposes of this case to say that section 17½ only purports, so far as here involved, to authorize legislation with reference to "employés," and its application, therefore, must be based upon the existence of an employment. The same considerations that led this court to hold unconstitutional the effort of the Legislature to extend the provisions of the Workmen's Compensation Act to relations other than those of employer and employé would apply with equal force to legislation under this section. It is not, therefore, necessary for us, in this action, to further construe section 17½. It is not improper to observe, however, that the printed arguments for and against that amendment, submitted with the proposed amendment, to the people at the election in 1914, are wholly confined to a consideration of the law as affecting the establishment of a minimum wage for women and minors. It is true, of course, that this fact would not limit the plain language of the constitutional provision in question. But, in view of its broad general terms, that fact is worthy of consideration in ascertaining the intent of the people in adopting the amendment. From these considerations it is manifest that no authority is thereby given to impose liability upon third persons for injuries to employés.

Respondent calls our attention to an amendment of section 21, art. 20, adopted at the general election in November, 1918. This amendment completely revises that section. As it was adopted long after the accident in question, it is conceded that it has no application, save, as is contended, that the last paragraph of the amendment has—

"swept away any technical defect which might have existed to hamper the full exercise of jurisdiction by the Industrial Accident Commis-

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sion under the statute which was in force when the amendment was adopted. The portion of the amendment thus relied upon is as follows: 'Nothing contained herein shall be taken or construed to hamper or render ineffectual in any measure the creation and existence of the Industrial Accident Commission of this state, or the state compensation insurance fund, the creation and existence of which, *with all the functions vested in them* are hereby ratified and confirmed.'" (Italics ours.)

For the purposes of this case it is sufficient to notice that, so far as the amendment in effect ratifies and confirms existing legislation purporting to vest power in the commission to award compensation against persons other than the employer, such power never was vested in the commission, for the reason that the legislative attempt to vest such power was unconstitutional and void. Carstens v. Pillsbury, supra. The amendment does not attempt to ratify this futile legislation, but only to ratify in the commission "functions vested in them." This amendment did not, therefore, purport to extend the power of the commission beyond that which had theretofore been lawfully vested in them. The fact, if it be a fact, that the commission was exercising the functions provided by the law of 1917 (section 25), that is, that they were in fact awarding compensation to employés against others than their employers, does not "vest" such functions within the meaning of the amendment, which must obviously refer to legal authority. It should be observed that the amendment did not attempt to ratify the Workmen's Compensation Act of 1917, but merely to confirm powers already lawfully vested in the commission. This distinction can be best emphasized, perhaps, by calling attention to the difference between the language under consideration and that of the constitutional amendment of October 10, 1911, with relation to the Railroad Commission and the Railroad Commission Act (Const. art. 12, § 22), wherein it was provided as follows:

"The provisions of this section shall not be construed to repeal in whole or in part any existing law not inconsistent herewith, and the 'Railroad Commission Act' of this state approved February 10, 1911, shall be construed with reference to this constitutional provision and any other constitutional provision becoming operative concurrently herewith. And the said act shall have the same force and effect as if the same had been passed after the adoption of this provision. * * *"

In the latter case the legislation was expressly ratified and the method of its interpretation pointed out in the constitutional amendment, while the amendment under consideration merely purports to ratify powers and functions already vested in the commission. If it was proposed to ratify and confirm legislation otherwise unconstitutional, that purpose should have been clearly expressed.

It follows, then, that section 25 of the Workmen's Compensation Act of 1917 (Stats. 1917, p. 853) is unconstitutional in so far as it attempts to authorize the awarding of compensation against a third person not an employer, for the same reason that the previous statute was unconstitutional, and that the amendment to section 21 of article 20 of the Constitution does not ratify the legislation condemned as unconstitutional in Carstens v. Pillsbury, supra.

Petitioner Perry also complains that the award was excessive, but, upon the basis of his own testimony that one could work at the business 260 days in a year at $6 to $7 a day, the award was not excessive.

The order awarding compensation against petitioner C. E. Perry is affirmed, and that portion of the order seeking to award compensation against the Pacific Gas & Electric Company is annulled.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; MELVIN, J.; OLNEY, J.

LAWLOR, J. (concurring). I concur specially in the judgment and in what is said on the question whether the relationship of employer and employé existed between C. E. Perry and the deceased. I also concur in the judgment on the constitutional question. This I would not be prepared to do, however, if the questions decided in Carstens v. Pillsbury, 172 Cal. 572, 158 Pac. 218, and Sturdivant v. Pillsbury, 172 Cal. 581, 158 Pac. 222, were now presented for the first time. I dissented in those cases principally for the reason that, in my opinion, the grant of power to the Legislature (section 21, art. 20, Const.) authorized that body, in order to more fully realize the fundamental objects of the new order of rights and liabilities, to create and enforce a liability against the owner, the general contractor, and the subcontractor as well as the immediate employer of the injured workman. To this view I still adhere, but, the contrary opinion having become the settled law of the state, I think the decision reached herein must be accepted.

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(180 Cal. 478)

In re WALKER'S ESTATE.

WALKER et al. v. NASON.

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(L. A. No. 5854.)

(Supreme Court of California. June 5, 1919.)

1. APPEAL AND ERROR ⟸1067—REFUSAL OF INSTRUCTION—HARMLESS ERROR.

Though appellant was entitled to a specific instruction on an issue, yet where issue was easily comprehended, and jury could not have failed to understand from given instruction that verdict would go for appellant if they found issue in his favor, refusal of specific instruction was not prejudicial.

2. BASTARDS ⟸5—LEGITIMACY—EVIDENCE OF PRIOR ACTS OF INFIDELITY.

That wife had given birth to an illegitimate child was inadmissible to show that later children were illegitimate, under Civ. Code, § 194, as to children born within 10 months after dissolution of marriage being presumed legitimate.

3. BASTARDS ⟸8 — LEGITIMACY — PRESUMPTION.

The presumption of legitimacy goes at least to the extent that, if by the laws of nature it is possible that the husband is the father, legitimacy is conclusively presumed, except where husband and wife are white and the child a mulatto.

4. APPEAL AND ERROR ⟸1097(1)—LAW OF CASE—CONFLICT.

Where two views adopted on former appeal are in direct conflict, neither is the law of the case, and it is necessary to examine the question de novo.

5. BASTARDS ⟸5—EVIDENCE OF NONINTERCOURSE—ADMISSIBILITY.

The English rule permitting evidence of nonintercourse, even where the parties are cohabiting, is not the rule in California, in view of Code Civ. Proc. § 1962, subd. 5.

6. BASTARDS ⟸5 — EVIDENCE — ADMISSIBILITY.

It is always permissible to show that it was not possible by the laws of nature for the husband to be the father, as by showing impotency on his part, want of intercourse during the possible period of conception, or that the child is of a race and color such that it could not have been conceived by the husband.

7. BASTARDS ⟸5 — WITNESSES ⟸57 — EVIDENCE OF NONINTERCOURSE—ADMISSIBILITY.

The fact that it was not possible by the laws of nature for the husband to be the father, where that fact is in issue, is to be inquired into in the same manner as any other fact which is the subject of judicial inquiry, and any competent evidence relevant to the question is admissible as in other cases, but it is the rule in California, as in many jurisdictions, that neither the husband nor the wife is competent to testify to lack of intercourse.

8. BASTARDS ⟸6 — ILLEGITIMACY — PROOF — SUFFICIENCY.

Evidence that the husband could not by the laws of nature be the father, as, for example, because of lack of intercourse with the mother, is not required to be such as to prove it beyond any reasonable doubt; it being essential only that proof be clear and satisfactory.

9. BASTARDS ⟸6 — LEGITIMACY — PRESUMPTION—GENERAL RULE.

The rule that presumption of legitimacy is conclusive, if it were possible by the laws of nature for the husband to be the father, does not operate to change the general rule that in civil cases the issue is to be determined upon the preponderance of the evidence.

10. BASTARDS ⟸5—ILLEGITIMACY—EVIDENCE —ADMISSIBILITY.

On issue of illegitimacy, court did not err in not confining the evidence to a showing of want of opportunity for intercourse between deceased and his wife.

11. APPEAL AND ERROR ⟸1214—DECISION IN ACCORDANCE WITH MANDATE OF COURT ON APPEAL—REVIEW.

Where one of the grounds upon which a second trial was directed was the admission of evidence in question, error cannot be predicated upon its rejection by the trial court, regardless of whether ruling is not, in the present judgment of the court on appeal, reconcilable with the principle underlying other rulings in the same decision; the ruling being specific and constituting a mandate to the lower court.

12. BASTARDS ⟸3, 5 — LEGITIMACY — PRESUMPTION.

On issue of nonintercourse by husband, evidence of wife's relation with other men is wholly immaterial, since such relation may have existed, and yet, if intercourse were had with husband during period of possible conception, the presumption is conclusive that the children are his.

13. APPEAL AND ERROR ⟸1064(2)—ERRONEOUS INSTRUCTION—HARMLESS ERROR.

In controversy involving question whether two children were the children of deceased and entitled to share in his estate, instruction that interlocutory decree for deceased husband in divorce suit, standing alone, was entitled to little weight, while clearly an instruction on the weight of evidence, *held* not prejudicial.

14. BASTARDS ⟸6—ILLEGITIMACY—PROOF.

Before the jury can find that the children in question are illegitimate, they must find on clear and satisfactory proof that decedent, alleged husband, "could not be their father."

15. EXECUTORS AND ADMINISTRATORS ⟸33—DISCHARGE OF ADMINISTRATRIX AS AFFECTING JURISDICTION.

The court did not lose jurisdiction of estate by order discharging administratrix, since order was founded and conditioned on decree of distribution, which, when vacated on appeal, left the matter as if no decree had been made.

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Department 1.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

In the matter of the estate of Cornelius Walker, deceased. Mabel A. Nason, as administratrix, filed her final account and petition for distribution to her as the only heir, whereupon Mrs. Mabel E. Walker, as guardian of her two sons, filed a counter-petition for distribution. From a decree of distribution rendered, Nason appeals. Affirmed.

See, also, Nason v. Superior Court of Los Angeles County, 179 P. 454.

Geo. M. Harker, of Los Angeles, for appellant.

Schmidt & Riggins, of Los Angeles, for respondent.

OLNEY, J. The decedent, Cornelius Walker, died intestate November 20, 1913. He left surviving him as his only heirs, then in being, his wife, Mabel E. Walker, and a daughter by a previous marriage, Mabel A. Nason. A few months before his death—that is, on July 3, 1913—he had secured an interlocutory decree of divorce from his wife on the ground of desertion. He had also made a property settlement with her, whereby she released any interest in his estate, with the result that on his death his daughter was the only heir then in being who was interested in the estate.

On April 11, 1914, something under five months after the decedent's death and nine months and eight days after the interlocutory decree of divorce, his widow gave birth to twin sons, who were named Edwin N. Walker and E. Earl Walker.

On the death of Walker, his daughter was appointed administratrix of his estate, and something more than a year later filed her final account as such, and petitioned that the estate be distributed to her as the only heir. Thereupon Mrs. Walker, as the guardian of her twin sons mentioned, filed a counter petition for distribution of the estate equally to them with the daughter, as being children of Walker. To this petition the daughter filed an answer, denying that the twins were the children of Walker, and alleging that they were illegitimate.

The issue of legitimacy so presented has been tried twice, each time before a jury. On the first trial the jury found the children illegitimate; an appeal was taken on their behalf, and a new trial ordered by this court for errors in the admission of evidence and the giving of instructions. Estate of Walker, 176 Cal. 402, 168 Pac. 689. On the second trial the jury found the children legitimate, and a decree of distribution was made, based upon this verdict. From this decree the present appeal is prosecuted by the daughter, Mrs. Nason.

On the first appeal it was held, in effect, that under section 194 of the Civil Code, providing that a child born within 10 months after the dissolution of the marriage of the mother is presumed legitimate, the children here involved must be presumed legitimate, and that this presumption could be overcome only by proper and sufficient evidence showing one or more of three alternatives, namely: Either (1) that the husband was impotent; or (2) that he was entirely absent from his wife during the period when the children must have been begotten; or (3) that he was present with his wife only "under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse."

It appeared at the second trial, as at the first, that Walker was not entirely absent from his wife during the period of possible conception. It should, in fact, be noted that his wife testified to acts of intercourse during this period. The second of the alternatives mentioned was therefore not present in the case, and the trial revolved around the other two—the questions as to the impotency of the decedent, and as to his having been present with his wife only "under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse."

[1] The serious questions on this appeal arise in connection with the second of these two last-mentioned alternatives. Before discussing them, it may be well to dispose of the single question in connection with the first—the alleged impotency of the decedent. The appellant requested, and was refused, a concise and specific instruction that if the jury found the decedent impotent their verdict should be for the appellant. There was evidence sufficient to warrant the jury in so finding, and the appellant was entitled to have the issue so presented submitted to the jury by a direct and specific instruction. It was covered in the instructions given, but not so clearly and definitely as in the one requested. The question involved, however, is one so easily and completely appreciable by a jury as well nigh to preclude the possibility of confusion or misunderstanding. The jury could not have failed to understand from the instructions given, taken in connection with the whole course of the trial, both that they were to pass on the alleged impotency of the decedent, and also that, if they found him impotent, their verdict should be for appellant. This, after all, was the only purpose of the particular instruction requested, and, that purpose being accomplished, it cannot be said that the refusal to give the particular instruction requested was prejudicial.

Passing now to the questions arising in connection with the second alternative involved here, namely, that Walker was present with his wife during the time of possible

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conception only under circumstances "such as afford clear and satisfactory proof that there was no sexual intercourse," it is not clear just what meaning should be given to the decision on the first appeal. There are two possible views, each in accordance with a rule found in other jurisdictions.

The first of these is that, where it appears that the husband and wife have met during the time when the child must have been begotten, the presumption of legitimacy can be overcome only by it being made to appear that the circumstances under which the husband and wife met were such as to afford no opportunity for sexual intercourse, even if they had been so minded, or, putting it conversely, that, if they met under circumstances which did afford such opportunity, it is conclusively presumed that intercourse did take place, and the child legitimate, and evidence that intercourse did not in fact take place is not admissible. The second possible view is that, even though the parties met under circumstances which afforded an opportunity for intercourse, yet the presumption of legitimacy can be overcome by showing that it was not in fact indulged in, and evidence showing, or tending to show, this is admissible.

The necessity for a determination as between these two possible constructions arises from the fact that if the first construction is the true one, and therefore the law of the case, it is practically an end of this appeal, since every error contended for by the appellant becomes immaterial, if the evidence should have been confined to a showing that the parties met only under circumstances which did not afford an opportunity for intercourse. There was practically no such evidence, although it did appear that the parties had met. The cause was not tried by the lower court on that theory, and was submitted to the jury on a hypothesis much more favorable to the appellant than that to which she was entitled, if the issue and the evidence should have been so confined.

In support of the view that the evidence should not be so confined is the ruling on the first appeal that evidence of the relations between the parties, and of their hostile feelings towards each other, was admissible "as tending to establish a relationship from which, depending upon other circumstances established and evidence of the disposition and character of the parties, the jury might fairly draw the inference that, notwithstanding opportunity therefor, intercourse was not had on the occasion when the husband visited his wife." For the purpose of showing such relationship, the introduction in evidence of the interlocutory decree of divorce was approved, as was also evidence of quarrels between the parties, of the exchange of abusive epithets between them, and of statements on the part of the husband indicating feeling against his wife. The admission of such evidence, and the ground upon which its admission is expressly put, cannot be reconciled with the view that, when once it appears that the parties have met under circumstances which permitted intercourse if they were so inclined, it is conclusively presumed that it took place, and that the evidence must be confined to showing that the parties did not meet under such circumstances.

[2] On the other hand, in support of the view that the issue and the evidence should be so confined, is the ruling on the former appeal that evidence was not admissible that the wife had given birth to an illegitimate child on February 1, 1913, about a month prior to the husband commencing his suit for divorce, and about five months prior to the interlocutory decree and the period of possible conception of the children here involved, and that this fact was known to the husband. Evidence merely that the wife had given birth to an illegitimate child was clearly inadmissible under either rule, or, in fact, under any rule. Standing alone, it would not tend to show that the husband did not have intercourse with the mother five months later, and if such intercourse was had the presumption that the children here are the fruit of it is conclusive.

[3] There is no doubt but that the presumption of legitimacy goes at least to this extent: That if it appear that by the laws of nature it is possible that the husband is the father (that is, if it appears that the husband had intercourse with the mother during the period of possible conception), legitimacy is conclusively presumed, and no guessing or weighing of probabilities as to paternity because of relations between the mother and other men will be permitted. The only exception to this, if it really be an exception, is where it is clear that, although the husband had intercourse with the wife, yet by the laws of nature it is impossible for him to have been the father, as, for instance, where husband and wife are white and the child a mulatto. But when the evidence goes further than merely showing a previous illegitimate birth from the mother, and shows that the husband knew of this fact, it is not possible to reconcile its exclusion with a rule admitting evidence of the relationship and feeling between the parties to rebut any inference that intercourse took place between them on the occasions when they met. It is difficult to conceive of anything which would more profoundly affect their relations than the knowledge or belief on the husband's part that his wife had a few months before given birth to a child conceived in adultery.

[4] These two views are both adopted on the former appeal. They are in direct conflict, with the result that neither is the law of the case (Gage v. Downey, 94 Cal. 241,

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29 Pac. 635), and it is necessary to examine the question de novo. The old English rule, at least as generally stated, was that if the husband were within the king's dominion and were not incapable of procreation, the child was presumed legitimate regardless of all other facts. It was carried to ridiculous extremes:

"Although a woman has issue in adultery, nevertheless, by the common law, if her husband is able to beget children and is within the four seas, the issue is not regarded as bastard. And this presumption is so strong that if a feme covert goes into another country and there takes a husband and has issue by him, the first husband being within the four seas, the issue is a mulier; but it is otherwise if the baron be over the seas." (4 Viner, Abr. Bastard, A, 2, p. 216.)

In modern times this harsh rule, like other similar rules of the common law, has been much modified, so that in general the actual fact may be examined into and the question not determined by formal rules.

Much the same change is apparently found in the Roman law. In the very interesting preface by Denis Le Marchant to his report published in 1828 of the Gardner Peerage Case, p. xiii, it is said:

"The earliest authority on this subject to which we can safely refer is contained in the Digest, from whence it has descended into most of the Codes of modern Europe. The same definition of legitimacy, though expressed in different terms, is given by two of the great Roman jurists. Paulus declares 'marriage to be proof of paternity,' whilst according to Ulpian 'the issue of a man and his wife are legitimate.' This definition did not originate with either of the writers by whom it is recorded. It probably was of great antiquity; for Julianus, who preceded them by more than a century, tacitly admits it, by determining it to be inapplicable to cases of nonaccess between a husband and wife; 'so that, although a husband who lived constantly with his wife should not be allowed to withhold his recognition of her child, yet where he had been very long absent from her, and she had borne a child during such absence, the law pronounced the child not to be his.' Scævola and Ulpian admitted this doctrine, but considering the presumption in favor of legitimacy to be still too strong, they allowed not only the fact of access, but of sexual intercourse, to be disputed; and 'if it could be satisfactorily established that either from intervening infirmity, or from any other cause, no sexual intercourse between husband and wife had taken place, or if the husband had been in such a state of health as disqualified him from generating, the child who might have been born under these circumstances in the house of the husband, notwithstanding the publicity of its birth, was not the child of the husband.' The causes of adulterine bastardy were thus reduced to two, the impotence of the husband and the absence of sexual intercourse between the husband and wife when the period of the wife's gestation commenced."

The matter of the presumptions in cases of alleged adulterine bastardy came up in England in 1811 for elaborate discussion in the Banbury Peerage Case, reported in the appendix (page 389) to Le Marchant's report of the Gardner Case just mentioned. William, Earl of Banbury, had died in 1632, supposedly childless, but in 1661 one Nicholas laid claim to the dignity of the earldom, as the earl's son. From that time on the matter had been one of frequently recurring dispute. The evidence showed clearly that Nicholas was the son of the earl's wife. He was born about a year before the earl's death. The earl at the time was 80 years of age, while his wife was much younger. They had been married for some 21 years without fruition of the marriage. The birth of Nicholas—or at least the fact that Lady Banbury was his mother—was apparently unknown to the earl. There was much evidence which made it fairly certain that Nicholas was, in fact, not the son of the earl, but of one Lord Vaux. Under these circumstances the committee of the House of Lords proposed several questions to the judges, and, among others, the question (page 430) whether the presumption of legitimacy could "be lawfully rebutted by evidence that such access did not take place between the husband and wife as by the law of nature is necessary to admit the husband to be the father of the child." The answer to this question and further questions to the judges which followed, together with their answers, are thus reported (pages 433–436):

"The Lord Chief Justice of the Court of Common Pleas (Sir James Mansfield), having conferred with his brethren, informed the committee that they were unanimously of opinion: 'That the presumption of legitimacy arising from the birth of a child during wedlock, the husband and wife not being proved to be impotent, and having opportunities of access to each other, during the period in which a child could be begotten and born in the course of nature, may be rebutted by circumstances inducing a contrary presumption.'

"The following question was then put to the judges: 'Whether the fact of the birth of a child from a woman united to a man by lawful wedlock, be always, or be not always by the law of England prima facie evidence that such child is legitimate; and whether, in every case in which there is prima facie evidence of any right existing in any person, the onus probandi be always, or be not always, upon the person or party calling such right in question; whether such prima facie evidence of legitimacy may always, or may not always, be lawfully rebutted by satisfactory evidence that such access did not take place between the husband and wife as by the laws of nature is necessary in order for the man to be in fact the father of the child; whether the physical fact of impotency, or of nonaccess, or of nongenerating access (as the case may be) may always be lawfully proved, and can only be lawfully proved by means of such legal evidence as is strictly admissible in every other case, in which it is necessary by the laws of England that a physical fact be proved.'

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"The following question was also proposed to the judges: 'Whether evidence may be received and acted upon to bastardize a child born in wedlock, after proof given of such access of the husband and wife, by which, according to the laws of nature, he might be the father of such child; the husband not being impotent, except such proof as goes to negative the fact of generating access?' 'Whether such proof must not be regulated by the same principles as are applicable to the legal establishment of any other fact?' To which the judges answered: 'That after proof given of such access of the husband and wife, by which, according to the laws of nature, he might be the father of the child (by which they understood proof of sexual intercourse between them), no evidence could be received, except it tended to falsify the proof that such intercourse had taken place, such proof must be regulated by the same principles as were applicable to the establishment of any other fact.'

"Afterwards, the following questions were put to the judges: '(1) Whether, in every case where a child is born in lawful wedlock, sexual intercourse is not by law presumed to have taken place after the marriage, between the husband and wife (the husband not being proved to be separated from her by sentence of divorce), until the contrary is proved by evidence sufficient to establish the fact of such nonaccess, as negatives such presumption of sexual intercourse, within the period when, according to the laws of nature, he might be the father of such child? (2) Whether the legitimacy of a child born in lawful wedlock (the husband not being proved to be separated from his wife by sentence of divorce) can be legally resisted, by the proof of any other facts or circumstances than such as are sufficient to establish the fact of nonaccess during the period within which the husband, by the laws of nature, might be the father of such child; and whether any other question but such nonaccess can be legally left to a jury, upon a trial, in the courts of law, to repel the presumption of the legitimacy of a child so circumstanced?'

"The Lord Chief Justice of the Court of Common Pleas delivered the unanimous opinion of the judges as follows: '(1) That in every case where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time, when by such intercourse the husband could, according to the laws of nature, be the father of such child. (2) That the presumption of the legitimacy of a child born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, can only be legally resisted by evidence of such facts or circumstances as are sufficient to prove, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place between the husband and the wife at any time when, by such intercourse, the husband could, by the laws of nature, be the father of such child. Where the legitimacy of a child in such a case is disputed, on the ground that the husband was not the father of such child, the question to be left to the jury is whether the husband was the father of such child; and the evidence to prove that he was not the father must be of such facts and circumstances as are sufficient to prove, to the satisfaction of a jury, that no sexual intercourse took place between the husband and wife at any time, when, by such intercourse, the husband, by the laws of nature, could be the father of such child. The nonexistence of sexual intercourse is generally expressed by the words "nonaccess of the husband to the wife"; and we understand those expressions, as applied to the present question, as meaning the same thing, because, in one sense of the word "access," the husband may be said to have access to his wife, as being in the same place, or the same house, and yet, under such circumstances as, instead of proving, tend to disprove that any sexual intercourse took place between them.'"

For the purposes of the present discussion two points in connection with these questions and answers are to be particularly noted: First, it was declared specifically that, although the husband and wife might have had opportunities for access to each other, yet evidence was admissible to rebut any inference from this that they did in fact have it; second, that the word "access" is used in the sense of sexual intercourse. The importance of this second point lies in the fact that there has been confusion as to the meaning of the word in this connection. It has been assumed that it meant only "access" in the sense that the husband saw or visited his wife—had "access" to her presence. It is largely from this misunderstanding of the sense in which this particular word was used that the impression has arisen that when "access" by the husband to the wife, in the sense of their meeting so as to afford an opportunity for sexual intercourse, is shown, the matter is concluded, and proof that intercourse did not take place is not admissible. An instance of this confusion is Bury v. Philpot, 2 My. & K. 349, 39 Eng. Rep. Full Reprint, 977, decided in 1834 and frequently cited, wherein the Master of the Rolls, Sir John Leach, declared:

"Access is such access as affords opportunity of sexual intercourse; and where the fact of such access between husband and wife within a period capable of raising the legal inference as to the legitimacy of an after-born child is not disputed, probabilities can have no weight; and a case ought never to be sent to a jury."

Upon the delivery in the Banbury Case of the answers quoted, Lord Redesdale (page 436), Lord Ellenborough (page 455) and Lord Eldon (page 484) delivered opinions following the rules contained in the answers and holding that Nicholas was illegitimate. Lord Erskine (page 464) delivered an opinion to the contrary, maintaining that the presumption of legitimacy could be overcome only by proof of nonaccess in the sense of a lack of opportunity for sexual intercourse. The committee then divided; the majority presenting a

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report against the claimant, a descendant of Nicholas, which was adopted by the House.

The answers to the questions so propounded have ever since been followed as the law of England, notwithstanding Bury v. Philpot, supra. Thus in the leading case of Hargrave v. Hargrave, 9 Beav. 552, 50 Eng. Rep. Full Reprint, 457, from which the language quoted on the first appeal in this case as stating the general principles applicable is taken, Lord Langdale said:

"In the course of the investigation I apprehend that evidence of every kind, direct or presumptive, may be adduced, for the purpose of showing the absence of sexual intercourse, which, in cases where there has been some society, intercourse, or access, has been called nongenerating access. We have therefore to attend to the conduct and the feelings, as evidenced by the conduct of the parties towards each other and the offspring, and even to the declarations accompanying acts, which are properly evidence. Such circumstances are of no avail against proper evidence of generating access; but they may have weight, when the effect of that evidence is doubtful."

See, also, Morris v. Davies, 5 Cl. & Fin. 163; Cope v. Cope, 5 Car & P. 604, 24 Eng. C. L. 730; Reg. v. Mansfield, 1 G. & D. 7, 1 Q. B. 444; Gordon v. Gordon, [1903] Pr. Div. 141.

Any detailed consideration of the American cases is unnecessary, for they, like the subsequent English cases, in the main look back to the Banbury Peerage Case and Hargrave v. Hargrave, supra, in order to determine the rule of the common law, and the differences between the American cases are largely due to a misinterpretation of one or the other of these two leading English cases. See, for an instance, Scanlon v. Walshe, 81 Md. 118, 130, 131, 31 Atl. 498, 48 Am. St. Rep. 488. The result of the American decisions is thus stated and correctly, in 3 Rul. C. L. 728:

"But there is considerable conflict of authority on the question whether opportunity of sexual intercourse between them (husband and wife) must be shown to have been impossible to rebut the presumption (of legitimacy). There are authorities which take the position that the question to be presented to the jury in a case of this character is not whether the mother of the child and her husband did or did not have sexual intercourse at or about the time the wife became pregnant, but whether the opportunity for sexual intercourse by any possibility presented itself to them. If it did, then, unless impotency can be shown, the presumption of legitimacy is conclusive. On the other hand, according to this view, if the opportunity could not by any possibility have presented itself to them then the presumption is rebutted. The authorities which take these views are in the minority; the great weight of authority being to the effect that access—that is, an opportunity for sexual intercourse—need not be shown to have been impossible, and that, where an opportunity for sexual intercourse is shown, the presumption favoring legitimacy, while very strong, is not conclusive, and may be rebutted by showing that intercourse did not in fact take place."

[5, 6] The English rule would seem to go so far as to permit evidence of nonintercourse even where the parties are cohabiting; i. e., living together in the same house or apartments. Such is not the rule in this state. Section 1962, subd. 5, Code Civ. Proc.; Estate of Mills, 137 Cal. 298, 70 Pac. 91, 92 Am. St. Rep. 175. But with this statutory exception the true rule in America, as well as England, is, we believe, that if it is possible by the laws of nature for the husband to be the father (that is, if there was coition and no impotency), no inquiry will be permitted into the probabilities of the case one way or the other, but the presumption of legitimacy is conclusive; and, on the other hand, it is always permitted to show that it was not possible by the laws of nature for the husband to be the father, as by showing impotency on his part, want of intercourse during the possible period of conception, or that the child is of a race or color such that it could not have been conceived by the husband.

[7] The fact that it was not possible by the laws of nature for the husband to be the father, where that fact is in issue, is to be inquired into in the same manner as any other fact which is the subject of judicial inquiry, and any competent evidence relevant to the question is admissible as in other cases; it being the rule, however, in California, as in many jurisdictions, that neither the husband nor the wife is competent to testify to lack of intercourse. Estate of Mills, supra.

[8, 9] It should perhaps be noted that, when it is said that the presumption of legitimacy is conclusive if it were possible by the laws of nature for the husband to be the father, it is not meant that the proof of the fact of such impossibility must itself be beyond possibility of doubt. The two things are very different. The fact to be proven is that the husband could not by the laws of nature be the father, as, for example, because of lack of intercourse with the mother. The evidence of that fact is not required to be such as to prove it beyond any possibility of doubt. A jury would be justified in finding a lack of intercourse, with the consequence that it was impossible that the husband be the father upon evidence which did not show such lack beyond possibility of question. The presumption of legitimacy is strong, and the proof of impotency or nonintercourse must be clear and satisfactory, but this is all. The presumption does not operate to change the general rule that in civil cases the issue is to be determined upon the preponderance of evidence, but, like other presumptions, operates under and beneath that rule.

[10] It remains to apply the foregoing

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views to the particular case. It is apparent at once that the action of the lower court in not confining the evidence to a showing of want of opportunity for intercourse between Walker and his wife was correct, and that errors complained of by appellant must be judged on the basis that although such opportunity did appear, yet evidence to the point that intercourse during the critical period did not take place was admissible, and the question of whether it did or did not was the real question to be submitted to and decided by the jury.

[11] Of the rulings of the lower court complained of, the most prejudicial to the appellant was the rejection of evidence, both direct and on cross-examination, that Mrs. Walker had given birth to an illegitimate child some five months before Walker must have had intercourse with her, if the children here involved are really his, and that Walker knew of this fact. Such evidence, if admitted, might well have resulted in a different verdict. The matter, however, is concluded by the decision of this court on the former appeal. One of the grounds, if not the principal ground, upon which a second trial was directed, was the admission of this very evidence at the first trial. It is true, as we have said, that such ruling was not, in our present judgment, reconcilable with the principle underlying other rulings in the same decision, nor with the true rule applicable in such cases. But, whatever may be said as to the reasons for it, the ruling itself is specific, and constituted a mandate to the lower court which it was bound to follow. Error cannot be predicated upon the action of the lower court in so doing. The ruling is the law of the case, and does not come within the principle of Gage v. Downey, supra.

[12] Complaint is made that the trial court refused to permit evidence as to who was the father of the twins other than Walker, and at the same time refused to instruct the jury that it was not necessary for them to find who the father was, if Walker was not. But it is clear from what has been said that the evidence was properly confined to proving nonintercourse by the husband. On that issue evidence of relations by the wife with another man or other men is wholly immaterial. Such relations may have existed, and yet, if intercourse were had with the husband during the period of possible conception, the presumption is conclusive that the children are his. As to the refusal to charge the jury that they need not find who the father was, if Walker was not, the jury were explicitly instructed that the only question for them to determine was whether the children were the children of Walker. The instructions given and the whole course of the trial make it plain that the jury could not have been misled on this point, or have conceived it their duty to find Walker to be the father unless they could determine the identity of the man who was.

The lower court several times charged the jury that the presumption of legitimacy could be overcome only by "clear and satisfactory" evidence, to which was added on one occasion the adjective "convincing" and on another the adjective "certain," and the giving of such instructions is assigned as error; that the presumption of legitimacy can be overcome only by clear and satisfactory proof is the law. If it were intended by the adjectives "certain" and "convincing" to instruct the jury that the proof must go beyond a reasonable doubt, and change the rule that civil cases are to be determined upon the preponderance of evidence the instruction was incorrect. It does not, however, admit of this interpretation. The jury was expressly instructed that they were to determine the issue by a preponderance of evidence and the context of the instructions containing the adjectives in question makes it plain that they were used in the same sense as "clear and satisfactory," and must have been so understood.

The trial court charged the jury with relation to the decree of interlocutory divorce as follows:

"The interlocutory decree was admissible, among other things, as tending to establish a relationship from which, depending upon other circumstances proved and evidence of the disposition and character of the parties, from which (sic) you might fairly draw the inference that, notwithstanding opportunity therefor, sexual intercourse was not had on the occasions when the husband visited the wife. Nevertheless, standing alone, such decree is entitled to little weight. It did not dissolve nor affect the relationship of husband and wife. It was merely a judicial determination that at the time the children were begotten the wife was not living with her husband; that is, dwelling in the same house with him as his wife."

[13] The portion of this instruction as to the little weight to be given to the fact of an interlocutory decree between the parties is clearly an instruction as to the weight of evidence, and under our constitutional prohibition of such instructions its giving was error. It is true that the instruction is in almost the exact language used by this court on the former appeal in commenting on the interlocutory decree. But the views of an appellate court on the weight of evidence are no more the proper subject of a charge to the jury than similar views of the trial court. If we could bring ourselves to believe that possibly this instruction had had any effect on the jury we would send the cause back for a new trial without hesitation. But we cannot bring ourselves so to believe.

The material point of the interlocutory decree was that it suspended marital rights and obligations and the usual incidents of

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the marital relation, and destroyed any inference or presumption from the fact of marriage that the parties were living together or having intercourse. But there could have been no mistake in the minds of the jury upon this point. They were charged, probably more favorably to the appellant than the strict rule would warrant, that there was an actual presumption of law arising from the interlocutory decree that the parties did not cohabit, which presumption had to be overcome by evidence, and that in the absence of a reconciliation between them cohabitation would be an act essentially immoral, and there was a presumption of law that an immoral act is not indulged in. Such instructions must have made it clear to the jury just what the effect of the interlocutory decree was, and just what part it could properly play in enabling them to determine the final question of fact submitted to them: Did or did not Walker have intercourse with his wife during the period of possible conception of the children here involved? In view of this, it is not possible to say that the single sentence with regard to the weight to be given the interlocutory decree, standing alone, was prejudicial.

[14] The appellant also complains that the jury were instructed that, before they could find the children illegitimate, they must find on clear and satisfactory proof that "Walker could not be their father." But such instruction, as we have seen, is a correct statement of the law. Counsel has confused the proving by a preponderance of evidence that the husband could not possibly be the father (as to which the jury was accurately charged) with proving beyond a doubt that he could not be. This matter we have already discussed.

The foregoing are the more serious contentions of appellant with respect to the evidence and the instructions. There are quite a number of others, but their discussion would not be helpful, and would still further lengthen this already long opinion. Suffice it to say that the facts of this case are such that we have examined the record carefully, with a view to ascertaining if there were any respect in which it could be fairly said that the jury might have been misled or confused, and that we have found none. Much might be said in regard to the weight of evidence, but that was a matter solely for the trial court, on a motion for a new trial.

The appellant also complains of alleged misconduct at the trial by opposing counsel. We find no basis for such complaint. The particular conduct most relied on is certain remarks to the jury in the course of argument. But the making of such remarks is denied by opposing counsel, they were not assigned as misconduct at the time, and they were urged before the lower court on a motion for a new trial, and a new trial denied. The trial court was in a better position to pass on the merits of such a complaint, and was also much freer to act, than an appellate court, if the trial seemed to it in any respect unfair.

The last point made by appellant is that the court did not have jurisdiction to make the decree of distribution appealed from; that it had jurisdiction only to preside at the trial "and issue judgment on the verdict," whatever may be meant by that. Now the issue tried was an issue made by the petitions for distribution and the answers thereto. The trial having determined the issue, the decree followed as of course. The point apparently relied on to sustain the appellant's position is that pending the first appeal, and while the first decree of distribution was in effect, the appellant, being the administratrix of the estate, as such administratrix delivered to herself as the only distributee under the decree all the property of the estate, and then had herself discharged as administratrix. All that this really means is that, the first decree of distribution, under which the appellant received the property, having been vacated, the appellant now has property to which she is not entitled and for which she must account. Heydenfeldt v. Superior Court, 117 Cal. 348, 49 Pac. 210; Ashton v. Heydenfeldt, 124 Cal. 14, 56 Pac. 624; Ashton v. Heydenfeldt, 127 Cal. 442, 59 Pac. 759; Ashton v. Heggerty, 130 Cal. 516, 62 Pac. 934; Ashton v. Zella, etc., Co., 134 Cal. 408, 66 Pac. 494.

It cannot affect the right of the minor children to have a decree distributing to them their part of the estate upon the issue as to their heirship being determined in their favor.

[15] The court did not lose jurisdiction of the estate by the order discharging the administratrix. That order was founded and conditioned on the first decree of distribution, and, this decree having been vacated on appeal, the matter stood as though no decree had ever been made. Ashton v. Heydenfeldt, 124 Cal. 14, 56 Pac. 624.

Decree of distribution affirmed.

We concur: SHAW, J.; LAWLOR, J.

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(41 Cal. App. 8)

TREMBLE v. TUMAN et al. (Civ. 2639.)

(District Court of Appeal, First District, Division 2, California. April 29, 1919. Rehearing Denied May 29, 1919; Denied by Supreme Court June 26, 1919.)

1. APPEAL AND ERROR ⟸1099(11)—JUDGMENT—LAW OF CASE.

Where on appeal by an owner who sued a contractor and surety judgment for the surety, which was based on special verdicts notwithstanding a general verdict for the owner, it was reversed by the Supreme Court on the ground that under the pleadings the general verdict and special verdicts were not inconsistent, such ruling is the law of the case, and will govern on appeal by the surety from a second judgment in favor of the owner if there is any evidence to sustain the general verdict.

2. APPEAL AND ERROR ⟸1002—REVIEW—VERDICT.

A verdict on conflicting evidence will not be disturbed on appeal.

3. CONTRACTS ⟸322(4) — BUILDING CONTRACTS—ACTIONS—EVIDENCE.

In an action by the owner against a contractor on building contract and surety, evidence *held* to warrant the finding that the contractor had abandoned his work so that the owner was warranted in completing the same, and holding the contractor and surety liable.

Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

Action by C. E. Tremble against G. E. Tuman and the United States Fidelity & Guaranty Company. From a judgment for plaintiff, the last-named defendant appeals. Affirmed.

Thomas, Beedy & Lanagan, of San Francisco, for appellant.

John W. Stetson, of Oakland, for plaintiff and respondent.

Gavin McNab, of San Francisco, and Clarence Coonan, of Eureka, for defendant and respondent.

BRITTAIN, J. In a suit by the owner against the contractor and his surety for damages for breach of a building contract, judgment was entered in favor of the owner and against the contractor, and in favor of the surety against the owner. The plaintiff appealed on the judgment roll from that part of the judgment in favor of the surety. Prior to the establishment of two divisions thereof, the District Court of Appeal of the First Appellate District affirmed the judgment. On rehearing the Supreme Court reversed both the decision of the District Court of Appeal and the judgment, directing the trial court to enter judgment in favor of the owner and against the surety. Tremble v. Tuman, 175 Cal. 696, 167 Pac. 142. From the judgment so entered the surety appeals, bringing up a bill of exceptions. The principal contention is that the evidence does not support the judgment.

The building contract was made in May, 1911, for the erection of a building to cost $30,000. Coincident with its execution, the appellant surety company executed its bond in the sum of $7,500 to the owner for the faithful performance of the contract. The plaintiff alleged abandonment of the work by the contractor on October 24, 1911, and damages amounting to $7,894.10. She prayed for judgment of $7,500 against the contractor and the surety. The suit was commenced in June, 1913. The issues of fact were submitted to a jury, which returned a general verdict against the defendants jointly for $5,000 and against the contractor alone for $850. To four questions submitted to the jury it answered: (1) The owner's architect did not delay the contractor's work by failure to furnish plans, specifications, or working detail drawings; (2) either the owner or her architect ordered the contractor to do extra work, but no delay was caused thereby; (3) the contractor did not have men working on the building every working day between October 24, 1911, and November 14, 1911; and (4) to the question, "Did Mrs. Tremble or Mr. Reed [her architect] take the job away from the defendant contractor and finish the building herself; if so, when did she take over the job?" the answer was, "Yes; November 14, 1911."

[1] The surety moved for a judgment according to the special verdicts and not in accordance with the general verdict, on the ground that the two verdicts were inconsistent. The motion was granted, and the first judgment entered in favor of the surety. That judgment was reversed by the Supreme Court. The only matter necessarily decided on the first appeal was that under the pleadings the general verdict and the special verdicts were not inconsistent, because the issue of abandonment was presented to the jury and determined by it in the general verdict. This is the law of the case. The determination is conclusive if there was any evidence to sustain the general verdict.

[2, 3] On behalf of the appellant it is contended there was no abandonment merely by reason of the failure of the contractor to act under a notice referring to section 14 of the contract, and further that, apart from abandonment based upon the construction of that section of the contract, there was no evidence of abandonment to support the general verdict. Section 14 provided that, should the contractor fail or refuse "to supply a sufficiency of materials or workmen to complete the contract within the time limited herein * * * for a period of more than three days after having been notified by the owner

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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in writing to furnish the same, the owner shall have power to furnish and provide said materials or workmen to finish the said work; and the reasonable expenses thereof shall be deducted from the amount of the contract price." The appellant presents a lengthy argument upon the interpretation to be given to this clause and relies on a case where a similar provision was construed. American-Hawaiian Engineering & Construction Company v. Butler, 165 Cal. 497–510, 133 Pac. 280, Ann. Cas. 1916C, 44. On behalf of the respondent it is contended the two cases may be distinguished. It is not necessary to determine the question thus presented. The determination of the jury upon the issue of abandonment is supported by ample evidence irrespective of the provisions of section 14 of the contract.

Various witnesses, some testifying for the plaintiff and some for the defendants, made statements of facts which are summarized below. The contractor was sick. He visited the work only two or three times. One Graves assumed charge of the work for the contractor. The work was delayed. Some of the materialmen were unpaid and refused to furnish further material. Notice was given to supply men and material on October 24, 1911, after which the contractor had no further consultations about the building or the further progress in connection with it, and gave no directions or orders. The average number of men employed on the work for a month was about three—at times as low as two. The work being done was practically nothing, and the job was at a standstill. The subcontractors were not being paid, they were in charge of Cook, the foreman. He was not half working; he was getting no money and was sore. He was not there all the time. On the Monday following the giving of the notice to supply men and material, and on the succeeding Saturday, and the Monday following that, there was no one on the job, nor was there any one working on November 14, 1911, when the owner took charge of the working hours. The architect testified that Graves and he arrived at the conclusion that Tuman could not make any further progress. Tuman had contracted to finance the work in a particular way. He failed to finance the work in that way, and was unable to finance it in any other way.

As against the evidence summarized above, counsel for the appellant admit Mr. Tuman's financial difficulties, but argue there is no evidence that because of such fact Mr. Tuman ever decided to abandon the work, and that the evidence of his financial condition did not show it was impossible for Tuman to complete the work. On the contrary, it is argued that, while Graves, as Tuman's agent, had difficulty in securing funds, and one or two of his attempts to secure them failed before the plaintiff finally took the work out of the hands of Tuman, Graves was successful in making financial arrangements which would insure the completion of the work, though possibly not pay all laborers or materialmen or subcontractors.

This arrangement was one made by Graves with three others, by which on November 6, 1911, 13 days after the notice was given, $10,000 was deposited in the Crocker Bank in the name of G. E. Tuman Company, a corporation. The building contract was with Tuman individually. He did not participate in the formation of the corporation, and was not a director until after his recovery in the following January. The corporation was formed primarily for the purpose of assisting Mr. Tuman in financing his matters while he was financially unable to attend to them himself. His financial difficulties related somewhat to the whole volume of the work that he was doing. The corporation was not to take over the work, and the directors of the corporation were to pass on any of Mr. Tuman's bills that were presented for payment. Between the date of the notice and that when the owner took over the work Reed and Graves had consultations in which Graves assured Reed he hoped to be able to finance the work, but finally, according to the evidence of Mr. Reed, when the latter told him the owner was going to take over the work, Graves said that was the only thing which could be done, that he could not get any money for anything, and that he could not get any money to complete the tile contract, that he could not get any money to pay labor, and that his hands were practically tied. He did not tell Reed he had made arrangements for money for the tile contractor. He never consented in so many words that Mrs. Tremble should take the job out of his or Tuman's hands, nor did he ever object to her doing so.

Counsel for the appellant admit it would be impossible for a contractor to avoid liability for having abandoned the work by merely keeping sufficient workmen on the job to sustain the appearance of continuance of the work, but they argue that abandonment is a question of intention. It may be shown by conduct. In law, the word "abandonment" does not necessarily imply a willful or culpable disregard of the contractor's obligations. It may, as in this case, be applied to a condition of affairs where, through misfortune the contractor is unable to finance his contract, or by reason of his mental or physical incapacity be precluded from carrying on his work or attending to the business incident to it. The cases cited by the appellant upon this subject lay down no other rule. Apart from any question of the interpretation of section 14 of the contract, the most that could be said upon the subject of abandonment is that the jury determined the fact upon conflicting evidence. On appeal this court is bound by such a determination.

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It is contended on behalf of the appellant that abandonment cannot take place unless the contractor intends to abandon; in other words, unless he expressly or impliedly agrees to quit. It is further argued that the contractor did agree to quit, and therefore the contract was abrogated so that the surety was released; further, that if the contractor did not agree to quit or intend to abandon the work, the owner's interposition amounted to a prevention of performance on the part of the contractor, by which the surety was released. From this it would appear the position of the appellant on the question of abandonment is that the contractor did not agree to quit, and on the question of the surety's liability that he did agree to quit; further, that upon whichever of these two positions the court may stand, the result will be the release of the surety. No true dilemma is presented. The fallacy is in the shifting positions. Either the contractor abandoned the work or he did not. The jury determined that he did. The surety is bound by that determination.

The judgment appealed from is affirmed.

We concur: LANGDON, P. J.; HAVEN, J.

(40 Cal. App. 753)

GOOD v. BROWN et ux. (Civ. 1685.)

(District Court of Appeal, Third District, California. April 22, 1919. Rehearing Denied by Supreme Court June 19, 1919.)

1. APPEAL AND ERROR ⟸1010(1)—EVIDENCE TO SUSTAIN FINDING.

On appeal in suit to foreclose mortgage on community real estate, finding that there was no agreement as contended by mortgagors that the mortgagee should resort first to personal property of the husband upon which he had a prior mortgage will be sustained, where the mortgagee testified positively that there was no such agreement.

2. HUSBAND AND WIFE ⟸267(6)—COMMUNITY PROPERTY—MORTGAGE BY HUSBAND AND WIFE—WIFE AS SURETY.

Where the mortgagee promised to furnish groceries, to perform other acts, and bring no action until after harvest, there was sufficient consideration for a mortgage of the wife's interest in community real estate, and she was a principal to the mortgage executed by both her and her husband, and not a surety, so as to be entitled to demand property of the principal to be first applied within Civ. Code, § 2850.

3. MORTGAGES ⟸411 — FORECLOSURE — COMPELLING FORECLOSURE OF PRIOR MORTGAGE.

Generally, the foreclosure of a mortgage will not be barred by the existence of another prior mortgage real or chattel which is security for the same debt.

4. HOMESTEAD ⟸108 — MORTGAGE — FORECLOSURE—EXHAUSTION OF OTHER PROPERTY.

Where husband and wife executed a mortgage upon community real estate, their homestead, as security for the husband's debt, the mortgagee upon suit to foreclose can be compelled to first exhaust a chattel mortgage upon personal property which was also community property before demanding a sale of the homestead.

Appeal from Superior Court, Madera County; W. M. Conley, Judge.

Foreclosure action by R. E. L. Good against George S. Brown and wife. From a judgment for plaintiff, defendants appeal. Reversed.

Ernest Klette, of Fresno, for appellants.

C. K. Bonestell, of Fresno, and Kitt Gould, of Clovis, for respondent.

BURNETT, J. The appeal is from a judgment of foreclosure of a mortgage on real estate. On the 12th day of June, 1912, the defendant George E. Brown delivered his promissory note in the sum of $1,000, payable 90 days after date, to the plaintiff, and to secure its payment executed a chattel mortgage upon certain personal property. Defendant Cynthia Brown was not a party to this note or mortgage, and when this suit was brought no action had been taken towards enforcing said chattel mortgage, and it existed as a valid lien on said personal property. Thereafter, on February 27, 1914, both of said defendants executed the real estate mortgage to secure the payment of this note. The land is community property, and prior to the execution of said mortgage the said defendant Cynthia Brown had executed and recorded, in due form, a declaration of homestead on said property.

The foregoing facts are undisputed, and in addition it is claimed by appellants that, when the real estate mortgage was signed by Cynthia Brown, it was agreed that the mortgagee would first exhaust the security on the personal property before resorting to the real estate mortgage.

The contentions of appellants are these: First, respondent was required to exhaust the personal property security before resorting to the foreclosure of the real estate mortgage; second, Cynthia J. Brown was a surety on the second obligation, and by virtue of section 2850 of the Civil Code she had a right to demand that the property of the principal, that is, the personal property, be first applied to the discharge of the obligation, or, at least, by reason of the homestead, such was in effect the situation; and, third, by virtue of said agreement, plaintiff was obligated to resort first to the personal security.

[1] As to the last of these, it may be dismissed with the statement that plaintiff tes-

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tified positively that there was no such agreement, and we are bound by the finding to that effect.

The other contentions may be considered together, and to understand them fully some additional facts should be stated. Before the real estate mortgage was executed, Good became dissatisfied with the chattel mortgage security, and notified Brown that, unless further security should be forthcoming, he would be compelled to take possession of said personal property and dispose of it. Good testified as to this:

"Well, I got Mr. Brown into the store and told him that it was absolutely necessary that I foreclose this chattel mortgage unless I was given additional security, because the stock was getting older every day and being much abused by the work given them, and my security was not sufficient. He at that time made a promise to me that he would give me a mortgage on a piece of property with his wife's signature to it. Later he brought the mortgage in and delivered it to me in my office at Clovis and I recorded it."

The following questions and answers indicate the nature of Mrs. Brown's connection with the transaction:

"Q. (by the Court). Mrs. Brown, why did you sign the mortgage? A. Simply because I wanted to get this money to go on with the grain and harvest and to do summer fallowing. Mr. Brown gave us to understand that there was only between six or seven hundred on the thousand. If I signed it, Mr. Good was to put up barley and groceries and summer-fallow the land. My husband told me this. Q. You signed it upon your husband's statement to you that Mr. Good would furnish $300 more over the amount that was for the purpose of buying provisions? A. Yes."

[2] It may be further stated that the plaintiff testified that he agreed not to bring an action to foreclose until after harvest. It thus appears that Mrs. Brown was not a surety, but one of the principal obligors, to the mortgage, which was executed to secure the payment of a community debt, and the promise "to put up barley and groceries and summer-fallow the land" and to bring no action until after harvest afforded sufficient consideration to support the hypothecation of her interest in the community real estate. As to this position we deem the citation of authorities unnecessary.

[3] As to the claim that the personal security should have been exhausted first, the general rule seems to be that the foreclosure of a mortgage will not be barred by the existence of another prior mortgage which is security for the same debt. 1 Wiltsee on Mortgage Foreclosure, § 308.

Under the general weight of authority, the rule is the same where the prior one is a chattel mortgage (Id. § 309), although it has been held otherwise in Alabama (Koger v. Weakly, 2 Port. [Ala.] 516).

[4] But the situation is changed by the fact that a homestead had attached to the real property, and it is the humane policy of the law to preserve, if possible, the homestead for the use and home of the family.

The principle is developed and well expressed in Blood v. Munn, 155 Cal. 228, 100 Pac. 694. Therein the mortgagee held a lien on two parcels of land, one being the homestead of the mortgagor, and the other a tract not having that character. Discussing the relation of the parties to the enforcement of the lien, the Supreme Court said that the homestead claimants "stand in the same situation as a surety for the payment of a debt, or the situation of a third person who had a lien upon or interest in only one of two mortgaged parcels, with respect to a prior mortgage upon both." After declaring the equitable right of such surety or third person, and that the right of a homestead claimant is as sacred as that of a surety, the court proceeds:

"For these reasons it has been decided that the homestead claimant may have his homestead protected and preserved as far as possible, when it is covered by a mortgage which also includes other property, by requiring the other property to be sold and applied upon the debt before the sale of the homestead."

In support of this doctrine a large number of authorities is cited. We shall go no further in that direction than to quote the following from 2 Freeman on Executions, § 440:

"Perhaps a more difficult question is: May one who has a lien on homestead and other property be compelled by the homestead claimants to first resort to the latter? On the other side, it is insisted that the right to compel a marshalling of assets never existed in favor of judgment debtors, but only on behalf of persons claiming under them, and that the creation of the lien by the homestead claimants was, in effect, an agreement on their part that the lienholder might, at his discretion, sell any of the property which was subject to such lien, and that such agreement precludes such claimants from exercising any control over such discretion. But homestead laws should be liberally construed, and no intention should be presumed; nor should any interpretation be indulged which is at variance with the natural and obvious purpose of the parties. * * * Hence a mortgage on a homestead and other property may fairly be interpreted as a waiver of the homestead right only as far as may be necessary to secure the debt; in other words, as a stipulation that the homestead may be sold, if the other property proves inadequate to satisfy the mortgagee's demand. Under this interpretation, the homestead claimants are entitled to compel the sale of the other property in preference to the homestead, and need not submit to the sale of the homestead until the other securities have been exhausted, without fully discharging the debt."

Of course, it can make no difference in the application of the principle that the security

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is included in two mortgages instead of one, or that one covers personal property instead of real estate. In fact, there would seem to be greater reason in case of a chattel mortgage to compel the mortgagee to resort to that before demanding a sale of the homestead.

Nor do we think that the question is affected in the least by the fact that the chattel mortgage covered community property, as did the homestead. If the personal property had been the separate estate of the husband, the wife, regardless of the consideration of the homestead, could, probably, compel a resort to said personal property before a foreclosure of the mortgage on the community property.

The ruling principle here is, though, as we understand it, the superior solicitude of a court of equity for the preservation of a homestead over other property not charged with that character.

We think, therefore, that the court should have suspended judgment in the suit until such time as plaintiff had exhausted the security under said chattel mortgage.

The judgment is reversed.

We concur: CHIPMAN, P. J.; HART, J.

(40 Cal. App. 772)

LISENBEE v. LISENBEE et al. (Civ. 1996.)

(District Court of Appeal, Third District, California. April 24, 1919.)

HUSBAND AND WIFE ⇐262(1)—COMMUNITY PROPERTY—EVIDENCE.

In suit to quiet title, defendants relying on presumption that property acquired during coverture is community in character, *held*, that presumption was overcome by positive testimony of witness.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by J. N. Lisenbee against Maud Irene Lisenbee and another. Judgment for plaintiff, and defendants appeal. Affirmed.

J. F. Ramage, of Stockton, for appellants.

A. H. Carpenter, of Stockton, for respondent.

BURNETT, J. The action was brought to quiet title to 43 acres of land in San Joaquin county. Defendant Maud Lisenbee, who was married to Charles S. Lisenbee in 1912 and was his second wife, was the only serious contestant of plaintiff's claim. Her opposition is based primarily upon the contention that the land was community property, and that the conveyance to plaintiff was made to defraud her of her community rights. Twenty acres of the land in controversy were conveyed to Charles Rothwell Lisenbee, a son of Charles S. Lisenbee by a former wife, by a deed from A. S. Gunn and wife, on August 23, 1913. The remaining 23 acres were conveyed by the said Charles S. Lisenbee and Maud Irene Lisenbee to said son on April 17, 1915, and he conveyed both parcels to plaintiff for a valuable consideration on the 30th day of January, 1917. On May 22, 1915, the said Maud Lisenbee brought an action against her husband for divorce on the ground of cruelty. She was denied a decree for the reason that her testimony was not sufficiently corroborated, but on May 19, 1916, she was awarded a certain amount for maintenance, and on November 12, 1917, an execution was issued thereon. This was levied upon the property, and by virtue thereof it was sold to one Floyd Klinger to satisfy said judgment.

Among the court's findings were the following:

"That the title of the 20-acre tract described in the complaint herein never at any time vested in Charles Samuel Lisenbee or Maud I. Lisenbee, his wife, and that the purchase price therefor was paid by Rothwell Lisenbee, and the conveyance of said realty was made to him for that reason. * * * That the 23-acre tract described in the complaint herein was purchased by Charles Samuel Lisenbee with the proceeds derived from the sale of 320 acres of land in Calaveras county that had been his separate and individual property that he owned for more than 20 years prior to his marriage with the defendant Maud Irene Lisenbee, and that for that reason he could convey the title thereto without his said wife, Maud, joining in the conveyance thereof, and that if any fraud or threats were made or practiced, as alleged in the defendant Maud I. Lisenbee's cross-complaint, the evidence thereof was wholly immaterial and such allegations require no findings thereon, as they could not affect the plaintiff's title to the realty in controversy."

There is the additional finding:

"That the deed from Charles and Maud Irene Lisenbee to Rothwell Lisenbee, dated April 17, 1915, was not without consideration, and all the allegations of fraud in the defendant Maud Irene Lisenbee's cross-complaint herein are untrue."

These conveyances to the son were prior to the beginning of said action for divorce, which culminated in the judgment for maintenance, and it is apparent that, if said conveyances were and are valid, appellants are in no position to question the sufficiency of the conveyance to plaintiff.

As to the conveyance of the 20-acre tract to the son, Charles S. Lisenbee testified:

"I went there one Sunday. There was a gentleman told me, Mr. Robert's neighbor, said Mr. Roberts wanted to sell the place. He says, 'You can't see him unless you come here Sun-

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day,' and I came Sunday to see him and brung Rothwell, my son, Charles Rothwell, with me, and Mr. Klinger went with me and went there and looked at the place. Rothwell said he wanted the place, for me to buy it for him, he would pay me for the place. He had a check book of $3,000 of his own and several hundred dollars besides, that he says I could use in buying it. 'Well,' I says, 'son, no use of that, your money is on interest; and I used my money I had off my place up yonder to buy it with, gave Mr. Roberts a check first."

He testified further that he was repaid a portion of it by his son. However, it is unimportant whether he was repaid the purchase price or not. He testified positively that he paid for the land out of money he received for the sale of other land which he owned prior to his marriage with appellant Maud. He therefore had the legal right to make a gift of it to his son or to convey it to him upon his promise to repay the purchase price. As to this transaction it may be stated there is no evidence whatever of fraud, nor does it appear that the conveyance to the son was in trust for any purpose. It may be added that appellants made no attempt to show that any of the money with which the land was purchased was community property.

Indeed, appellants rely as to that upon the presumption that property acquired during coverture is community in character. This presumption, however, was overcome in the opinion of the trial judge, by the positive testimony of the witness, and we must follow his finding.

The character of the other tract must be likewise considered. The said Charles S. Lisenbee testified positively that it was purchased with money obtained from the sale of land belonging to him before his second marriage. No attempt was made to disprove this. While he seems to have quibbled to a certain extent, was, apparently, an ignorant and somewhat stupid witness, yet his testimony, if believed, is amply sufficient to support the finding of the lower court.

It was undoubtedly believed and acted upon, and it is idle to ask an appellate court to set the finding aside because the circumstances may be somewhat suspicious and there may be some reason for believing that he was trying to defraud his wife.

If we concede that the deed of April 17, 1915, executed after his wife had left him, was the result or an intention to place his property beyond her reach, and that it might have been set aside on the ground of fraud, it can be of no avail to appellants, since the deed was not attacked on any such ground, but solely for the reason that the signature of Maud I. Lisenbee was obtained by duress. But, as already shown, this circumstance was immaterial in view of the fact that, upon sufficient evidence, the court found that the land was separate property of the husband.

It follows from the foregoing that appellants' claim of the insufficiency of the evidence to show the delivery of the deed from Rothwell Lisenbee to plaintiff is of no decisive moment. They were not creditors of the plaintiff, and it is really of no legal concern to them whether or not the title became vested in respondent. But, it may be said, the deed to plaintiff was read in evidence without objection, and it carried with it the presumption of delivery at its date, irrespective of any testimony in regard thereto. McGarray v. Robinson, 135 Cal. 314, 67 Pac. 279.

Moreover, there was positive evidence that it was delivered to the attorney for plaintiff at the latter's request and by the former filed for record in the recorder's office.

As to the consideration for the deed, if any be sought, the testimony is uncontradicted that plaintiff gave his promissory note for $7,000 for the land and thereafter leased it to said Rothwell Lisenbee.

Counsel for appellant Maud I. Lisenbee complains bitterly of the treatment accorded her by her husband; but whatever justification there may be, on moral grounds, for condemnation of his conduct, there seems to be no doubt, from the record before us, upon well-established principles, that the judgment should be affirmed, and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

(41 Cal. App. 38)

PEOPLE v. GOODRICH et al. (Cr. 466.)

(District Court of Appeal, Third District, California. May 1, 1919.)

1. LARCENY ⟸61—FROM THE PERSON—EVIDENCE—SUFFICIENCY.

In a prosecution for grand larceny by stealing a purse from the pocket of the complaining witness, evidence *held* to justify a conviction.

2. CRIMINAL LAW ⟸938(1) — NEW TRIAL —GROUNDS.

In a prosecution for grand larceny, it was not error to overrule a motion for new trial based on newly discovered evidence, where no showing of diligence was made, and it was not probable that the evidence if introduced would have changed the result.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Josephine Goodrich, alias Mrs. Phillips, and another, were convicted of grand larceny, and, from an order denying a motion for a new trial, they appeal. Affirmed.

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Frank E. Murphy, Wm. P. Toscano, of San Francisco, D. P. Eicke, of Stockton, and Francis L. Borden, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Defendants were convicted of the crime of grand larceny, and they appeal from the order denying their motion for a new trial. The principal contention of appellants is that the evidence is insufficient to sustain the verdict. We are satisfied, however, that the claim is without substantial merit. After reading the record, we are convinced that, not only does the evidence support the finding of the jury, but there is no reasonable doubt of the guilt of the defendants.

It appears without conflict that on September 28, 1918, about 4 p. m., one Song Won Sook, a Korean, was in the act of boarding a railroad train at Stockton, and while getting on the train a purse containing the sum of $61.50 was abstracted and stolen from his pocket. It is a reasonable inference that the theft was committed by the defendants and one Ervine Williams acting in concert and collusion. As to which one actually picked the Korean's pocket there is some uncertainty, but that the three were participants in the crime stands out clear enough. The prosecuting witness understood English quite imperfectly, and, testifying without an interpreter, his statements are not altogether consistent, some of them being even unintelligible, but, regarding and giving full credit to his testimony as a whole, the jury could scarcely doubt the guilt of the defendants. The following from the transcript will indicate the difficulty with which he expressed himself, and it also shows the actual participation in the crime of the three said parties:

"Mr. Rendon: Q. These two take money out of your pocket? A. Yes, two, one more, three. Q. Who take him money out of your pocket, him, two or the other man or three or more or two, how many? A. That time my money. Q. Which one? A. Three. Q. Which one take him out of your pocket? A. That lady. Q. The lady? A. Yes, this lady and give him to him. Q. How know he take him out of your pocket, what for you know? A. (Witness shows) Overcoat here, one man here, lady here, and one man here, take him this way, see. Q. How know he take him, you see him take him? A. No, I no see, I hear, no eye. Q. How you save (know)? A. I no see. One man here that side, nobody see him and she take him this way (shows). Q. How know she take him, how you save? A. Oh, overcoat here hanging down, nobody see that side. Q. How you know him take him money too? A. I know him take him money. I look to see. Q. I see; you feel him right there? A. Yes, sure."

He also testified that there was no one except these three near him at the time of the theft and he details other circumstances that we need not repeat.

Mrs. Winnie Honnold testified:

That she was in the car which the Korean was entering. That she "was sitting there looking out the window, and I turned around, and I saw like a crowd gathered there, and I went to look and see what was going on, and the next thing I saw was a purse looked like it was dropping, and then the man put his hand under it and grabbed it and stuck it in his right-hand pocket, trouser pocket, and walked on out of the car. That man was Mr. Phillips, the defendant."

In describing the position of the parties when the purse was taken, she said:

"The Korean was standing in the middle, and one man in front of him, and the lady (Mrs. Phillips) on the left-hand side and one man in the back," and that they were all right close to the Korean, and that she first saw the purse on the side where the lady stood, and that she saw Phillips catch it with his hand above the floor about the distance of the Korean's knees.

Many circumstances are related by various witnesses that tend to confirm the conclusion of the jury, but we shall do no more than to refer to them in a somewhat general way.

These defendants and said Williams were stopping for a time at the same place in Sacramento without visible means of support. It is true that Mrs. Phillips testified that they were canvassing for an atlas and that they were engaged in that business, but the record discloses certain facts that throw discredit upon her story. They went to Stockton together and put up at the same hotel, and here again the jury had a right to conclude that their visit was for no lawful purpose. They went to the depot together without any apparent reason. There is some pretense that their purpose was to inquire in reference to certain baggage belonging to them, but their subsequent conduct stamps that story as a mere subterfuge. While at the depot they saw the Korean purchase a ticket and replace his purse in his pocket. Defendant Phillips was seen talking suspiciously to his wife. The three arranged themselves in such position as to be able to accomplish the theft with the least difficulty and danger of detection. It is a fair inference that the three in entering the car had no other intention than to perpetrate the larceny. There is no evidence, indeed, that these defendants expected to become passengers, and the explanation of Mrs. Phillips as to why she entered the car is altogether too unreasonable for belief, and the jury undoubtedly rejected it as simulated. Williams testified that he intended to travel on the train, but it appears that he did not purchase a ticket, and there are other circumstances tending to discredit his statement. After the larceny was committed,

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Mrs. Phillips and Williams took a seat together, while Phillips hurriedly left the car and made his escape, although some time thereafter he was arrested. When the Korean charged Williams with the theft of his money, the latter and Mrs. Phillips in a fine frenzy of assumed innocence denied the accusation, but significantly suggested that he had lost it and volunteered to assist him in the search for it. As evidence of a guilty conscience, it may be added that Mrs. Phillips denied that she had ever met Williams before, and she made other statements that she afterwards contradicted.

[1] Without further disquisition, we think it may be said that the record is surcharged with indubitable proof that these defendants were justly convicted, and one can hardly resist the conclusion that they are "professional crooks."

[2] The only other point made by appellants is that the court should have granted their motion for a new trial on the ground of newly discovered evidence. All that is said by appellants in their briefs as to this is as follows:

"The defendants' and appellants' motion for a new trial was based upon the fact that new evidence material to the defendants which could not with reasonable diligence have been discovered and produced at the trial, and affidavits (Clerk's Trans. pp. 29 and 30) were presented in support thereof. The affidavits, and motion for new trial are a part of the record and we believe any argument thereon is unnecessary. The facts as presented by the record, speak for themselves."

In view of such a general reference to the affidavits, we would be justified in passing the matter by without investigation. However, we have read the two affidavits, which were offered, and it is quite apparent that they are of slight, if any, importance, and it is not at all probable that if affiants had so testified at the trial the result would have been different. Besides, it may be added that no showing of diligence whatever was made by appellants, and the court was therefore justified in disregarding said affidavits.

The order is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(41 Cal. App. 6)

HEAD et al. v. SOLOMON. (Civ. 2764.)

(District Court of Appeal, First District, Division 2. California. April 29, 1919.)

TRIAL ⚖404(2) — FINDINGS — ULTIMATE FACT—CONCLUSION OF LAW.

A finding that "the aforesaid agreement and its modifications was fully canceled and terminated in the month of July, 1916, by mutual consent of all the parties thereto," was a finding of an ultimate fact, and is not subject to the objection that it was a conclusion of law.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Gust Head and another against C. Solomon, Jr. Judgment for defendant upon the complaint and for plaintiff upon the cross-complaint, and plaintiffs appeal on the judgment roll alone. Judgment affirmed.

Rufus Thayer and C. F. Nichols, both of San Francisco, for appellants.

Robert S. Norman, of San Francisco, for respondent.

BRITTAIN, J. The appeal is on the judgment roll alone. The suit was for damages for breach of contract to buy and to pay for certain antimony ore. Plaintiffs alleged damages in the sum of $2,697.50. Under the terms of the contract as amended by a subsequent written instruction, the defendant in part payment was to deposit for the account of the plaintiffs the sum of $1,000 cash in a bank in San Francisco. The defendant by cross-complaint alleged a breach of the contract on the part of the plaintiffs to the defendant's damage of $1,000. The court found probative facts in regard to the tender of the deposit and in the same finding the ultimate fact that the defendant had fully complied with all the conditions to be performed under the said agreement as far as the plaintiffs permitted and allowed him to do so. It is contended on behalf of the appellants that the probative facts found are at variance with the ultimate fact of tender. It is also contended that a finding reading, "The aforesaid agreement and its modifications was fully canceled and terminated in the month of July, 1916, by mutual consent of all the parties thereto," was a conclusion of law, and that no finding of fact was made upon the essential issue of cancellation of the contract.

The suit was commenced in March, 1917. If by mutual consent the parties to the contract canceled the same before that time, the suit for its breach could not be maintained. The determination of the issue of cancellation adversely to the plaintiffs disposes of the appellants' contention in regard to the matter of tender. A finding "that plaintiff did not rescind said sales" has been held to be a finding of fact. Hollenbach v. Schnabel, 101 Cal. 317, 35 Pac. 872, 40 Am. St. Rep. 57. It was the ultimate fact, just as in this case the finding that the agreement was canceled and terminated by mutual consent of all the parties thereto was the ultimate fact. Weidenmueller v. Stearns, etc., Co., 128 Cal. 626, 61 Pac. 374. The court further found

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that the plaintiffs were not damaged, and that the defendant was not damaged.

Upon all the findings the court concluded the plaintiffs were not entitled to take anything by their action; that the defendant was not entitled to take anything by his cross-complaint, and the defendant was entitled to costs. Judgment was rendered accordingly. The judgment and conclusions of law are supported by the findings. They were sufficient and within the issues.

The judgment is affirmed.

We concur: LANGDON, P. J.; HAVEN, J.

(41 Cal. App. 52)

GALLICK v. BELL et al. (Civ. 2755.)

(District Court of Appeal, First District, Division 2, California. May 2, 1919.)

EVIDENCE ⟸98—FAILURE TO SUSTAIN BURDEN OF PROOF.

In a suit to foreclose a chattel mortgage, where the defense was an excessive charge contrary to Personal Property Brokers' Act, but there was no evidence that plaintiff was a personal property broker as defined in that act, the finding must be against defendant under the rule that, where no evidence is offered on the issue, the court must find the fact against the person having the burden of proof.

Appeal from Superior Court, Marin County; Emmet Seawell, Judge.

Suit by Mrs. M. Gallick against C. G. Bell and others to foreclose a chattel mortgage. Judgment for the plaintiff, and certain defendants appeal. Affirmed.

Gillogley, Crofton & Payne, of San Francisco, for appellants.

R. B. Gaylord, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the defendants C. G. Bell and Gertrude Bell from a decree of foreclosure and sale, made in an action by plaintiff to foreclose a chattel mortgage. The facts are briefly that the note and mortgage sued upon were executed by the appellants. The note was for the face value of $275, and bore interest at the rate of 2 per cent. a month. C. G. Bell, one of the defendants and appellants, testified that the sum of $35 was deducted from the face value of the note, and he was given only $240 for the note of $275, and no other consideration. Appellant contends that the court erred in making the decree of foreclosure because the note and mortgage sued upon were void under the provisions of the Personal Property Brokers' Act (Act 2637, General Laws of California), which statute provides that a personal property broker shall not charge or receive interest in excess of the rate of 2 per cent. per month, upon any loan; appellants' contention being that the retention of the bonus of $35 in addition to the 2 per cent. interest was a violation of the statute.

A personal property broker within the meaning of the statute is defined to be:

"* * * Every person or corporation engaged in the business of loaning or advancing money or other thing and taking in whole or in part as security for such loan or advance any chattel mortgage. * * *". Section 1.

There is no evidence in the record that plaintiff was a personal property broker, and the court therefore properly found that plaintiff was not, at the time of the execution and delivery of the note and mortgage, a personal property broker. This finding is in accordance with the rule that, where no evidence upon a question is offered, the court must find the fact to be against the person having the burden of proof. Leviston v. Ryan, 75 Cal. 293, 17 Pac. 239. In the present case, as the appellants were relying upon usury as a defense, they had the burden of establishing the necessary elements contemplated by the statute.

The judgment is affirmed.

We concur: BRITTAIN, J.; HAVEN, J.

(40 Cal. App. 776)

WARNER et al. v. BERTHOLF. (Civ. 2817.)

(District Court of Appeal, First District, Division 1, California. April 24, 1919.)

1. APPEAL AND ERROR ⟸1011(1) — FINDING BASED ON CONFLICTING EVIDENCE — REVIEW.

Court on appeal cannot disturb finding on conflicting evidence.

2. MUNICIPAL CORPORATIONS ⟸705(10) — LOOKOUT FOR AUTOMOBILE—DUTY OF PEDESTRIAN.

Plaintiff had the right to use the street in the pursuit of her lawful intention to board street car, and contention that although she had once assured herself that no automobile was approaching, it was her duty not to walk along and with the street car without at all times looking behind her, cannot be sustained.

3. MUNICIPAL CORPORATIONS ⟸705(1)—USE OF STREET — DUTY OF DRIVER OF AUTOMOBILE.

It was the duty of defendant in driving her automobile to see persons upon the street in front of her, where, as in this case, her view was unobstructed.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

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Action by Helen H. Warner and others against Ina Bertholf. Judgment for plaintiffs, and defendant appeals. Affirmed.

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Albert H. Elliot, of San Francisco, for appellant.

Albert E. Carter and John D. Murphy, both of Oakland, for respondents.

WASTE, P. J. This is an appeal by the defendant from a judgment had by plaintiff for damages for personal injuries suffered when the plaintiff was struck by the automobile of the defendant.

As we read the record, it was stipulated by the attorney for the defendant that if any judgment at all should be rendered or entered against the defendant, the judgment of $600, awarded plaintiff in this case, is not excessive, and is proper so far as the amount of the damage is concerned.

Plaintiff was standing on the easterly side of College avenue, in the city of Berkely, intending to board a south-bound car, which she saw approaching on the westerly, or south-bound track. She crossed the street in front of the approaching car, signaled the motorman to stop, and stood waiting for the car to pass. As she so stood, she looked northerly on College avenue, and saw no automobile or vehicle approaching. As the street car passed her, it slowed down, then being some distance north of the customary stop sign. It passed plaintiff, who turned and walked southerly along with the car. At this time she was midway between the side of the car and the westerly curb line of the street. She was facing and walking south, and her back was to the north. While walking in this direction, she was suddenly struck in the back by the automobile of the defendant, and suffered the injuries complained of, and which resulted in the judgment which is brought here for review on this appeal.

The testimony of the plaintiff, as to her position in the street at the time of the accident, and her movements just prior thereto, is corroborated in detail by the testimony of the motorman of the car, and by the conductor, as to the point in the street where she was struck.

[1-3] According to the testimony of defendant and one of her witnesses, plaintiff stepped from the westerly curb of the street, directly in front of the approaching automobile. This conflict in the evidence was reconciled by the trial court, as it was its duty to do, and we cannot disturb its finding on that point. In view of the evidence, which the trial court found to be true, we see no merit in this appeal. The plaintiff had a right to the use of the street in the pursuit of her lawful intention to board the street car. We find no support in appellant's authorities under the facts of this case of the contention made here that it was the duty of the plaintiff, after she had once assured herself that no automobile or other vehicle was approaching, not to walk along and with the street car without at all times looking behind her. Raymond v. Hill, 168 Cal. 473, 143 Pac. 743. It was the duty of the defendant, in driving her automobile, to see persons on the road in front of her, where, as in this case, her view was unobstructed. Barker v. Savas (Utah) 172 Pac. 672.

The judgment is affirmed.

We concur: RICHARDS, J.; NOURSE, Judge pro tem.

(41 Cal. App. 49)

GUIGNI et al. v. RATTO et al. (Civ. 2941.)

(District Court of Appeal, First District, Division 2, California. May 2, 1919.)

1. APPEAL AND ERROR ⟸801(5)—MOTION TO DISMISS—DETERMINATION.

On motion to dismiss an appeal from a judgment entered on stipulation, the court will examine the certified copy of the judgment roll solely to determine whether the appeal is within either of the two exceptions to the rule that an appeal does not lie from a consent judgment, namely, cases where there was no jurisdiction, and where the complaint did not state a cause of action.

2. LANDLORD AND TENANT ⟸291(8)—FORCIBLE DETAINER—COMPLAINT—SUFFICIENCY.

Complaint alleging that plaintiff leased for a term of years certain premises of which defendant was in possession as a tenant by the month, and that they served written notice on defendant to vacate within three days and he refused to do so, sufficiently states a cause of action for forcible detainer.

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by C. Guigni and others against Louis Ratto and others. Judgment was entered for the plaintiffs on stipulation, and defendants appeal. Appeal dismissed.

W. P. Caubu, John T. Williams, and Leo R. Friedman, all of San Francisco, for appellants.

Harry I. Stafford, of San Francisco, for respondents.

PER CURIAM. The respondents move to dismiss the appeal from a judgment entered upon stipulation.

The respondents sued the appellant and ficticious defendants for unlawful detainer. After demurrer, the defendant answered on January 13, 1919. Under date of January 16, 1919, a stipulation, filed February 8, 1919,

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was made providing that judgment might be entered for the plaintiffs and against the defendants for restitution of the premises, cancellation of lease, and $250 damages. The stipulation further provided execution should be stayed until March 1, 1919. On February 8, 1919, judgment was signed in accordance with the terms of the stipulation, including provision for the stay of execution until March 1, 1919. By successive orders the stay was continued in force until March 20, 1919, when notice of appeal was given, and a further order was made staying all proceedings on the judgment until the "appeal shall have been dismissed or determined," upon the said defendant filing a stay bond with two sureties in the sum of $3,000. A transcript on appeal has not been filed. The notice of motion for dismissal was accompanied by a certified copy of the judgment roll, orders staying execution, and notice of appeal. No counter showing was presented on behalf of the appellant.

[1] The respondents rely on the rule that an appeal will be dismissed where the judgment from which the appeal was taken was entered upon a stipulation. Hibernia S. & L. S. v. Waymire, 152 Cal. 286, 92 Pac. 645. On behalf of the appellant it is contended there are two exceptions to this rule; the first being in cases where the lower court did not have jurisdiction of the subject-matter of the action, and the second in cases where the complaint is fatally defective. In each of these cases it is contended on behalf of the appellant that no valid judgment could be entered, even by consent, because jurisdiction cannot be conferred by agreement.

It is further contended by the appellant that, under the rule that an appellate court will not look into the record to determine upon the merit of a motion to dismiss the appeal, a complete answer to the motion has been made in this case by the suggestion that there was no jurisdiction in the court below to enter the judgment. To uphold this contention would necessitate the announcement of a rule which would enable parties to litigation entirely to disregard and needlessly delay the execution of judgments entered by consent. Without going into a consideration of matters which might be presented upon the appeal, if the appeal could be sustained in the face of the stipulation, since the appellant, in opposition to the motion to dismiss, relies upon an exception to the admitted rule covering such cases, the court is constrained to examine the certified copy of the judgment roll solely for the purpose of determining whether or not the appeal is within either of the exceptions claimed by counsel for the appellant to exist.

[2] The substantial averments of the complaint are that on and prior to October 15, 1917, Paul Arata and Irene Arata were the owners in fee of the premises in San Francisco, described in the complaint; that on the last-mentioned date the owners leased the premises for a term of five years, commencing on that date; that the plaintiffs entered into possession under the terms of the lease and since have been the lessees; that prior and up to that date, the defendant Ratto was a tenant of the premises from month to month; that on that day the plaintiffs served notice in writing upon Ratto to deliver up possession and vacate the premises, and Ratto had refused, failed, and neglected so to do; that on December 17, 1918, the plaintiffs served Ratto with a written notice within three days to vacate the premises, and he had failed, neglected, and refused so to do; and that plaintiffs had been damaged by Ratto's default in the sum of $5,000.

As to the second claimed exception, it cannot be said that the complaint was fatally defective. Neither can it be said as to the first exception that the court was without jurisdiction of the subject-matter of the action. The defendant demurred to the complaint on the ground that it did not state facts sufficient to state a cause of action, and on the ground that it was uncertain, in that it could not be ascertained from the complaint what notice in writing was given to the defendant to deliver up possession of the premises. The demurrer was overruled, whereupon the defendant answered, denying on information and belief the lease to the plaintiffs and their entry under the lease, and averring a lease of the premises from the owners to himself from December 15, 1917, to December 15, 1918. He also denied the plaintiffs were damaged. The answer was verified on January 13, 1919. If the parties had gone to trial upon the issues thus presented, a valid judgment might have been entered. The judgment entered upon the stipulation is equally binding. Even though the rule requiring dismissal of appeal in such cases may be subject to the exceptions claimed by counsel for the appellant, they have failed to bring the case within either exception.

The appeal is dismissed.

All concur.

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(40 Cal. App. 696)

HENDERSON v. E. LAUER & SONS.
(Civ. 1924.)

(District Court of Appeal, Third District, California. April 17, 1919.)

1. SALES ⟸197—TITLE—RISK.

The common-law rule which is the rule in California is that the risk as to goods sold rests where the title resides.

2. SALES ⟸202(6)—SHIPMENT C. O. D.

The seller's shipment of goods C. O. D. as ordered with bill of lading attached and sent to a bank to be taken up by seller before delivery of goods showed seller's intention that ownership and right to possession of goods should not pass to buyer until the draft was paid.

3. SALES ⟸202(6) — SHIPMENTS C. O. D. — RESERVATION OF TITLE—EVIDENCE.

The effect of a sale C. O. D. and shipment with bill of lading and draft attached to reserve title in the seller until payment may be rebutted by evidence as to seller's contrary intention.

4. SALES ⟸202(6) — LOSS WHILE IN RAILROAD WAREHOUSE—RISK—TITLE.

Where goods ordered were shipped C. O. D. with bill of lading and draft attached and sent to a bank with notice to buyer that on payment of draft the bank would turn over the original invoice, the shipment showed seller's reservation of title until payment, so that loss of goods by fire while in railroad's warehouse would fall upon seller.

Appeal from Superior Court, Modoc County; Clarence N. Raker, Judge.

Action by J. S. Henderson against E. Lauer & Sons. From a judgment for plaintiff for part of his demand, and from an order denying motion for new trial, he appeals. Judgment and order affirmed.

J. T. Sharp, of Alturas, for appellant.

Jamison & Wylie, of Alturas, for respondent.

CHIPMAN, P. J. It is alleged in the complaint that defendant "became indebted to R. F. Smith & Sons Company, Chicago, Ill., in the sum of $471.31, lawful money of the United States, upon an express contract, for goods, wares, and merchandise sold and delivered to said defendant" at its special instance and request, that before filing the complaint Smith & Sons Company assigned the said claim to plaintiff, and that no part thereof has been paid.

The answer denies the averments of the complaint except that defendant herein admits that it is indebted to plaintiff in the sum of $31.91. The cause was tried by the court without a jury, and plaintiff had judgment for the sum of $31.91 and interest, amounting in all to the sum of $34. Plaintiff appeals from the judgment and from the order denying his motion for a new trial.

The controversy arises out of a shipment of goods by plaintiff's assignor to defendant of the value of $440.40, which before delivery were destroyed by fire in the warehouse of the railroad company at Alturas.

Witness Ryerson, bookkeeper and credit manager of Smith & Sons Company, testified that the shipment was "C. O. D. draft with bill of lading attached, the original bill of lading and draft sent to the First National Bank of Alturas." On November 13, 1914, Smith & Sons Company wrote defendant as follows:

"We are to-day shipping your C. O. D. order given to our Mr. Laney sending draft for $440.40 together with original invoice to the First National Bank at Alturas. When this draft is paid the bank will turn over the original invoice to you."

It was admitted that the goods remained in the warehouse of the railroad company for seven months, and until destroyed, June 28, 1915. It appeared also that the bank at Alturas notified defendant that the draft and bill of lading were in its possession, soon after being received by it. In answer to a letter written by Smith & Sons Company, defendant, of date July 22, 1915, wrote not to "be worried or alarmed over the claim of $440.40," and requesting that company to present the claim to the railroad company, which it did, and which was refused payment on the ground as testified to by the railroad company's general manager, that the company was acting only in the capacity of a warehouseman.

In its letter the Smith & Sons Company also said that, if the railroad company would not pay the claim, the E. Lauer & Sons Company would pay it. It is not contended that this promise was supported by any consideration or was otherwise than a voluntary offer. The letter went in as bearing upon the question as to the ownership of the goods while in storage. When on the witness stand, Mr. Lauer, president of Lauer & Sons Company was asked the question:

"You understood all the time that these goods were being held for you and all you had to do was to go to the First National Bank and give your check and take the goods; isn't that the fact? A. Sure. Q. That was the way these goods were ordered C. O. D., were they not? A. Yes, sir."

We find in the record no explanation of defendant's failure to take up the draft and call for the goods. Witness Lauer testified:

"Q. Did you tell them [Smith & Sons Company] that you would not receive the goods for any cause from the time they were shipped to you, and ordered here in Alturas, until after the fire? A. I do not think we had any correspondence over them at all."

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He testified that his company ordered the goods shipped through Mr. Laney, salesman of Smith & Sons Company, that they came C. O. D. as ordered, and that his company had never repudiated the contract.

We find no evidence in the record from which the intention of the parties can be safely determined other than is to be found in the simple fact that the goods were ordered by defendant, and that they were shipped to Alturas C. O. D., as ordered, bill of lading with draft attached, sent to First National Bank, Alturas.

[1] We understand that the rule at common law is the rule in this state, viz. that the risk is placed where the title resides. Jue Yee v. Ch. Tetzen & Co., 12 Cal. App. 55, 106 Pac. 594; Hilmer v. Hills, 138 Cal. 134, 70 Pac. 1080; Seeligson v. Philbrick (C. C.) 30 Fed. 600.

[2-4] It was said in Seeligson v. Philbrick, supra:

"Where a bill of exchange for the price of the goods is inclosed to the buyer for acceptance, together with a bill of lading, if he refuse acceptance, he acquires no right to the bill of lading, or the goods of which it is the symbol. Where a vendor deals with the bill of lading only to secure the contract price, the property rests in the buyer on payment thereof. See Benjamin on Sales (4th Ed.) § 339, and numerous cases cited."

In Dows v. National Exchange Bank, 91 U. S. 618, 23 L. Ed. 214, it was said that the transmission of the invoice of goods does not pass the property in the goods without an acceptance and payment of the draft drawn against them. An invoice is not a bill of sale, nor is it evidence of a sale. A bill of lading taken deliverable to the shipper's own order is inconsistent with an intention to pass the ownership of the cargo to the person on whose account it may have been purchased.

It was held in Greenwood Grocery Co. v. Canadian County Mill & Elevator Co., 72 S. C. 450, 52 S. E. 191, 2 L. R. A. (N. S.) 79, 110 Am. St. Rep. 627, 5 Ann. Cas. 261, that even if the bill of lading provides for the delivery to the consignee, "yet, if the consignor draws for the price attaching the bill of lading to the draft, this is sufficient evidence of his intention to reserve title and right of possession until the draft is paid, and the consignee is not entitled to the goods until payment." Unless rebutted by evidence to the contrary, Mr. Benjamin says the fact of making the bill of lading deliverable to the order of the vendor is almost decisive to show his intention to reserve the jus disponendi and prevent the property from passing to the vendee. Benjamin on Sales (7th Ed.) § 379.

In Hilmer v. Hills, supra, the court quoted with approval from Sanborn v. Shepherd, 59 Minn. 144, 60 N. W. 1089, as follows:

"There being no agreement of the parties to the contrary, the law presumes the sale to have been made for cash; and, upon a sale for cash, payment of the purchase money and the delivery of the property are concurrent and mutually dependent acts. Neither party is bound to perform without contemporaneous performance by the other. The payment of the purchase money was a condition precedent to plaintiff's right of possession."

We find nothing in Ramish v. Kirschbraun & Sons, 107 Cal. 659, 40 Pac. 1045, cited by appellant, controverting the rule above stated. Doubtless the parties may agree that title shall pass to the consignee or the purchaser of the goods upon delivery to the purchaser of the bill of lading with draft attached. The effect of a sale C. O. D. and shipment with bill of lading and draft attached, as shown, may, as Benjamin says, be rebutted by evidence to the contrary intention, as appeared in the cases cited by appellant, but we find no evidence in the record which warrants our holding that Smith & Sons Company intended that title should pass to defendant without first paying for the goods by taking up the draft.

The goods for which judgment was confessed were delivered to defendant and constituted a credit sale and the bill of lading stated "payable 30 days," whereas the bill of lading in question stated, "payable C. O. D. draft with B/L First National Bank," and in no sense constituted a credit sale. We think it quite clear that the vendor did not intend that the ownership and right to the possession of the goods should pass to defendant until its draft was paid. We think that the loss of the goods should fall upon plaintiff.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

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(40 Cal. App. 675)

PEOPLE v. SCHIAFFINO et al. (Cr. 465.)

(District Court of Appeal, Third District, California. April 16, 1919.)

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CRIMINAL LAW ⊂⊃1182 — AFFIRMANCE — POINTS AND AUTHORITIES—EVIDENCE.

Appellants having failed to file points and authorities, with proof of service upon Attorney General, within 15 days after filing of transcript, as required by rule 2, or to apply for further time, and the case having been submitted upon the record on motion of Attorney General, there being no appearance at call of calendar of defendants, who were given notice that cause was placed upon calendar, judgment will be affirmed, where the evidence, though largely circumstantial, cannot be said to be insufficient to support verdict of guilty.

Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

Charles Schiaffino and Tony Frankino were convicted of having feloniously and burglariously broken into and entered a store, and they appeal. Affirmed.

C. H. Brennan and T. M. O'Connor, both of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM. Defendants were tried jointly for the crime of having feloniously and burglariously broken into and entered the store of Herrick & Brooks, in the town of Middleton, county of Lake, on the 18th day of September, 1918, "with intent then and there to commit a crime," and "then and there opened a safe by use of nitroglycerin, contrary to the form, force, and effect of the statute," etc. The jury returned a verdict of guilty as charged, and the court sentenced defendants to the state prison at San Quentin. Defendants appealed.

The clerk's transcript was filed January 25, 1919, and the reporter's transcript was filed February 6, 1919. Under rule 2 (176 Pac. viii), the appellant in a criminal case is required to "file his points and authorities, with proof of service on the Attorney General, within 15 days after the filing of the transcript." The cause was placed upon the April calendar and due notice thereof sent to defendants' attorneys. They have filed no points and authorities, and have not applied for further time in which to file points and authorities. At the call of the calendar there was no appearance for defendants, and on motion of the Attorney General the cause was submitted on the record.

We have read the evidence in the case, and while it is largely circumstantial, we cannot say it is insufficient to support the verdict.

The judgment is affirmed.

(41 Cal. App. 23)

MOSHER v. LACK. (Civ. 1897.)

(District Court of Appeal, Third District, California. April 30, 1919. Rehearing Denied by Supreme Court June 26, 1919.)

1. VENDOR AND PURCHASER ⊂⊃44—RESCISSION OF SALE—MATERIAL MISTAKE—EVIDENCE—SUFFICIENCY.

In a suit to rescind a contract to purchase lands on the ground of fraudulent representations and mistake as to the amount of land conveyed, evidence as to the difference in value between the acreage received and the acreage intended to be sold *held* sufficient to justify a finding that the mistake was a material one.

2. VENDOR AND PURCHASER ⊂⊃44—SUITS TO SET ASIDE PURCHASE—PRESUMPTIONS.

In suits to set aside purchases of land on the ground of mistake as to quantity, there is always a presumption that where the price per acre is considered the quantity influences the buyer as an inducement to pay the gross amount agreed upon.

3. VENDOR AND PURCHASER ⊂⊃113—SUITS TO SET ASIDE—DISCREPANCY IN QUANTITY.

A purchaser of land may have his purchase set aside, where it appears that owing to a mutual mistake a materially less acreage was conveyed than was intended.

4. VENDOR AND PURCHASER ⊂⊃127—SUIT TO SET ASIDE PURCHASE—RECOVERY FOR IMPROVEMENTS.

In suit to set aside the purchase of a half interest in land on the ground of a material mistake as to the quantity conveyed, it was not error to allow plaintiff to recover one-half the value of the improvements placed thereon.

5. EVIDENCE ⊂⊃474(18)—OPINION—SPECIAL KNOWLEDGE—VALUE.

In a suit to set aside a purchase of land on the ground of material mistake as to quantity, it was not error to admit evidence by a civil engineer acquainted with the property as to the cost and value of improvements thereon.

6. EVIDENCE ⊂⊃474(18)—OPINION OF OWNER—VALUE.

In a suit to set aside a purchase of land on the ground of material mistake as to quantity, it was not error to allow plaintiff to testify as to the cost of the items entering into the value of the improvements placed by him thereon.

Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

Action by J. W. Mosher against M. D. Lack. Judgment for plaintiff, and defendant appeals. Affirmed.

Carr & Kennedy, of Redding, for appellant.

George R. Freeman, of Willows, for respondent.

BUCK, Presiding Judge pro tem. This is an action to rescind a contract to purchase

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lands on the ground that the contract was entered into as a result of false and fraudulent representations and mistake in regard to the amount of land conveyed. The case was tried by the court without a jury, and findings were made establishing the mistake but negativing the fraudulent representations; a judgment was given for plaintiff, from which this appeal is taken by the defendant under the alternative method.

By the terms of the contract in question, which was made on November 2, 1914, the appellant agreed to sell, and the respondent agreed to buy, for the sum of $6,300, an undivided one-half of a piece of land described by metes and bounds and "containing 80 acres more or less." The purchase price was to be paid as follows: $1,500 at the time of the making of the agreement, $650 twelve months thereafter, $2,000 two years thereafter; and, as a credit upon the purchase price to the extent of $900, the respondent agreed to execute and deliver to the appellant a deed to certain real property in Shasta county known as the "old Graham place"; also, the respondent agreed to assume one-half of a mortgage on the property in the sum of $2,500.

On the issue of mistake, plaintiff, in his complaint, alleges as follows:

"That in order to induce plaintiff to purchase a half interest in and to said land and to enter into said contract, defendant informed plaintiff that the land described in said contract contained 80 acres of land and the purchase price of a half interest therein was based on the belief that said land did contain 80 acres; that plaintiff at the time of entering into said contract and at the time he paid defendant the sum of $1,500 and at the time he executed the deed described in paragraph III hereof to defendant believed that said Glenn county land did so contain 80 acres and had no knowledge to the contrary until the month of May, 1915, when he caused a survey to be made and then discovered for the first time that said land did not contain 80 acres, but contained less than 40 acres; that said land does not contain 80 acres, and plaintiff would not have entered into said contract of November 2, 1914, had he not relied upon and acted upon the representation that said land did contain 80 acres; that plaintiff and defendant at the time of entering into said contract both believed that said land contained 80 acres and the purchase price of one-half interest therein was based upon the assumption by both parties that said land did contain 80 acres of land."

Upon conflicting evidence, the court made a finding substantially in accordance with this allegation, except that the court found that the land contained only 55.64 acres, instead of only 40 acres.

Counsel for appellant has filed able and instructive briefs. But his argument is based upon his contention that the foregoing basic finding "is not supported by the evidence, but in certain respects is in conflict with other findings of the court and contrary to all the evidence."

It is true that the testimony of plaintiff's witnesses is contradicted by witnesses for the defendant. But if the trial court believed the testimony of plaintiff's witnesses the evidence in the record is sufficient to sustain the above finding. From the evidence offered on behalf of the plaintiffs it sufficiently appears that the contract upon which the minds of the parties met was a contract pertaining to a half interest in a piece of land which each of the parties at the time of the contract believed contained 80 acres of land, when, as a matter of fact, it contained only 55.64 acres, and that this mutual mistake was a material mistake and induced the plaintiff to enter into the contract.

Also, from the testimony on behalf of the plaintiff, it appears that the price per acre was considered by the parties at the time of the trade. So it was not simply a sale in gross. The plaintiff's testimony is as follows:

"Q. How was this figure (the price of the land) arrived at? A. I asked Mr. Lack what the value of this land was per acre, and he said that river bottom land, such as that was, was worth from $175 to $200 an acre, but that the bank had appraised it at a little less than that, and he was willing to exchange on that appraisement that the bank had put on it, but he said 'we value the cleared land at $175 an acre.' So that was the basis on which we made the exchange. Q. At the time of your negotiation and fixing of this price between yourself and Mr. Lack, how many acres were figured as cleared land? A. Sixty-three acres. Q. Was there any other land besides that 63 acres cleared land figured? A. No cleared land. Q. Any other land? A. Yes, supposed to be a little less than 20 acres covered with timber. Q. What did Mr. Lack say about that portion of the land, if anything? A. That portion of the land was supposed to be put in at about $100 per acre. Q. If you did not believe at that time, Mr. Mosher, that there were 80 acres in that land, would you have entered into this contract? A. No."

[1, 2] The difference in value between the acreage received and the acreage intended to be sold was sufficient to justify the court in finding that the mistake was a material one when taken in connection with the plaintiff's testimony that he would not have entered into the contract had he not believed that the land contained 80 acres. And there is always a presumption that, where the price per acre is considered, the quantity influences the buyer as an inducement to pay the gross amount agreed upon. McComb v. Gilkeson, 110 Va. 406, 66 S. E. 77, 135 Am. St. Rep. 944, and cases cited in note; McCombs v. Church, 180 Pac. 535.

The court evidently believed that the plaintiff was told by the defendant that the land contained 80 acres; also, probably believed

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that the knowledge and standing of the defendant was such that plaintiff would be justified in believing anything that the defendant might tell plaintiff about the land. From the testimony of defendant it appears that for ten years he had occupied the responsible position of county assessor in the county of Shasta, and he further testified that—

"Mr. Mosher did not really say anything. He apparently didn't know anything about the land business. Really all the information he got I volunteered. Q. You volunteered you would take $12,600? A. I did not. Q. You did volunteer that the bank had appraised the land at $12,600? A. He asked me what I considered the property worth. Q. And you told him the bank had appraised it? A. Yes, I told him the only knowledge I had was that they appraised it at $12,600. Q. Did you tell him why the bank appraisement was made? A. I don't know whether I did or not. Q. What did you know about the bank appraisement? A. I knew all about it. It was made at my request."

The bank appraisement referred to was offered in evidence, and the first words it contains relative to the appraisement are, "The place contains about 80 acres," and the appraisement which follows is based upon this acreage.

[3] This evidence may have had some weight with the court in reaching the conclusion that the defendant at whose request this appraisement was made had an honest, though mistaken, belief that the land did contain 80 acres, and that the same information was given to the plaintiff in regard to the acreage of the land as was given to the appraiser of the bank when the appraisement was made by the bank at the request of the defendant.

So far as mistake and rescission are concerned, this case comes within the principles enunciated by our Supreme Court in the case of Hannah v. Steinman, 159 Cal. 142, 112 Pac. 1094. See, also, Johnson v. Withers, 9 Cal. App. 52, 98 Pac. 42; Quarg v. Scher, 136 Cal. 406, 69 Pac. 96; Eichelberger v. Mills Land & Water Co., 9 Cal. App. 628, 100 Pac. 117.

[4] The court did not err in allowing the plaintiff to recover one-half of the value of the improvements placed upon the property. Fountain v. Semi-Tropic L. Co., 99 Cal. 677, 34 Pac. 497.

[5, 6] The court did not err in permitting the plaintiff and the witness Stiles to testify in regard to the cost and value of the improvements placed upon the land. The witness Stiles was a civil engineer, and acquainted with the property, and the plaintiff testified fully in regard to the cost of the items which entered into the value of the improvements.

Judgment is affirmed.

We concur: HART, J.; BURNETT, J.

(40 Cal. App. 574)

MORSE et al. v. IMPERIAL GRAIN & WAREHOUSE CO. (Civ. 2400.)

(District Court of Appeal, Second District, Division 1, California. April 4, 1919.)

1. WAREHOUSEMEN ⟸24(7) — LIABILITY — PROVISIONS OF RECEIPT.

In view of Deering's Gen. Laws 1915, Act 4320, a warehouseman cannot relieve itself from liability for loss of goods resulting from want of ordinary care and diligence by inserting in a receipt that the goods were deposited at the risk of the depositor.

2. WAREHOUSEMEN ⟸24(1) — LIABILITY — CONTRACT.

A warehouseman may by special contract assume liability for loss of goods due to any cause and make himself an insurer thereof.

3. WAREHOUSEMEN ⟸24(7) — LIABILITY — CONTRACT—LIMITATION.

Under a warehouse receipt reciting that the property deposited was received "for account and at the risk of" the depositor, and that the warehouseman "is not responsible for loss occasioned to the merchandise stored with them by fire or elements," the warehouseman was not liable where, through no lack of ordinary care or diligence on its part or its servants, the merchandise was stolen from the warehouse, in view of Deering's Gen. Laws 1915, Act 4320.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by C. F. Morse and Lionel Brackenberry, partners, doing business under the firm name and style of Morse & Brackenberry, against the Imperial Grain & Warehouse Company. From a judgment for defendant and an order denying their motion for a new trial, plaintiffs appeal. Affirmed.

F. R. McNamee, of Los Angeles, Leo A. McNamee, of Las Vegas, Nev., and Luke J. McNamee and Parke Godwin, both of Los Angeles, for appellants.

Albert M. Norton and Emery & Rehart, all of Los Angeles, for respondent.

SHAW, J. Action to recover for 12 sacks of wool deposited with defendant as a warehouseman, and which defendant failed to redeliver on demand therefor.

Judgment went for defendant, from which and an order denying a motion for a new trial made by plaintiffs, they appeal.

The case was submitted for decision upon an agreed statement of facts, the material parts of which are as follows:

"The respective parties hereto * * * agree upon the following statement of facts, and submit the same to the court for the determination of the points in controversy hereinafter specified. The facts agreed upon are as follows: (1) The defendant is * * * a public warehouseman; (2) The plaintiffs * * * did, on April 15, 1916, duly deliver to defendant, as

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such warehouseman, 69 sacks of wool for storage, which defendant agreed to receive, keep, and store in its warehouse in the city of El Centro * * * in accordance with the following warehouse receipt," which receipt, in addition to the matters required to be specified therein by section 2 of "An act to make uniform the law of warehouse receipts," stated the wool was received "for account and at the risk of Morse & Brackenberry," and also contained a provision that, "The Imperial Grain & Warehouse Company is not responsible for loss occasioned to the merchandise stored with them, by fire or elements"; "(4) on July 5, 1916, plaintiffs duly demanded a redelivery of said 69 sacks of wool, and then and there offered to pay defendant the full amount of its storage charges thereon; (5) upon such demand defendant redelivered 57 sacks thereof, but failed and refused to redeliver the remaining 12 sacks thereof, giving as a reason therefor that the 12 sacks, on some date unknown, had disappeared, or were stolen from its said warehouse, without any fault or carelessness, misconduct, or negligence of defendant, or its servants or either of them, and through no lack of ordinary care or diligence on the part of the defendant or its servants and while defendant was using ordinary care and diligence, which plaintiffs contend is no defense to this action, even if true."

By the stipulation "the points in controversy" as specified for submission to the court for its determination were:

"(1) Is not the liability of the defendant absolutely fixed by the provisions of its warehouse receipt above set out?" (2) Under the rule of "Expressio unius est exclusio alterius," does not the provision exempting defendant from loss due to fire or the elements estop it from making any defense other than that the goods were so lost? (3) Is defendant's liability restricted to such loss only as resulted from the want of ordinary care and diligence?

It was further provided that if the court upon the "above statement" should find for plaintiffs, judgment should follow in their favor; otherwise it should be for defendant.

An act of March 19, 1909, entitled "An act to make uniform the law of warehouse receipts" (Deering's Gen. Laws 1915, p. 2022), requires all receipts to embody certain provisions, and section 3 of said act provides that a warehouseman may insert in a receipt any other terms and conditions, provided that such terms and conditions shall not "in any wise impair his obligation to exercise that degree of care in the safekeeping of the goods intrusted to him which a reasonably careful man would exercise in regard to similar goods of his own." And section 21 of said act provides that a warehouseman shall be liable for any loss or injury to goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to goods would could not have been avoided by the exercise of such care.

[1, 2] Counsel for both parties, as they must, concede the receipt should be interpreted in the light of the provisions of the act from which we have quoted. This being true, provisions having for their purpose the exemption of a warehouseman from liability which the law in express terms imposes upon him cannot be deemed effectual for any purpose. Hence it follows that defendant could not by the provision, "For account and at the risk of Morse & Brackenberry," so inserted in the receipt, relieve itself from liability for loss of the goods if such loss resulted from a want of ordinary care and diligence exercised by it. To this extent the law protects one who for hire deposits his goods for storage with a warehouseman who, while he cannot in any case exempt himself from the liability imposed by law, may by special contract assume liability for loss of goods due to any cause, thus making him an insurer thereof. However, there is nothing whatever in the receipt before us upon which such additional liability can be predicated.

[3] In support of their argument for reversal, appellants cite a number of cases to the effect that, since the provision, "For account and at the risk of Morse & Brackenberry," is to be disregarded, and since the loss of the goods was not due to fire or the elements, the contract should be construed as an absolute promise on the part of defendant to redeliver the goods, as was held in the case of Pope v. Farmers' Union Milling Co., 130 Cal. 139, 62 Pac. 384, 53 L. R. A. 673, 80 Am. St. Rep. 87. In that case a number of sacks of wheat were received by a warehouseman upon an agreement to redeliver the same, subject alone to loss due to the elements. It was held that a failure to deliver the goods for any cause other than that they were destroyed by the elements constituted no defense. That case and others to like effect were decided prior to the adoption of the act of 1909 and at a time when the extent of a warehouseman's liability was the unrestricted subject of special contract.

The question as to whether defendant was guilty of negligence in the care of the wool must be determined from the facts agreed upon, which the trial court construed as a stipulation that the theft or loss of the goods was not due to negligence or want of ordinary care on the part of defendant. Appellants insisted that such interpretation was wholly unwarranted. We cannot assent to this contention. Construed in the light of the surrounding circumstances, and having in view the purpose which prompted it and the points submitted for determination, there can be no doubt that it was intended as an admission by plaintiffs that the loss of the goods, as alleged in the answer, was not due to carelessness or negligence of defendant, and that, as custodian thereof, it had exercised ordinary care. Otherwise construed, there could be no purpose in inserting defendant's reasons for

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failure to redeliver the 12 sacks of wool, which, as stated, "plaintiffs contend is no defense to this action, if true." That such was the intent appears from appellants' brief, wherein counsel, in referring to the language quoted, says:

"In framing such clause plaintiffs had in view the decision of this court in Pope v. Farmers' Union Milling Co., 130 Cal. 139, 62 Pac. 384, 53 L. R. A. 673, 80 Am. St. Rep. 87, supra."

Clearly the case was submitted to and decided by the trial court upon the theory that the fact as to whether defendant was negligent in the care of the wool was immaterial; that, conceding it had exercised ordinary care, nevertheless, since the goods were not destroyed by fire or the elements, it was, as decided in Pope v. Farmers' Union Milling Co., supra, bound upon demand therefor to make delivery thereof. The effect of the stipulation, taken in connection with plaintiffs' action thereunder, was to concede that defendant was not chargeable with negligence or want of ordinary care, which, upon their theory, constituted no defense to the action.

Since no appeal lies from the order denying the motion for a new trial, it is dismissed.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

(49 Cal. App. 778)

ADLER v. SAWYER. (Civ. 2767.)

(District Court of Appeal, First District, Division 2, California. April 25, 1919. Rehearing Denied by Supreme Court June 23, 1919.)

1. GUARANTY ⟸4—DISTINGUISHED FROM INDEMNITY CONTRACT.

A contract by which defendant agreed to protect plaintiff against loss arising from the sale by defendant himself of a note and its security is not a contract of guaranty, within Civ. Code, § 2787, defining a guaranty as a promise to answer for the debt, default, or miscarriage of another person.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Guaranty.]

2. GUARANTY ⟸16(3)—SUFFICIENCY OF CONSIDERATION — STATUTORY PROVISIONS — APPLICABILITY TO OTHER CONTRACTS.

Civ. Code, § 2792, requiring a distinct consideration for contracts of guaranty not entered into at the same time as the original obligation, and not forming a part thereof, is applicable to contracts of guaranty only.

3. TRIAL ⟸404(1) — FINDINGS OF TRIAL COURT—CONSTRUCTION—LIBERAL CONSTRUCTION—RECONCILING CONFLICT.

The findings of a trial court are to be liberally construed in support of the judgment, all findings to be read together, and, if possible, to be reconciled, so as to prevent any conflict on material points.

4. APPEAL AND ERROR ⟸907(2)—REVIEW—PRESUMPTION — CONTRACTS — CONSIDERATION—EVIDENCE SUPPORTING.

On appeal on the judgment roll alone in an action on a contract, in which the allegations of the complaint and answer failed to raise the issue of consideration, it will be presumed in support of the judgment that the evidence by which good consideration for the contract sued upon was shown was received without objection, and that the case was tried by consent of the parties, as if such issue had been properly raised.

5. LIMITATION OF ACTIONS ⟸56(2)—ACCRUAL OF RIGHT OF ACTION—CONTRACTS—INDEMNITY.

The statute of limitations as to an action upon a contract of indemnity against loss does not commence running until the person indemnified suffers the loss against which the contract protects him.

6. APPEAL AND ERROR ⟸907(2)—REVIEW—PRESUMPTION—FINDINGS OF TRIAL COURT—EVIDENCE CONSIDERED.

Where, on appeal, there is no evidence before the court sufficient to determine when plaintiff suffered loss on a contract of indemnity and his right of action accrued, it will be presumed that the finding of the trial court that plaintiff's cause of action was not barred by the statute of limitation was sustained by sufficient evidence.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Charles Adler against F. W. Sawyer. From a judgment for plaintiff, defendant appeals. Affirmed.

F. W. Sawyer, of San Francisco, for appellant.

Gerald C. Halsey, of San Francisco, for respondent.

HAVEN, J. Defendant appeals, upon the judgment roll alone, from a judgment rendered against him in an action upon a written contract of indemnity. On August 18, 1911, in consideration of the payment of $3,000, the defendant sold and transferred to plaintiff a certain promissory note in that amount, dated July 17, 1909, the payment of which was secured by a deed of trust. On September 22, 1911, defendant executed and delivered to plaintiff the contract sued upon. That document recites the prior sale of the note to the plaintiff, the receipt of the consideration by the defendant, the fact that statements had been made as to the possible invalidity of the note, and concludes as follows:

"Said F. W. Sawyer hereby agrees to protect said Charles Adler against any and all

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possible loss or damages that he may sustain by not being able to in any manner realize the full benefits of note and trust deed or to recover the full amount of said note and trust deed from any reason whatever arising out of the transaction."

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Appellant contends that this contract is one of guaranty, and, as such, it is unsupported by a sufficient consideration, for the reason that it was not entered into at the same time as the original obligation, and did not form a part thereof, and that the record shows there was no distinct consideration therefor, as required by section 2792 of the Civil Code. The argument is based upon the allegations of the complaint and the findings, a portion of which are set forth in appellant's brief. The full record on this matter is as follows:

In the complaint it is alleged:

"That subsequent to the transfer of the said note and of the said deed of trust by the said defendant, F. W. Sawyer, to the said plaintiff, Charles Adler, above mentioned and alleged, said defendant, F. W. Sawyer, and the said plaintiff, Charles Adler, entered into a certain agreement in writing, wherein and whereby, for the original consideration paid by the said Charles Adler to the said defendant, F. W. Sawyer, for the transfer of the said note and of the said deed of trust, and for other reasons expressed therein, the said defendant, F. W. Sawyer, agreed to protect the said Charles Adler against any and all possible loss for damage that he might sustain," etc.

In his answer the defendant denies:

"That the alleged agreement in said complaint alleged to have been entered into between Charles Adler and defendant, F. W. Sawyer, was entered into for any other consideration than is expressed in said agreement."

Upon this issue the court found:

"That all of the allegations of plaintiff's complaint on file herein are, and each of them is, true and correct, and fully sustained by the evidence, and the court further finds that there was a good and sufficient and valuable consideration for the making and execution and delivery of all of the written instruments particularly described in plaintiff's complaint. [The contract sued upon was one of the instruments thus referred to.] And the court further finds that the defendant, Sawyer, for a good and sufficient and valuable consideration, on the 22d day of September, 1911, agreed to protect plaintiff against any and all possible loss or damages that plaintiff might sustain by not being able to in any manner realize the full benefits of the note and trust deed described in plaintiff's complaint, or to recover the full amount of said note and trust deed from any reason whatever."

[1, 2] A guaranty is defined as "a promise to answer for the debt, default, or miscarriage of another person." Civ. Code, § 2787. In the contract here involved defendant agreed to protect plaintiff against loss or damage arising from the sale by defendant himself of the promissory note and its security. Section 2792 of the Civil Code is applicable to contracts of guaranty only. Upon the question of consideration, it is not necessary to decide whether the contract sued upon comes within that category. Even if it be assumed that the section relied upon applies to this particular contract, the contention of appellant is without merit.

[3, 4] The findings of the trial court are to be liberally construed in support of the judgment, and all the findings are to be read together. If possible, they are to be reconciled so as to prevent any conflict on material points. A judgment will not be reversed on the ground of a conflict in the findings, unless the findings are incapable of being harmoniously construed. Ames v. City of San Diego, 101 Cal. 390, 395, 35 Pac. 1005; Haight v. Haight, 151 Cal. 90, 92, 90 Pac. 197. So reading and construing the findings before us, it is clear that the court found that the contract sued upon was supported by a good and sufficient and valuable consideration, and that there is no such conflict in the findings as to lead to a reversal of the judgment. The allegations of the complaint and answer raised the issue of the consideration for the execution of the contract. But, even if they did not, upon this appeal on the judgment roll alone, it must be presumed in support of the judgment that the evidence by which the existence of a sufficient consideration was established was received without objection, and that the case was tried by consent of the parties as if such issue had been properly raised. Churchill v. Baumann, 95 Cal. 541, 547, 30 Pac. 770.

[5, 6] It is further contended by the appellant that the action is barred for the reason that the contract was dated September 22, 1911, and this action was not commenced until July 6, 1917. The contract sued upon is not a guaranty of payment of the promissory note transferred by defendant to plaintiff, but is rather a contract of indemnity against loss by reason of the inability of the plaintiff to realize upon the note and the security therefor. There is a marked difference between these two classes of contracts. Under a guaranty of payment, the liability of the guarantor becomes fixed by the failure of the principal debtor to pay at maturity; but under a contract of indemnity against loss no right of action accrues against the indemnitor until the person indemnified suffers the loss against which the contract protects him. In this case the plaintiff's cause of action against the defendant upon the contract arose when it was determined that plaintiff would not recover the full amount of the transferred note. In the absence of any evidence, we are unable to determine when this loss oc-

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curred and plaintiff's right of action accrued. The trial court found, however, that plaintiff's cause of action was not barred by any of the provisions of the Code of Civil Procedure relied upon. It must be presumed that this finding was sustained by sufficient evidence.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

(40 Cal. App. 670)

FERGODO et al. v. DONOHUE et al.
(Civ. 2645.)

(District Court of Appeal, First District, Division 1, California. April 16, 1919.)

JUDGMENT ⊂=505—SETTING APART HOMESTEAD—COLLATERAL ATTACK—ERROR.

Error of a probate court in setting aside as a homestead absolutely for decedent's minor children land formerly community property, which upon the death of decedent's wife became his separate property within Code Civ. Proc. § 1468, was an error, committed in the exercise of its jurisdiction, which cannot be indirectly attacked in a later proceeding to quiet title to the land.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action to quiet title by George J. Fergodo and others against W. H. Donohue and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Cedric W. Peterson, of Pleasanton, and Neal Power, of San Francisco, for appellants.

W. S. Tinning, of Martinez, C. A. Gale, of Pleasanton, and W. H. L. Hynes, of Oakland, for respondents.

KERRIGAN, J. This is an action to quiet title. The complaint was in two counts. The cause was tried on the first count, and judgment went for the defendants. As to the second count a demurrer thereto was sustained, and, plaintiffs having refused to amend, judgment by default upon that count was also entered against them. The plaintiffs appealed from both judgments. That relating to the default judgment not being seasonably taken, it was heretofore, upon motion made in this court, dismissed.

The question involved in the remaining appeal concerns the construction of an order setting apart a homestead to minor children. The facts are undisputed and simply told. The property set apart was community in character, and had belonged to E. S. Fergodo and his wife. Mrs. Fergodo predeceased her husband, and the latter died in the year 1904, leaving him surviving as the result of this union 11 children, 6 of whom were minors. No homestead had ever been selected by either spouse in lifetime, but in the course of probate proceedings upon the estate of E. S. Fergodo, deceased, the court, upon petition of the guardian of the minor children, and after due notice and hearing, set apart absolutely in fee as a homestead to the minor children the property here involved. Subsequently the estate was closed, and the remaining property distributed to all the children, both adults and minors. After the latter reached majority they conveyed the homestead property to the defendants. No objection was made, at the time of the making thereof, either to the decree setting apart the homestead, or to the final decree of distribution, and no appeal was ever taken from either of them.

It is conceded that the property had been the community property of E. S. Fergodo and his wife; and assuming for the purposes of this case that upon the death of Mrs. Fergodo the property became the separate property of the surviving husband within the meaning of section 1468 of the Code of Civil Procedure, and that therefore the court committed error in setting it aside as a homestead absolutely instead of for a limited time, still we think it was but an error committed in the exercise of its jurisdiction, which cannot be indirectly attacked. It has been so decided. In the Matter of Moore, 96 Cal. 530, 31 Pac. 584, the probate court had set aside to the widow of the deceased absolutely a homestead from the separate property of the deceased; and in a proceeding similar to the present the same question came before the Supreme Court which, in passing thereon, said:

"If it should be conceded that the court erred in setting apart any portion of it absolutely to the widow, still it was only an error committed in the exercise of its jurisdiction, and the order was not void. No appeal was ever taken from this order, and it is now in full force. This being so, the court erred in distributing, as part of the estate, the land so set apart as a homestead. By force of the decree setting it aside, the title to the homestead is, as against the heirs of the deceased, in the parties named in that decree."

See, also, Estate of Bette, 171 Cal. 584, 153 Pac. 949; Rountree v. Montague, 30 Cal. App. 170, 157 Pac. 623; McGavin v. S. F. Protestant Orphan Asylum Society, 34 Cal. App. 168, 167 Pac. 182.

Upon the authority of those cases the judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

⊂=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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(40 Cal. App. 708)

PACIFIC MFG. CO. et al. v. PERRY et al.
(Civ. 2750.)

(District Court of Appeal, First District, Division 2, California. April 18, 1919. Rehearing Denied by Supreme Court June 16, 1919.)

1. MECHANICS' LIENS ⟸290(2) — FORECLOSURE — FINDING — AMOUNT OF WORK DONE PRIOR TO ABANDONMENT.

In an action to foreclose contractor's and materialmen's liens, a finding as to the value of the work and materials already done and furnished at the time of contractor's abandonment of the work in contract couched in the language of Code Civ. Proc. § 1200, as it stood prior to its repeal in 1911, *held* to find the ultimate facts required by such section.

2. MECHANICS' LIENS ⟸164(1) — FORECLOSURE AFTER ABANDONMENT BY CONTRACTOR —LIABILITY—CONTRACT PRICE.

The rights of mechanic's lien claimants on abandonment of performance of the contract by the contractor must be adjudged as of that date, and though a contract legally made limits the liability of the owner to lien claimants to the contract price, it is not error to fail to consider the cost to the owner of completion of the contract, since Code Civ. Proc. § 1200, as it stood prior to its repeal in 1911, recognized that the contract might be abandoned, and provided for an equitable determination of the amount of contract completed and portion of contract price applicable to liens.

3. MECHANICS' LIENS ⟸281(4) — FORECLOSURE—AMOUNT OF CONTRACT PRICE APPLICABLE—EVIDENCE.

In an action for foreclosure of mechanics' liens after contractor's abandonment, where the testimony was conflicting, but testimony of experts showed the per cent. of the contract completed at the time of abandonment, evidence *held* sufficient to support findings.

4. MECHANICS' LIENS ⟸161(2) — ABANDONMENT OF CONTRACT — COMPUTATION OF AMOUNT OF CONTRACT PRICE APPLICABLE TO LIEN PAYMENT.

In an action to foreclose mechanics' liens after abandonment by contractor, the actual cost of completion to the owners, which was increased by the abandonment, was properly not taken into consideration in determining the percentage of the contract completed, and percentage of the contract price applicable to payment of liens.

5. EVIDENCE ⟸117 — JUDGMENT ROLL — NECESSITY OF OTHER EVIDENCE.

In an action to foreclose mechanics' liens after abandonment by contractor, where there was an entire absence of evidence connecting a payment referred to in a receipt with the claim sued upon, the trial court did not err in sustaining plaintiff's objection to the offer of the judgment roll containing the receipt.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Consolidated action by the Pacific Manufacturing Company and others against R. A. Perry and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

C. Irvine Wright, F. E. Boland, and John Douglas Short, all of San Francisco, for appellants.

W. B. Rinehart and Ezra Decoto, both of Oakland, and Robert B. Gaylord, of San Francisco, for respondents.

HAVEN, J. This is the second appeal in consolidated actions to foreclose contractors' and materialmen's liens, the opinion on the first appeal being reported in 31 Cal. App. 274, 160 Pac. 246. On June 10, 1910, the defendant R. A. Perry, acting on behalf of the defendant Winifred A. Perry, his wife, entered into a valid contract with defendant Magneson for the construction of a residence and garage for the total contract price of $23,567, which contract was recorded on June 13, 1910. The contractor commenced construction of the building thereunder, and continued until February 11, 1911, at which latter date he abandoned work under the contract. On March 22, 1911, the defendants R. A. and Winifred A. Perry filed for record a notice of abandonment by the contractor of said contract. The details of the contract, so far as they may be material, are set forth in the opinion on the former appeal, and need not here be repeated. The present appeal is by the defendants from a decree adjudging plaintiffs entitled to liens as set forth in their several complaints, and decreeing the foreclosure thereof. All the claims of lien here involved are based upon work performed or materials furnished prior to the abandonment of the contract. The controversy is concerned mainly with the proper portion of the contract price applicable to the payment of such liens under section 1200 of the Code of Civil Procedure, prior to its repeal in 1911, and particularly as to the correct method of computation to be adopted in arriving at that amount. The court found:

"That the value of the work and materials already done and furnished at the time of the abandonment of said work and contract by the said defendant Magneson, as aforesaid, to wit. on the 11th day of February, 1911, including materials then actually delivered and on the ground, estimated as near as may be by the standard of the whole contract price, exclusive of the extra work hereinafter mentioned and referred to, was and is the aggregate sum of $17,468.71, being 74.2 per cent. of the amount of the contract price, to wit, $23,567, on account of which there had been paid the contractor, the defendant Magneson, at the time of abandonment, the sum of $10,000."

The court also found that during the course of construction of the buildings, and prior to the abandonment of the contract, certain extra work was performed by the contractor, subcontractors, and materialmen,

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under authorization in writing from the defendants Perry and in conformance with the provisions of the contract, the reasonable value of which aggregated $4,016.36, on account of which there had been paid to the contractor the sum of $1,300, leaving a balance unpaid for said extras in the sum of $2,716.36.

[1, 2] Appellants attack the finding above quoted as not being a sufficient finding of fact under the terms of section 1200, Code of Civil Procedure. It is couched, however, in the language of that section, and is sufficient under the authority of Marshall v. Vallejo Commercial Bank, 163 Cal. 469, 474, 126 Pac. 146. The ultimate fact is found as required by the section referred to. The real contention of appellants is that this finding is not supported by the evidence, for the reason that it does not appear that the cost of completion of the building was an element taken into consideration in arriving at the amount found to be applicable to the payment of liens at the time of abandonment. Appellants argue that the cost of completion after abandonment was much greater than it would have been if there had been no abandonment, and as the owners were obliged to pay this extra cost through no fault on their part, it should have been taken into consideration in arriving at the amount applicable to claims of lien which accrued prior to abandonment.

It is admitted by appellants that this contention is contrary to the rule laid down in Ganahl Lumber Co. v. Weinsveig, 168 Cal. 664, 669, 143 Pac. 1025. But it is claimed that the rule announced in the case last referred to is contrary to all the previous decisions of the Supreme Court, and to the law of these cases as announced upon the former appeal. Particular reliance is placed by appellants upon the cases of Roystone Co. v. Darling, 171 Cal. 526, 583, 154 Pac. 15, McDonald v. Hayes, 132 Cal. 490, 64 Pac. 850, Hoffman-Marks Co. v. Spires, 154 Cal. 111, 116, 97 Pac. 152, and Marshall v. Vallejo Commercial Bank, 163 Cal. 469, 126 Pac. 146, as announcing a rule which is inconsistent with that declared in the Ganahl Case, as construed and applied on the former appeal, and by the trial court in the instant cases. Upon a careful reading of the decisions referred to, we do not find the inconsistency claimed by appellants. In our opinion, the confusion of appellants arises from a failure fully to appreciate the fact, so clearly pointed out in the Ganahl Case, that upon abandonment the performance of the contract has come to an end, and the rights of all parties thereunder must be adjusted as of that date. It is true that a contract legally made limits the liability of the owner to lien claimants to the amount of the contract price; but the liability thus referred to is to lien claimants whose claims have arisen under the contract. Section 1200, Code of Civil Procedure, as it existed prior to its repeal, recognized that a building contract might be terminated by abandonment, and provided a method of arriving at the proportion of the contract price applicable to liens in that event. As stated in the Ganahl Case, if the contract is half performed, it is equitable, and a protection of the constitutional rights of all parties, to decree that one-half of the price agreed to be paid for the performance of the entire contract, less payments made, should be applied to the discharge of liens which had accrued prior to the abandonment. This is undoubtedly the rule established by the decision last above referred to; and, even if it could be construed as inconsistent with former decisions as claimed by appellants, we should consider ourselves bound thereby. We are of the opinion, however, that all the cases referred to are entirely harmonious.

[3, 4] The testimony was conflicting as to the value of the work done and materials furnished at the time of abandonment, and as to the reasonable value of all the labor and materials necessary to construct and complete the buildings according to the contract, plans, and specifications. The findings of the court are sufficiently supported, however, by the evidence of experts offered on behalf of the plaintiffs. These witnesses testified that the reasonable value, at the time the buildings were constructed, of all the labor and materials necessary and required to construct and complete the buildings according to the contract, plans, and specifications was the aggregate sum of $26,255.08; and that the aggregate value of the labor and materials actually used in the construction of the buildings and upon the ground at the time of the abandonment was $19,454.84. They then computed that the latter sum was 74.2 per cent. of the former, and therefore testified that the contract had been 74.2 per cent. completed at the time of the abandonment. Upon this testimony the court held that 74.2 per cent. of the contract price, less payments made, was applicable to the discharge of liens which had accrued prior to the abandonment. In our opinion, this method of computation follows the rule announced in the Ganahl Case and is justified thereby.

It is further claimed by appellants that a different rule is announced in the opinion rendered upon the former appeal in these cases, and that that opinion has become the law of these cases, even if it should be found to be inconsistent with the decisions of the Supreme Court. The court there held that it was "unable to formulate any equation under the rule of section 1200 as approved by the Supreme and appellate courts which would support the findings of the court for the full amount found subject to the liens, on the theory of a valid contract abandoned by the contractor." It is pointed out by the

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writer of that opinion that the amount for which the court gave judgment on the first trial exceeded the amount of the fund available for the discharge of liens, computed upon respondents' own theory, by $674.59. It was doubtless this discrepancy which made it impossible for the appellate court to formulate an equation which would support the findings of the court for the full amount found subject to liens, and led to a reversal of the first judgment. A careful reading of the entire opinion does not disclose any conflict with the rule above referred to. Special reference is made therein to the decision in the Ganahl Case, and it is stated that the meaning of section 1200, Code of Civil Procedure, as affecting the liability of the owner in the case of an abandonment of a valid contract, is very clearly pointed out in the case referred to. Appellants rely upon the following language in the former opinion:

"But respondent makes no allowance for the cost of completing the buildings which, through no fault of appellants, were left in an unfinished condition. What the actual cost of completion was to appellants may be immaterial (Ganahl Lumber Co. v. Weinsveig, supra), but as was said in Hoffman-Marks Co. v. Spires, 154 Cal. 111, 116, 97 Pac. 152: 'When he (owner) is, without any default on his part, burdened with the cost of completing the building, it is but fair and just that he should be relieved of the obligation of paying to the original contractor, or those claiming under him, so much of the contract price as corresponds to the portion of the work left undone. In no other way can he be protected in his constitutional right to have his liability limited to the amount which, by a valid contract, he has agreed to pay.'"

There can be no claim in the instant cases that the owner has not been relieved of the obligation of paying to the original contractor, or those claiming under him, so much of the contract price as corresponds to the portion of the work left undone. As we understand the portion of the opinion above quoted, it means merely that, while the actual cost of such completion to appellants may be immaterial, the reasonable cost thereof, according to the plans and specifications, must be taken into consideration in arriving at the proper proportion of the contract which had been completed at the time of abandonment, and the proportion of the contract price applicable to liens at that time. Appellants' contention is that the actual cost of completion to the defendants should have been taken into consideration in arriving at the figures above referred to. This is contrary to the rule laid down in the Ganahl Case, and it is so stated in the portion of the opinion on the former appeal above quoted. We think, therefore, that the trial court was correct in construing the opinion on the former appeal in these cases as not being inconsistent with the rule laid down in the Ganahl Case.

[5] Objection is made by appellants to the allowance of the lien of the Pacific Manufacturing Company on account of a claimed error of the trial court in sustaining an objection to the offer in evidence by defendants of the judgment roll in another action by the same plaintiff against O. M. Magneson, the contractor herein, in which a judgment was recovered for $2,567.59 and execution issued thereon. Attached to the sheriff's return on such execution was a receipt signed by plaintiff's attorney in the sum of $2,611.45. Defendants sought to prove by this record that the claim here sued upon had been paid, but the record offered did not show that the indebtedness there sued upon is the same indebtedness as is involved in the present suit. Defendants offered no evidence to that effect. They now rely upon the concurring opinion of Mr. Justice McKee in Goss v. Strelitz, 54 Cal. 640, 644, as establishing the rule that any payment from the contractor to the Pacific Manufacturing Company should be applied in payment of the lien involved in this action, in the absence of any showing of other existing indebtedness. In the case referred to the payment which was applied was received from the contractor on account of bricks furnished for the particular contract. If there had been evidence here that the payment collected through the action referred to was so received on account of this particular contract, the authority would be applicable. Inasmuch, however, as there is an entire absence of any evidence connecting the payment referred to in the receipt mentioned with the claim sued upon in this action, the trial court did not err in sustaining plaintiffs' objection to the offer of the judgment roll.

The judgment appealed from is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

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(41 Cal. App. 17)

STRADLEY v. UNION TRUST CO. OF SAN FRANCISCO (DELANO-ROCHDALE CO., Intervener). (Civ. 2836.)

(District Court of Appeal, First District, Division 1, California. April 29, 1919. Rehearing Denied by Supreme Court June 26, 1919.)

ATTACHMENT ⟸175—BANKS AND BANKING ⟸129—OWNERSHIP OF PROPERTY—DEPOSIT OF MONEY FOR ANOTHER — DELIVERY OF PASSBOOK.

Where one deposited money with a trust company in the name of his brother and delivered the passbook to the brother and received from the brother his own canceled note, as between the brothers the money was paid for the note, and the payor could not set up any claim to it after delivery of the passbook and receipt of the note, and an attaching creditor of the payor is in no better position than the payor.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by L. J. Stradley against the Union Trust Company of San Francisco, in which the Delano-Rochdale Company intervened. Judgment for plaintiff, and the intervener appeals. Judgment affirmed.

W. W. Kaye, of Bakersfield, for appellant.
Herbert Choynski and James Raleigh Kelly, both of San Francisco, for respondent.

NOURSE, Judge pro tem. The plaintiff, L. J. Stradley, brought an action against the Union Trust Company of San Francisco to recover a deposit of $3,600 held by said defendant. The Delano-Rochdale Company, having previously attached the account in an action instituted by it against B. F. Stradley, a brother of plaintiff, intervened in this action, claiming that the money deposited with the defendant bank was in fact the property of B. F. Stradley. The money in dispute having been paid into court, the action was dismissed as to the defendant bank, and, judgment going for plaintiff, the intervener brings this appeal.

The facts are that B. F. Stradley, being indebted to his brother for something like $3,997, evidenced by his promissory note, deposited $4,000 in the savings department of the defendant bank in the name of his brother, L. J. Stradley. When making the deposit he signed the name of L. J. Stradley, and did not at any time disclose to the bank that he was not the party in whose name the deposit was made. He then sent the passbook to his brother, accompanied by a letter notifying him that the deposit was made to repay his indebtedness. Upon the receipt of the passbook and letter L. J. Stradley returned to B. F. the promissory note of the latter. Some time thereafter B. F. Stradley wrote to his brother for money, and the brother mailed to him the passbook covering the $4,000 so deposited. With this passbook B. F. Stradley withdrew from the account $400, signing his brother's name for that purpose.

Thereafter the intervener commenced an action against B. F. Stradley and attached the account.

The whole question involved is whether at the time of this levy the money belonged to L. J. Stradley, in whose name it was deposited, or to B. F. Stradley, who actually made the deposit in his brother's name.

Whatever title B. F. Stradley had he parted with when he delivered his passbook to his brother and received his canceled note paid through the medium of this transaction. As between the two brothers there can be no doubt that the money belonged to L. J. Stradley, and that B. F. could not set up any claim to it, especially after he had delivered the passbook and received the note in exchange. As far as L. J. Stradley is concerned, the attaching creditor is in no better position.

The trial court had ample evidence to sustain the finding that the money was not the property of B. F. Stradley, but that the deposit was made in the name of and for the use and benefit of the plaintiff. Judgment properly went for plaintiff, and it is accordingly affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

(41 Cal. App. 42)

WONG FOO v. SOUTHERN PAC. CO. (Civ. 2672.)

(District Court of Appeal, First District, Division 1, California. May 2, 1919. Rehearing Denied by Supreme Court June 30, 1919.)

1. SALES ⟸197 — TITLE — EXECUTORY CONTRACT—DELIVERY—QUALITY OF GOODS.

Agreement for sale of potatoes in ground, of certain quality and weight, to be shipped to certain place where sale was to be consummated, which permitted buyer to reject potatoes if they failed to measure up to required standards, was merely an executory contract of sale, the title remaining in seller.

2. SALES ⟸202(4)—TITLE—CONDITION PRECEDENT—PAYMENT.

Where contract provided for payment of balance of purchase price after receipt of goods in good merchantable condition, such payment was a precedent condition of sale, without which title did not pass, though buyer did not reject goods.

3. SALES ⟸202(1) — TERMINATION OF CONTRACT—RIGHT TO POSSESSION OF GOODS.

Where goods were shipped by seller under contract making payment of balance of price a precedent condition to sale, seller was enti-

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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tled to the property upon buyer's refusal to make payment, upon arrival of goods; such refusal terminating the agreement.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Wong Foo against the Southern Pacific Company. From judgment for plaintiff, and from order denying new trial, defendant appeals. Reversed.

F. A. Cutler, of San Francisco, and John A. Wilson, of Stockton, for appellant.

Pringle & Robbins, of San Francisco, for respondent.

KERRIGAN, J. This is an action to recover damages for the alleged conversion of 810 sacks of potatoes by defendant company in its capacity as warehouseman.

Plaintiff claimed to be the owner and entitled to the possession of the property, which had been deposited for storage in the warehouse of the defendant company at Stockton. It is alleged in the complaint that while the potatoes were in the possession of defendant, plaintiff demanded the same, and offered to pay the charges thereon, but that defendant not only failed to deliver them, but converted and disposed of the same to its own use.

The answer of the defendant specifically denied the allegations of the complaint, and for a separate answer alleged that on the 24th day of November, 1915, one James Donlon entered into an agreement with a produce firm called the Rourke Company, whereby said Donlon agreed to sell said company 810 sacks of potatoes at $1.30 a sack, and that under the terms of said agreement said potatoes were to be delivered f. o. b. at the river bank and shipped to Stockton, their arrival in good condition at said place to be considered as the time and place of the consummation of said sale. The answer further alleged that on December 2, 1915, Donlon shipped the potatoes to Rourke Company, and that defendant received them and stored the same in its warehouse, but that Rourke Company had not, prior to January 12, 1916, or at any time thereafter, paid Donlon any part of the purchase price thereof, but that on said last-named date Rourke Company had declared its inability to pay its debts, whereupon said Donlon gave notice to defendant company not to deliver the potatoes to said company, and demanded possession of them, in pursuance to which demand defendant delivered the potatoes to Donlon.

From the evidence it appears that the sale of the potatoes was negotiated by an agent of Rourke Company with one Hop Sing, who had charge of Donlon's land, and who was farming the same under an agreement with Donlon. It also appears that Hop Sing had no title to the potatoes, but that he was vested with authority to make a sale thereof. The material part of the agreement entered into by these parties on behalf of their principals is as follows:

"Hop Sing hereby sells to Rourke Company * * * 810 fancy spuds at $1.30 per sack * * * being that certain lot in ground at Donlon Island * * * to be delivered f. o. b. bank and shipped to Stockton on or before Monday, next week, 1915, unless otherwise directed by Rourke Co. Must be new sacks, full, open-mouthed, contents properly graded and sorted and * * * to average 116 lbs. to sack.

"In consideration I hereby acknowledge receipt of * * * one dollar in part payment of above sale; balance to be paid after receipt of goods in good merchantable condition as above mentioned. It is understood that arrival of goods at Stockton in good condition, as provided above, shall be considered as the time and place for the consummation of this sale. * * *

"Rourke Co., Buyer,
"By Kei Woo.

"Dated Nov. 24, 1915."

On November 29, 1915, five days after the execution of this agreement, Rourke Company sold the potatoes to plaintiff, Wong Foo, for the sum of $1,053.

To support his claim of title to the property plaintiff introduced in evidence the agreement of sale above recited, and also evidence of his purchase from Rourke Company. In defense of the action defendant claimed that under the agreement the Rourke Company never acquired title to the property, and therefore it could convey none.

Judgment went for plaintiff; a new trial was denied, and this is an appeal from such judgment and order.

[1] We are of the opinion that appellant is correct in its contention that Rourke Company never acquired title to the property in question. At the time of the execution of the contract the potatoes were in the ground, and it was provided by the terms of the agreement that they be of a certain quality and weight, and further that they be shipped to Stockton, where the sale was to be consummated. These provisions of the agreement were for the purpose of permitting the Rourke Company either to elect to purchase the potatoes if they came up to the required standards, or to reject the same if they failed to measure up thereto. The agreement, therefore, amounted to no more than an executory contract of sale, the title to the property remaining in the vendor. Blackwood v. Cutting Packing Co., 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199.

[2, 3] In addition thereto the contract further provided that the balance of the purchase price was to be paid after receipt of the potatoes in good merchantable condition. The payment was therefore a precedent condition of sale, which suspended the completion of the contract until this condition was performed, and prevented the right of property passing to the vendee. Hilmer v. Hills,

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138 Cal. 134, 70 Pac. 1080. There was no compliance with this part of the agreement, Rourke Company being insolvent, and Donlon was entitled to his property as the refusal to pay terminated the agreement. Liver v. Mills, 155 Cal. 459, 463, 101 Pac. 299.

Here no question of estoppel is involved, and Rourke Company, never having acquired title to the property, could convey none to plaintiff.

The contention of respondent that the contract of sale was fully executed upon the arrival of the goods at Stockton, for the reason that Rourke Company elected not to exercise its right of rejection, is without merit. Payment was the principal condition upon which the title depended; and no attempt was made by Rourke Company or its vendee to comply with this provision. As owner of the property Donlon was therefore entitled to its possession.

For the reasons given the judgment and order are reversed.

We concur: WASTE, P. J; RICHARDS, J.

(40 Cal. App. 715)

PEOPLE, on complaint of CITY OF PASADENA et al., v. CITY OF MONTEREY PARK et al. (Civ. 2800.)

(District Court of Appeal, Second District, Division 1, California. April 18, 1919.)

1. MUNICIPAL CORPORATIONS ⟸12(1) — ORGANIZATION — JURISDICTION — PENDENCY OF ANNEXATION PROCEEDING.

While valid annexation proceedings were pending, the county supervisors would not have jurisdiction to entertain and act upon a petition calling for proceedings to organize a city, including a part of the territory sought to be annexed, in view of St. 1913, p. 593, § 7, as amended by St. 1915, p. 309, § 4, dealing with exclusiveness of annexation proceedings.

2. MUNICIPAL CORPORATIONS ⟸29(4) — ANNEXATION OF UNINHABITED TERRITORY.

Annexation proceedings, under St. 1913, p. 587, *held* invalid in that they were upon their face an attempt to treat as inhabited various uninhabited tracts of land and to annex them to the city under the form of proceedings prescribed by said statute, which applies solely to the annexation of inhabited territory.

3. MUNICIPAL CORPORATIONS ⟸33(10) — ANNEXATION PROCEEDINGS — COLLATERAL ATTACK.

In quo warranto proceedings challenging defendants' right to exercise the franchise of a city and its respective offices, on the ground that part of the territory included was annexed to complainant city, defense based upon invalidity of annexation proceedings was available; the petition in the annexation proceedings being insufficient on its face.

4. MUNICIPAL CORPORATIONS ⟸12(1) — ORGANIZATION — JURISDICTION — PENDENCY OF ANNEXATION PROCEEDING.

There being no valid pending annexation proceeding affecting any of the territory included in the proceeding for the incorporation of a city, the board of supervisors was authorized to receive and act upon petition for incorporation.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action in the nature of quo warranto by the People, upon the complaint of the Cities of Pasadena, South Pasadena, and Alhambra, against the City of Monterey Park, claiming and pretending to be a city of the sixth class, John M. Dutcher, and others. From the judgment rendered, plaintiffs appeal. Affirmed.

U. S. Webb, Atty. Gen., John Munger, City Atty., of Pasadena, William Hazlett, City Atty., of South Pasadena, Alfred Barstow, City Atty., of Alhambra, and Barstow, Rohe & Jeffers, of Los Angeles, for appellants.

Thomas A. Berkebile, of Los Angeles, for respondents.

CONREY, P. J. This is an action in the nature of quo warranto in which the plaintiffs challenge the right of the defendants to exercise the franchise of a city and its respective offices. The plaintiffs claim that by virtue of certain proceedings begun on the 17th day of April, 1916, and completed on the 14th day of August, 1916, certain territory was annexed to and became a part of the city of Alhambra. Defendants claim that by proceedings begun on the 8th day of May, 1916, and completed on the 29th day of May, 1916, the city of Monterey Park became a municipal corporation of the sixth class. The alleged city includes territory which was a part of the territory included in the annexation proceedings. The annexation proceedings were conducted under the annexation act of 1913 (St. 1913, p. 587), and the incorporation proceedings were conducted under the municipal corporations act of 1883 (St. 1883, p. 93). Both of the proceedings in question were conducted according to the regular forms of procedure provided by the respective statutes.

[1] The first proposition urged by appellants is that, since the petition for annexation was received and acted upon by the commission of the city of Alhambra and an annexation election had been called prior to the commencement of the proceedings for the organization of the city of Monterey Park, the board of supervisors of Los Angeles county did not have jurisdiction to entertain and act upon a petition calling for proceedings to organize a city including a part of

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the same territory while the annexation proceedings were pending. In considering this contention let it be assumed that valid annexation proceedings were pending at the time when the incorporation proceedings of defendant city were commenced. The question involved does not appear to have been passed upon by the courts of this state. The only decisions referred to in the briefs are those cited by appellants, and they all sustain the proposition stated. Especially in point are People v. Morrow, 181 Ill. 315, 54 N. E. 839; Taylor v. City of Ft. Wayne, 47 Ind. 274; Independent District of Shelton v. Board of Supervisors, 51 Iowa, 658, 2 N. W. 590. The Illinois decision contains a statement of the other two cases, and the court said:

"As between courts of co-ordinate jurisdiction, the tribunal first acquiring jurisdiction retains it, and is not to be interfered with by another co-ordinate court. The reason of the rule is that otherwise confusion and conflict would arise. Here power is given over the same territory to two parties authorized to act—one a city council or board of trustees, who may attach it to a municipality to which it is adjacent; the other a majority of the legal voters within its boundary, who may organize it into a village."

Further along it is said:

"It cannot, we think, be presumed that the Legislature intended to give citizens and legal voters of certain territory the power to organize a village, and at the same time authorize other parties, by a subsequent proceeding, to defeat that right; and it is clear that to hold otherwise would be to bring into conflict, resulting in confusion, the two opposing powers, or, speaking in a general sense, jurisdictions. Had the petition for annexation been first presented to the city council and its action postponed from time to time, until, by a subsequent proceeding, the organization of the territory into a village had been perfected, the same question would be presented, and we do not think in that case it could reasonably be held that the power of the city council to carry out the annexation proceeding would be defeated. The question as it arises under our statute and decisions is a new one, and not wholly free from difficulty, but we think the foregoing views are sustained by both reason and authority."

Respondents endeavor to break the force of these decisions in two ways: First, they say that the rule to the effect that, when courts have concurrent jurisdiction of the same subject-matter, the first that assumes jurisdiction excludes the other, does not apply unless the parties are the same or stand in privity to each other and the points in litigation or the redress sought in both courts are identical. They insist that in each of the three cases above mentioned the territory over which the two municipalities sought to acquire jurisdiction was identical, whereas in the case at bar it is not identical, and that this fact creates an exception which takes the case out of the general rule. Reference to the decisions above cited, however, shows that the territory involved in the respective opposing proceedings was not identical, except in the Illinois case. Nor do we think that the fact that one proceeding includes some territory not included in the other is alone sufficient to take the case out of the rule.

The other contention urged by respondents in opposition of the proposition stated is based upon the provisions of section 7 of the annexation act of 1913, as amended in 1915. Stats. 1915, p. 309, § 4. That section deals with the exclusiveness of annexation proceedings first instituted by one city as against annexation proceedings affecting the same territory and instituted by another city while the first proceedings remain pending. As to a controversy arising out of such conflicting annexation proceedings, the statute speaks unnecessarily, if the unwritten law relied upon by appellants, and to which we have already referred, would be applicable to such a case. We are satisfied that it would so apply, and that section 7 is merely declaratory of existing law. Respondents argue, however, that by reason of the enactment of section 7 the Legislature sought to fix and limit the jurisdiction of a municipality attempting to annex under that act, and that it should be presumed that the Legislature expressed all it intended to express and granted all jurisdiction that it intended to grant to municipalities annexing thereunder. They say that the legal maxim applies, "expressio unius est exclusio alterius." We think, however, that section 7 was intended to declare and place beyond doubt the disability of one city to annex territory during the pendency of proceedings by another city to annex the same territory, and was not enacted as a limitation of the jurisdiction of the municipality first acting in the matter. The creation of a new and separate municipal corporation through the action of the county authorities and including the territory proposed to be annexed is not a part of the subject-matter of said section 7. That section and the entire act in which it is included dealt solely with the subject of annexations, and not with the original creation of municipal corporations.

[2] We come now to the question whether, as contended by respondents, the annexation proceedings were in fact void. The territory included in the annexation proceedings was in those proceedings treated as one tract of inhabited territory adjoining the city of Alhambra. Its real character was that of a series of parcels of land. This is made manifest by analysis of the description, and is exhibited to the eye by inspection of Defendants' Exhibit A, which is shown in the transcript. The entire territory contains 661.82 acres, far the greater part of which is, and at all times herein mentioned was, a tract of land belonging to the relators, situated

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nearly 2 miles south of the south boundary of the city of Alhambra, as that city was constituted on the 17th day of April, 1916. For convenience, this tract is in the record called "new sewer farm." The remainder of the annexation territory consists of: (1) Three narrow strips (nowhere more than 300 feet wide) which run around the north, the east, and the south sides of a tract of land designated in the record as "old sewer farm," which belongs to the city of Pasadena and is located immediately east of the city of Alhambra; (2) five strips of land connecting the three above-mentioned strips with the new sewer farm. These five strips consist of: (a) A parcel 30 feet wide, being the south half of that part of Hellman avenue; (b) a parcel 70 feet wide, being the entire width of Garfield avenue; (c) a parcel 60 feet wide, being the entire width of Newmark avenue; (d) a parcel 70 feet wide, being the entire width of Ramona avenue; (e) a parcel 50 feet wide and approximately one mile in length, extending southwesterly from Ramona avenue to the new sewer farm. The only inhabitants of the annexation territory were eight persons who lived in three houses, all of which were situated on one acre on the strip lying east of the old sewer farm, at a point 3.54 miles from the north limits of the new sewer farm. The highways included in the annexation territory extend through a thickly populated section of Monterey Park, and the lines of annexation were so drawn that they exclude 31 electors, 38 homes, and 93 inhabitants living along and adjacent to said highways. Also the lines were so drawn that the ranch house and inhabitants thereof on the new sewer farm were eliminated from the annexation territory, as was also a power station and cottage located on an adjacent corner to the new sewer farm. These lines of exclusion made indentations into the area which naturally was a part of the same territory with the new sewer farm. The result of these exclusions was that all of the tracts involved in the annexation territory were uninhabited, except the tract on which said eight persons lived. These eight persons were all employés working on the old sewer farm, and they were the sole signers of the petition by which the annexation proceedings were instituted.

On these facts it is too plain to admit any doubt that the annexation proceedings were on their face an attempt by the flimsiest subterfuge to treat as inhabited various uninhabited tracts of land, and to annex them to the city of Alhambra under the form of proceedings prescribed by a statute which applies solely to annexation of inhabited territory. It is likewise clear that such proceedings were a palpable fraud upon the inhabitants of the community through whose lands the cord of connection was run from the land adjoining Alhambra to the limits of the new sewer farm. The annexation petition showed on its face that several of the parcels included were public highways, and that therefore they could not be inhabited territory.

"It is not disputed that there are in force in California three separate statutes under which annexations of territory to municipalities may be made: Act of 1889 (Stats. of 1889, p. 358), of 1899 (Stats. of 1899, p. 37), and of 1913 (Stats. of 1913, p. 587). The distinctive features of these acts, as far as germane to the present consideration, and pointed out by respondents, are as follows: (1) Act of 1889 for annexation of inhabited territory upon petition of electors of existing city; (2) act of 1899 for annexation of uninhabited territory; (3) act of 1913 for annexation of inhabited territory upon petition of electors in territory proposed to be annexed, which territory may be either (a) one body (sections 2 to 4), or (b) two or more bodies, which must be submitted as separate propositions (section 6)." People v. City of Lemoore, 174 Pac. 93.

People v. Town of Ontario, 148 Cal. 625, 84 Pac. 205, was an action to determine the validity of municipal annexation proceedings. The original city area was in the form of a square. The proposed annexation was of a broad band of territory completely surrounding the city. It was claimed that some of the included parcels of land were uninhabited, and therefore could not be annexed except by proceedings under the act of 1899. In response to this claim the court (148 Cal. 641, 84 Pac. 209) said:

"Upon this branch of the case a full consideration of the acts of the Legislature satisfies us that the act of 1899 was never designed to in any way affect any of the provisions of the act of 1889, so far as territory which, taken as a whole, may fairly be said to be inhabited territory is concerned, and the evidence in the case at bar was such as to sustain the conclusion of the court below to the effect that the territory here annexed was of that character, notwithstanding the presence of several uninhabited tracts or parcels, each exceeding five acres in area. If the 'territory' proposed to be annexed, regarded as a whole, may fairly be said to be inhabited, the proceedings must be had under the act of 1889, regardless of the number of parcels of land included therein that are uninhabited. Any other construction of the act of 1899 would materially affect the act of 1889, which, it is clearly indicated, was never intended. It is expressly provided in section 5 of the act of 1889 [1899] that 'nothing in this act shall be deemed to repeal the provisions of any act now providing for the annexation of inhabited territory.'"

There may be cases wherein it would be difficult to pass upon the question whether a described territory, "regarded as a whole, may fairly be said to be inhabited," and wherein, therefore, a court would not readily disregard the action of municipal authorities in such proceedings. But in the case at bar the fact that several distinct portions of the territory were uninhabited is not only

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admitted, but, as we have shown, necessarily appears from the description contained in the annexation petition, which description is repeated in the subsequent resolution, ordinance, notices of election, and certificate by means of which the annexation proceedings were conducted and completed.

[3] Appellants contend that the defense based upon the invalidity of the annexation proceedings cannot be maintained, because such defense comes by way of collateral attack in a quo warranto case. They say that quo warranto is not a proceeding wherein the court may inquire into the question whether the commission of the city of Alhambra did or did not wholly and fairly and completely do and determine everything necessary to be determined when they granted the petition for annexation and annexed the territory in question. They rely upon People v. Town of Ontario, 148 Cal. 625, 84 Pac. 205, where it was held that in a quo warranto proceeding the determination of the city board of trustees affirming the genuineness and numerical sufficiency of the signatures to the petition would not be inquired into in such proceeding, and that the findings and determination of the board must be deemed conclusive "in a quo warranto proceeding, or in any case where the order is collaterally attacked." In further elucidation of the basis upon which its conclusions rested the court said:

"Under the decisions the order of the board calling the election must here be taken as conclusive evidence that the petition presented, sufficient on its face, was in effect sufficiently signed by electors to confer the requisite power, and that the finding of the board to that effect, be it express or implied, was sustained by satisfactory proof."

Assuming, without deciding, that the question whether or not all of the territory included was inhabited, was regularly submitted to and decided by the commission of the city of Alhambra, such decision is not final in this case. This is so because, for the reasons which we have stated, the petition was "on its face" not sufficient. And it is worthy of notice that in People v. City of Lemoore, supra, which was an action "in the nature of quo warranto," the judgment pronouncing against the validity of annexation proceedings was founded upon a complaint which charged that certain parcels of land included in the attempted annexation were in fact not inhabited. These allegations were treated as material and as tendering issues upon which evidence could have been received, and the judgment (entered on default of answer after an order overruling defendants' demurrer to the complaint) was affirmed.

[4] Since, therefore, there was in fact no valid pending annexation proceeding in existence on the 8th day of May, 1916, affecting any of the territory included in the proceedings for incorporation of the city of Monterey Park, it follows that the board of supervisors was authorized to receive and act upon the petition for such incorporation, and that the incorporation proceedings, conceded to be regular in form, are valid.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

(41 Cal. App. 54)

PEMBROOK v. HOUSTON. (Civ. 2897.)

(District Court of Appeal, Second District, Division 2, California. May 2, 1919.)

1. FRAUD ⟸34 — CONDITION PRECEDENT — PAYMENT OR OFFER TO PAY BALANCE OF PURCHASE PRICE.

In action for damages for fraudulent representations, consisting in defendant's pointing out to plaintiff and representing to plaintiff as the land to be sold a different tract, plaintiff having elected to affirm the contract, complaint *held* not demurrable, though it appeared therefrom that plaintiff was indebted to defendant for the balance of the purchase price and had not offered to pay or paid.

2. FRAUD ⟸43 — FACTS CONSTITUTING — PLEADING.

In action for damages for fraudulent representations, consisting in defendant's pointing out to plaintiff and representing to plaintiff as the land to be sold a different tract, plaintiff having elected to affirm the contract, complaint, while insufficiently stating facts relied on as constituting actionable fraud, *held* sufficient as against general demurrer.

Appeal from Superior Court, Los Angeles County; J. E. Barber, Judge.

Action by Sarah V. Pembrook against T. H. Houston. Judgment for defendant, and plaintiff appeals. Reversed.

Olin Wellborn, Jr., and Stephen Monteleone, both of Los Angeles, for appellant.

Davis, Kemp & Post, of Los Angeles, for respondent.

SLOANE, J. This is an action for damages for alleged fraudulent representations by defendant in negotiating a contract of sale of real estate. General demurrer to the complaint was sustained, and, plaintiff refusing to amend, judgment was given for the defendant. Plaintiff appeals on the judgment roll.

Under the contract as pleaded the defendant agreed to sell, and the plaintiff agreed to buy, a tract of land described as the north 32 acres of lots 1 and 2 of fractional section 12, township 1 south, range 11 west, S. B. M., for $4,800. $500 was paid upon execution of the contract November 29, 1911, and $250 was to

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be paid on the 1st of October, 1912, and a like sum yearly thereafter until fully paid, with interest at 7 per cent., payable semiannually. The complaint for damages rests upon an allegation—if it is sufficiently pleaded—that the defendant, in negotiating the sale, pointed out and represented as the land to be sold a different tract than that covered by the description. The plaintiff had paid in all $1,051 on the contract price before discovery of the alleged fraud. She elects to affirm the contract, and sues for damages in the sums of $1,200, for improvements placed on the wrong tract of land, and $3,800, the alleged difference between the value of the land actually covered by the contract and $4,800, the value of the land she claims was represented to her.

[1] The first objection to the sufficiency of the complaint is that it appears therefrom that, although the plaintiff had elected to affirm the contract and sue for damages, and is seeking to recover $5,000, she is indebted to the defendant, under the terms of the contract, in the sum of $3,800, the unpaid balance of the contract purchase price, with accrued interest thereon, which she has not paid or offered to pay, a portion of which was due before she discovered the facts on which she bases fraud, and that a still larger sum was due before the commencement of this action. We doubt if the failure to allege payment or tender of the amount for which she was in default at the time of discovering the alleged fraud is fatal to plaintiff's right of action. If the defendant is shown to have been actually guilty of fraud, he was not in a position to declare a forfeiture; and we are of the opinion that the fraud, if it existed, justified the plaintiff in withholding the payments to recoup the damages she would be entitled to recover. We so construe the rule laid down by the Supreme Court in the case of Hines v. Brode, 168 Cal. 507, 143 Pac. 729. That was a case closely analogous to this, excepting for the fact that the plaintiff, the vendee, was not in default at the time of commencing suit, but he only averred ability and willingness to pay amounts accrued on his contract to the time of discovery of the fraud. In that case the contract price was for $2,000, and interest on deferred payments, and only $311.25 had been paid at the time of commencing suit. No tender or declaration of willingness or ability to pay the balance of the purchase price was made, although the plaintiff had elected to affirm the contract and sue for the deceit. He recovered judgment for damages in the same of $4,000, but no offset was made to defendant for the unpaid purchase price under the contract, and a new trial was granted on that account. As the opinion of the court sets out, in the ordinary case, where the contract has been wholly executed, its affirmance would give to the defendant the benefit of his entire consideration, and require him to answer in damages only for the difference between the actual value of the land sold and the value it would have had if it had been as represented. The court there lays down the rule, as applicable to executory contracts, as follows:

"Nevertheless we think the rule not difficult of determination. Where, under an executory contract, a plaintiff seeks recoupment in damages for deceit while affirming the contract (and it must necessarily be an affirmance if the action be not after rescission), it must be conclusively taken as to such plaintiff that he stands ready and willing to pay the full consideration called for by the contract, and that the damages which he is entitled to recover are no other and no greater than those which would be awarded to a plaintiff who had fully executed his contract. Therefore, in case of an executory contract, from the award which the jury may make because of the fraud must be deducted the unpaid part of the purchase price or the value of any other consideration."

As we have already pointed out, the only difference between the case cited and the one before us is that in the case here the plaintiff was already in default in a small amount at the time of discovering the facts relied upon to establish fraud. But, if the discovery of the fraud suspends liability to make payments accruing after the discovery of the fraud and pending the action, as we believe it does, we see no reason why defendant should not be estopped by his fraud from claiming at this time a forfeiture for previous suspended payments. It is the fraud itself, and not the discovery, which imposes the disability upon the defendant.

There are facts set out in plaintiff's complaint that suggest the probability that the whole story of this affair has not been told. It appears that shortly after plaintiff gave notice to defendant of her discovery of the alleged misrepresentations of the property sold, the defendant made a demand for redelivery of possession, and that plaintiff surrendered to defendant possession of the premises. No explanation of this transaction is given. It may have been intended as a forfeiture of the contract or as a rescission; but there is nothing in the complaint to attach to it a significance that would defeat plaintiff's right of action, and we cannot assume one to exist.

[2] But another objection, or series of objections, is raised by respondent in support of his judgment and against the sufficiency of this complaint. It is claimed that the complaint does not state facts sufficient to constitute actionable fraud. It clearly does not sufficiently state the facts relied upon, and if special demurrer had been made on that ground, it would have been properly sustained. A careful scrutiny of the complaint fails to disclose any direct allegation of facts which would constitute misrepresentation as to the

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land to be conveyed under the contract. It is alleged that in the course of the negotiations "defendant showed and exhibited to plaintiff certain land and real estate other and different from the real estate included within the description contained in the agreement of sale," and that "the defendant well knew that the land shown and exhibited was not the land included in the description"; but no word or act is pleaded to show that the plaintiff at any time represented that this outside parcel of land so shown, and so known to him, was to be included in the contract of sale. For all that appears, other than by inference, he may have pointed out this outside parcel as belonging to a neighbor. It is true the pleading avers that at all times the plaintiff relied upon "the representations" made by the defendant as to the land shown and exhibited to plaintiff being the land included in the description, and that at all times the defendant knew that plaintiff was relying "upon the representations" made by defendant to plaintiff to the effect that the land shown and exhibited to plaintiff was the land included within the description; but what were the representations? What was said or done in pointing out this land to justify plaintiff in the conclusion that defendant was intending to designate this outside land as the land he was selling nowhere appears by direct averment in the complaint. Moreover, although the complaint states that plaintiff wholly relied on the representations of defendant that the land pointed out was the land included in the description, it is further alleged that the plaintiff, at various times prior to the 25th day of August, 1913, stated to defendant that she had been informed by a party by the name of Blaine that he was the owner of portions of the property shown by defendant as agreed to be sold under the contract, and that the same did not belong to respondent. How long prior to the 25th day of August did this occur? Quite probably plaintiff may refer to a time subsequent to this contract of sale, but, under the rule that the averments must be construed most strongly against the pleader, this averment may include the period covering the negotiations preceding the contract.

Appellant in his brief states that these objections were not presented on the argument of the demurrer in the trial court, and it is probable that, if they had been, plaintiff would not have refused to amend, for they point out very serious defects in the pleadings; but this could not be sufficient reason for ignoring an objection to the sufficiency of a cause of action because raised for the first time in the appellate court. However, the only question of the sufficiency of this complaint was raised by general demurrer, and, as it is obvious that there has been an attempt to plead the facts relied on as establishing fraud, and that the weakness of the complaint is in the insufficiency of their statement, rather than an entire failure of statement, we are disinclined to hold the complaint insufficient, in the absence of special demurrer. Lattin v. Hazard, 85 Cal. 58, 24 Pac. 611; Grant v. Sheerin, 84 Cal. 197, 23 Pac. 1094; Mullally v. Townsend, 119 Cal. 47, 52, 50 Pac. 1066.

The judgment is reversed.

We concur: FINLAYSON, P. J.; THOMAS, J.

(40 Cal. App. 782)

PEIXOUTO v. PEIXOUTO et al.
(Civ. 2759.)

(District Court of Appeal, First District, Division 2, California. April 25, 1919.)

1. SPECIFIC PERFORMANCE ⟸22—ORAL CONTRACT TO CONVEY REALTY.

Where a father promised defendant son orally that if the latter would build upon, live upon, and improve certain land, the former would convey same to the latter, and, in pursuance of such agreement, the boundaries of the tract were marked off, and defendant in reliance on agreement performed his part of the agreement, but the father conveyed the tract to plaintiff, another son, who had notice of the rights of defendant, specific performance will be granted against plaintiff seeking to quiet title.

2. APPEAL AND ERROR ⟸1011(1)—FINDING—REVIEW.

The evidence being conflicting, but sufficient to warrant finding the court on appeal cannot disturb finding.

3. LIMITATION OF ACTIONS ⟸102(3)—ACCRUAL OF RIGHT—CESTUI QUE TRUST—POSSESSION.

Where father promised defendant son, that, if the latter would improve certain land, the father would convey it to him, and defendant went upon the tract and performed his part of the agreement, but the father conveyed the tract to plaintiff, another son, who had notice of the rights of defendant, plaintiff held the bare legal title in trust for defendant, and the statute of limitations would not run against defendant while he was in possession.

4. LIMITATION OF ACTIONS ⟸103(3)—REPUDIATION WHICH WILL SET THE STATUTE IN OPERATION.

Where a father promised defendant son that, if the latter would improve certain land, the father would convey it to him, and defendant went upon the tract and performed his part of the agreement, but the father conveyed the tract to plaintiff, another son, who had notice of the rights of defendant, the giving of notice by plaintiff that he desired defendant to surrender possession was not such a repudiation as would start the statute running against defendant.

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5. LIMITATION OF ACTIONS ⟸102(3)—REPUDIATION OF CONVEYANCE OF LEGAL TITLE.

The ownership of the equitable title cannot be lost by the bar of the statute while the owner is in actual possession and enjoyment of his estate.

6. SPECIFIC PERFORMANCE ⟸49(2)—CONSIDERATION—SUFFICIENCY.

Where a father promised defendant son orally that if the latter would build upon, live upon, and improve certain land, the former would convey the same to the latter, and in pursuance of such agreement the boundaries of the tract were measured and marked off, and defendant in reliance upon agreement went upon the tract and performed his part of the agreement, but the father conveyed the tract to plaintiff, another son, who had notice of the rights of defendant, *held*, there was sufficient consideration to warrant specific performance against plaintiff seeking to quiet title.

7. SPECIFIC PERFORMANCE ⟸114(2)—CONSIDERATION—SUFFICIENCY—PLEADING.

It is not necessary that allegation as to adequate consideration be in express terms, it being sufficient to set out the facts and value of the land from which it affirmatively appears that the consideration was adequate.

8. FRAUDS, STATUTE OF ⟸129(7)—ORAL CONTRACT TO CONVEY LAND—PART PERFORMANCE.

The making of improvements upon the land was sufficient to take oral contract to convey without the statute.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by Manuel A. Peixouto against F. A. Peixouto and others. From that portion of the judgment in favor of defendants on their counterclaim, plaintiff appeals. Affirmed.

B. C. Mickle, of Centerville, and Dixon L. Phillips, of Oakland, for appellant.

Peter J. Crosby and Stanley R. Sterne, both of Oakland, for respondents.

LANGDON, P. J. This action was brought to quiet title to certain land in the county of Alameda. The defendant F. A. Peixouto filed an answer and cross-complaint in which he set up an oral contract between the plaintiff's grantor and himself by which the plaintiff's grantor agreed to convey to defendant a small portion of the land to which plaintiff sought to quiet his title. The facts set up in the answer and cross-complaint are substantially as follows: That the plaintiff and defendant F. A. Peixouto are brothers; that Frank A. Peixouto, Sr., is the father of the plaintiff and said defendant; that in 1912 the said Frank A. Peixouto, Sr., was the owner and in possession of all the land described in plaintiff's complaint; that for a long time prior thereto the defendant had worked for his said father in and about said tract of land, and in April, 1912, the father promised the defendant, orally, that if the defendant would build upon, live upon, and improve a certain portion of said land, the father would give and convey to the said defendant such portion; that in pursuance of said agreement the said Frank A. Peixouto, Sr., measured and marked off the boundaries of said portion; that thereafter the defendant, in reliance upon said promise and agreement, entered into possession of the said portion of land and erected thereon a dwelling house of the value of $700 and expended the further sum of $300 in improving and fencing the land; that ever since April, 1912, the defendant has continued in open, notorious, and exclusive possession of said portion of the tract of land described in plaintiff's complaint; that the said Frank A. Peixouto, Sr., neglected and refused to grant and convey said portion of said land to defendant, and later conveyed the entire tract to the plaintiff; that the conveyance was made to the plaintiff without any valuable consideration, and while the defendant was in open and visible possession of a part of the same, and at a time when all the facts relating to the agreement between the defendant and his father were well known to the plaintiff herein. Defendant asked that the plaintiff be ordered and directed to execute and deliver to the defendant a deed and conveyance of that portion of the land described in the complaint which was included in the oral contract between the defendant and his father. The plaintiff denied substantially all the allegations of the cross-complaint. Judgment was given quieting title in the plaintiff to the land described in the complaint, excepting that portion thereof set out in the cross-complaint of defendant; and, as to that portion, judgment was given for the defendant, decreeing that the plaintiff holds the legal title thereto in trust for said defendant and cross-complainant, and that the said plaintiff execute to the defendant a good and sufficient deed therefor, and upon his failure so to do, within 30 days, a commissioner named execute and deliver such deed, which shall operate as a transfer from the plaintiff to the defendant of the property described therein; and that the plaintiff be enjoined from asserting any right in the said portion of the property held in trust for the defendant. From the latter portion of the judgment, the plaintiff appeals.

Appellant first contends that the pleading and proof does not show a contract sufficiently certain and unambiguous in its terms to warrant specific performance, and particularly for the reason that, as he asserts, there is no evidence that respondent has

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performed, or fully performed, because the alleged oral agreement was so indefinite and uncertain as to time and terms of performance by defendant that it would be impossible to say what year, month, or day performance was to be completed. The point made by appellant is that it is impossible to determine when the defendant was to build or complete his house. This matter can be of no importance here, because the house has been built and completed, and that side of the contract has been fulfilled. In so far as the part of the contract to be performed by the defendant is concerned, he alleged and proved that he fully performed all things to be by him performed. The contract alleged and proven does not disclose that there was a time limit placed upon his building of the house, and therefore time not being made of the essence of the contract, so far as the evidence discloses, it becomes immaterial just when he did complete the work. He has completed it in accordance with the contract found to exist by the court, and the date of the completed performance can be of no moment except in regard to the point raised by the appellant that the statute of limitations is applicable to defendant's claim, which contention will be considered hereafter.

[1, 2] The cross-complaint sets forth an oral gift of land, followed by possession on the part of the donee and the erection of valuable improvements. The property covered by the alleged oral contract is fully identified, and was located and staked out and agreed upon by the parties. The complaint states, the evidence clearly establishes, and the court found, that the defendant, in reliance upon such agreement, went upon the property, erected a home thereon, and improved and cultivated the land, and has been in possession of the same ever since. This is sufficient to justify a decree of specific performance on the part of the vendor or the party standing in the place of the vendor with notice of the rights of the cross-complainant. Magee v. Magee, 174 Cal. 276, 162 Pac. 1023. Contracts to convey land, under such circumstances, have always been enforced in this state. Burlingame v. Rowland, 77 Cal. 315, 19 Pac. 526, 1 L. R. A. 829; Manly v. Howlett, 55 Cal. 94; Bakersfield T. H. Ass'n v. Chester, 55 Cal. 98; Anson v. Townsend, 73 Cal. 415, 15 Pac. 49; Kinsell v. Thomas, 18 Cal. App. 683, 124 Pac. 220. The evidence as to the existence of the contract to convey is conflicting, but the finding is that such an agreement was made, and that finding cannot be disturbed by this court, as the evidence of the defendant and of his witnesses is sufficient to warrant it. We think that the contract alleged and proven is not lacking in certainty nor too indefinite for a court of equity to enforce.

[3] The main question in the case is as to the application of the statute of limitations. It is admitted that defendant completed the house and other improvements some time in 1912, and appellant contends that defendant's claim, accruing when he had performed the things to be by him performed, is now barred by the statute of limitations; the cross-complaint not having been filed until October, 1916. We think there is no merit in this contention. When there exists a contract to convey land and the vendee has fully performed and nothing remains to be done on his part, the vendor then holds the legal title in trust for the benefit of the vendee. Defendant having shown by his proof, and the court having found, that the plaintiff in this case took the land with knowledge of the defendant's rights, the plaintiff would be in the same position as his grantor and would be holding the bare legal title in trust for the defendant. Under such circumstances, while the cestui que trust was in possession, the statute of limitations would not run as against him. Gilbert v. Sleeper, 71 Cal. 290, 12 Pac. 172; Love v. Watkins, 40 Cal. 547, 6 Am. Rep. 624; Beebe v. Dowd, 22 Barb. (N. Y.) 255; Lakin v. Sierra B. G. M. Co. (C. C.) 25 Fed. 337; Fleishman v. Woods, 135 Cal. 256, 67 Pac. 276; Scadden v. Scadden, 121 Cal. 33, 53 Pac. 440; Smith v. Matthews, 81 Cal. 120, 22 Pac. 409.

[4] We are not unmindful of the argument made by appellant that the notice given by Frank A. Peixouto, Sr., to the defendant that the agreement was terminated and that he desired the defendant to surrender to him the possession of the property, served upon December 1, 1913 (which was after the defendant had fully performed, and while defendant was in the undisputed possession of the property), was such a repudiation as would set the statute in operation, even as against a cestui que trust. With this contention we cannot agree. It was said in the case of Bennett v. Morrison, 120 Pa. 390, 14 Atl. 264, 6 Am. St. Rep. 711, and the language is quoted with approval in the case of Luco v. De Toro, 91 Cal. 405, 18 Pac. 866, 27 Pac. 1082, that, if the trustee wishes to start in operation the statute of limitations, he must in some way repudiate the agreement and must take possession, either in person or by agent, in order to break the relation his vendee sustained to him under the agreement before the statute will commence to run. So in the present case, we apprehend that even though the vendor had taken possession of the property, in addition to that possession, he would have had to bring home to the vendee, as in the case of tenants in common, knowledge that he thereafter denied his right to possession in order to rely upon the bar of the statute; and, clearly, notice of the denial of the ven-

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dee's title, while the vendee was in undisputed possession, would have no effect whatever.

In the case of Rush v. Barr, 1 Watts (Pa.) 110, the language of which is quoted with approval in Luco v. De Toro, supra, the court said:

"Whenever the legal title is in one, and the real interest in another, these form but one title, and the statute does not run between them until the trustee disclaims and acts adversely to the cestui que trust. * * * And so in all cases where two persons have each an interest in a tract of land, of such kind that both their interests form but one title, and by their agreement one is to possess for his own use and the use of the other. In such cases the statute does not run until he in possession disclaims the right and interest of the other—denies his right and refuses possession, and such disclaimer and denial must be such that the other has notice of it."

It is true that in some portions of the opinion in the case of Love v. Watkins, supra, cited by appellant, there is language that would indicate, if taken without any connection with the facts under discussion, that notice of adverse claim is sufficient to start the statute in operation; but we believe it will be found, upon an examination of that case and of other cases cited, that, where such language is used, it is used in relation to the particular facts of the case —and that those facts were that the one giving the notice was also in possession, or, at least, that the vendee himself was not in possession when the notice was given. If the vendor has possession, then, assuredly, it is only necessary for him to give notice of holding such possession adversely. Our conclusion seems evident from the quotations from cases contained in appellant's own brief. He quotes from the case of Love v. Watkins, supra, in which the court refers to the case of Harris v. King, 16 Ark. 122, and states that in that case "it was held that a vendor who had received the purchase money became the trustee of the vendee, and although actually in possession of the land held the naked legal title in trust for him, and the statute of limitations was no bar to an action for specific performance of the contract if the vendor had done no act inconsistent with the vendee's title, other than simply holding possession."

As was said in the case of McCauley v. Harvey, 49 Cal. 497:

"A person all the while in possession according to his right, cannot, while holding the possession, be divested of that right in favor of another. If authority be needed in support of a proposition so self-evident, it may be found in Love v. Watkins, 40 Cal. 547."

The case of Fleishman v. Woods, 135 Cal. 256, 67 Pac. 276, is to the same effect. There has been no dispute in the cases following Love v. Watkins, as to the holding of that case. That case has been quoted as authority for the proposition that the statute will not begin to run so long as the purchaser is in possession, in the following cases: Gilbert v. Sleeper, 71 Cal. 290, 12 Pac. 172; Fleishman v. Woods, supra; Scadden, etc., Co. v. Scadden, 121 Cal. 33, 53 Pac. 440; Fogarty v. Fogarty, 129 Cal. 46, 49, 61 Pac. 570; Smith v. Matthews, 81 Cal. 120, 22 Pac. 409; Luco v. De Toro, 91 Cal. 405, 18 Pac. 866, 27 Pac. 1082; McCauley v. Harvey, 49 Cal. 497. "Possession draws to it, or rather extinguishes all adverse claims and titles." Love v. Watkins, supra.

[5] Both upon principle and the weight of authority, it is necessary for us to hold in this case that no statute of limitations is applicable to the right which defendant is asserting in his cross-complaint. So far as equity is concerned, defendant was the absolute owner of an indefeasable estate and the vendor was a naked trustee having no interest, but charged with the simple duty of conveying to the vendee upon demand. Equity regards the vendee as the owner, upon the principle that it considers that as done which ought to be done. Defendant, therefore, could not be divested of his indefeasible estate while he was in possession, by any one out of possession. The owner of the equitable title is supposed, for the purposes of a court of equity, to have acquired and to hold the title, and the court will compel the conveyance of the legal title only because the equitable title is not recognized in a court of law; but, where it is recognized, it constitutes ownership, and it cannot be lost by the bar of the statute while the owner is in actual possession and enjoyment of his estate. Love v. Watkins, supra. Since the defendant could not be divested of his title by the operation of the statute, it follows that, having the equitable title, he is entitled to enforce a conveyance of the naked legal title as an incident to such equitable ownership. As long as the equitable title exists, it must exist with all its incidents.

[6, 7] Appellant contends that there is no allegation in the cross-complaint that the plaintiff has received an adequate consideration for the contract. It is not necessary that such allegation should be in express terms. It is sufficient if the cross-complaint set out the facts and the value of the land and it affirmatively appear therefrom that the consideration was adequate. Magee v. Magee, 174 Cal. 276, 162 Pac. 1023. In the numerous cases cited herein covering contracts similar to the one found by the trial court to exist in this case, it has been held that under facts very similar there existed a sufficient consideration to warrant specific performance. The case of Burlingame v. Rowland, 77 Cal. 315, 19 Pac. 526, 1 L. R. A. 829, presents a very similar state of facts.

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[8] The objection that the contract should have been in writing is without merit. The contract had been partly performed, and the making of the improvements upon the property is sufficient to take it without the statute of frauds.

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The judgment is affirmed.

We concur: BRITTAIN, J.; HAVEN, J.

(41 Cal. App. 1)

WARDEN v. BITTLESTON LAW & COLLECTION AGENCY et al. (Civ. 2885.)

(District Court of Appeal, Second District, Division 2, California. April 28, 1919. Rehearing Denied by Supreme Court June 26, 1919.)

1. MUNICIPAL CORPORATIONS ⟹581 — SALE FOR DELINQUENT ASSESSMENTS—NOTICE TO REDEEM—SUFFICIENCY.

Where land owned in common was sold for delinquent assessment levied under Street Improvement Act 1909, notice by purchaser to one co-owner that on the 7th day of August, 1915, or thereafter, unless sooner redeemed, application would be made for a deed, and notice to the other co-owners to the same effect, but stating date as August 31st, were insufficient under section 17 of the act to cut off the right of the co-owners to redeem, and plaintiff has only "the lien of the assessment" as provided by section 15.

2. MUNICIPAL CORPORATIONS ⟹581—STREET IMPROVEMENTS—ASSESSMENT—RIGHT OF REDEMPTION—TERMINATION.

The right of redemption from a sale under Street Improvement Act 1909 continues in the owner indefinitely until notice of redemption is given and a deed executed in accordance with the provisions of the statute.

3. MUNICIPAL CORPORATIONS ⟹581—SALE FOR DELINQUENT ASSESSMENT—NOTICE OF REDEMPTION—STATUTE.

Assessments for street improvements, like tax proceedings, are in invitum, and where the statute prescribes the notice of redemption which is to divest the owner of his title, that notice must be given.

4. MUNICIPAL CORPORATIONS ⟹456(1), 575 —STREET IMPROVEMENTS—SEPARATE ASSESSMENT OF INTEREST OF CO-OWNER.

Under Street Improvement Act 1909, the undivided interest of each co-owner is neither assessed nor sold for delinquent taxes separately.

5. MUNICIPAL CORPORATIONS ⟹581—STREET IMPROVEMENTS—DELINQUENT ASSESSMENT—REDEMPTION.

While, under Street Improvement Act 1909, §§ 14, 16, a co-owner as a "party in interest" may redeem, still he must pay the same amount that would be paid by a sole owner, were the land owned in severalty.

6. MUNICIPAL CORPORATIONS ⟹581 — ASSESSMENT FOR IMPROVEMENTS — SALE — REDEMPTION BY COTENANT.

A redemption by a tenant in common is a redemption of the entire estate, and not merely of his undivided interest, though he doubtless would have a claim against his cotenants for reimbursement to the extent of their proportionate shares.

7. MUNICIPAL CORPORATIONS ⟹581 — ASSESSMENTS FOR IMPROVEMENTS — CUTTING OFF RIGHT OF REDEMPTION OF CO-OWNERS.

Purchaser cannot proceed piecemeal to cut off right of redemption of each co-owner.

8. MUNICIPAL CORPORATIONS ⟹581 — DELINQUENT ASSESSMENT—REDEMPTION.

Street Improvement Act 1909 contemplates but one sale for delinquent assessment and but one redemption, so that if the whole estate be owned in common by two or more as cotenants, and if any one of them retains the right to redeem, his right of redemption not having been cut off by sufficient notice, all may redeem.

9. MUNICIPAL CORPORATIONS ⟹581—DELINQUENT ASSESSMENTS—REDEMPTION—NOTICE.

Under Street Improvement Act 1909, a notice of redemption must set forth the time when the purchaser will apply to the tax collector for a deed, and the time fixed must be definite and certain.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Julia P. Warden against the Bittleston Law & Collection Agency and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Catherine A. McKenna and J. Irving McKenna, both of Los Angeles, for appellant.

Duke Stone, of Los Angeles, for respondents.

FINLAYSON, P. J. Plaintiff sued to quiet title to a parcel of land in the city of Los Angeles, claimed by her by reason of an assessment sale under the Street Improvement Act of 1909. Stats. 1909, p. 1042. Defendants recovered judgment; plaintiff appeals. The appeal presents for our consideration the sufficiency of certain notices of redemption.

[1] Defendants Robert H. Punter and Rebecca Punter were owners of the land as tenants in common. On March 19, 1914, they mortgaged the property to defendant Krug. Pursuant to a decree foreclosing the mortgage, Krug purchased the property at sheriff's sale on July 20, 1915, and on July 27, 1915, recorded the sheriff's certificate of sale. On August 5, 1914, which was subsequent to the mortgage to Krug, but prior to the foreclosure sale thereunder, the city tax and license collector, pursuant to the provisions of the Street Improvement Act, sold

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tlie property to plaintiff for a delinquent assessment levied to pay for certain street improvements. Thereupon the tax and license collector delivered to plaintiff a certificate of sale, as provided by the act. On July 7, 1915, which was shortly prior to the expiration of the time allowed by law to the co-owners for redemption from the foreclosure sale to Krug, plaintiff caused to be served upon defendant Rebecca Punter, one of the two co-owners, a notice that—

"On the 7th day of August, 1915, *or thereafter*, unless sooner redeemed, application will be made * * * to the city tax and license collector * * * for a deed."

This notice was not served on the other co-owner, Robert H. Punter, but thereafter, on July 29, 1915, plaintiff did cause a notice of redemption to be served upon Robert. The notice so served on Robert Punter set forth that—

"On the 31st day of August, 1915, *or thereafter*, unless sooner redeemed, application will be made * * * to the city tax and license collector * * * for a deed."

Though served upon Robert, this notice was not served upon Rebecca Punter. No notice to redeem from the street assessment sale to plaintiff was served on Krug, the mortgagee and purchaser at the foreclosure sale. On September 1, 1915, the city tax and license collector executed a deed to plaintiff. Claiming to be the owner under this deed, plaintiff brought this action to quiet her title. We think the notices of redemption that plaintiff caused to be served upon Robert and Rebecca were insufficient, and that plaintiff has only that which she acquired under the assessment sale to her on August 5, 1915, i. e., "the lien of the assessment," as provided by section 15 of the act. Stats. 1909, p. 1051.

[2] The right of redemption from a tax sale or from a sale under a Street Improvement Act, such as is here under consideration, continues in the owner indefinitely until notice of redemption is given and a deed executed in accordance with the provisions of the statute. By section 17 of the Street Improvement Act (Stats. 1909, p. 1051), it is provided that—

"At any time after the expiration of twelve months from the date of sale, the tax collector must execute to the purchaser, * * * if such purchaser * * * has complied with the provisions of this section, a deed of the property sold. * * * The purchaser * * * must at lease thirty days before he applies for a deed, serve upon the owner of the property, and upon the occupant of such property, if the same is occupied, a written notice, setting forth * * * the time when such purchaser * * * will apply to the tax collector for a deed."

The service of notice upon the owner, as provided by the act, means personal service. "When a statute requires service on a person it means personal service, unless some other service is specified or indicated." McDermont v. Board of Police, 25 Barb. (N. Y.) 647.

[3] Assessments for street improvements, like tax proceedings, are in invitum, and where the statute prescribes the notice which is to divest the owner of his title, that notice must be given. None other will suffice. A court will not be justified in saying that some other kind of notice would be equally effective. The express requirements of the statute cannot be avoided on the ground that they serve no useful purpose. It is never a question whether, by reason of some omission, the owner has been injured or misled; but whether there has been a compliance with everything the law makes a condition precedent to the right to a deed.

[4-6] Under the statute the undivided interest of each co-owner is neither assessed nor sold separately. Each parcel of land is assessed and sold in solido. Each parcel must be sold to the person who will take the least quantity of land and pay the amount of the assessment penalty, and costs due, including fifty cents for the certificate of sale. Stats. 1909, p. 1050, § 14. At any time before the expiration of one year from the date of the sale the parcel sold may be redeemed by "any party in interest." Section 16. The party so redeeming must pay to the tax collector the full amount for which the property was sold, and in addition thereto a penalty of 10 per cent. if redeemed within 6 months, or 25 per cent. if redeemed within 12 months. Section 16. It will thus be seen that though a co-owner, as a "party in interest," may redeem, still he must pay the same amount that would be paid by a sole owner were the land owned in severalty. A redemption by a tenant in common is a redemption of the entire estate, and not merely of his undivided interest, though he doubtless would have a claim against his cotenants for reimbursement to the extent of their proportionate shares.

[7, 8] If a co-owner cannot proceed by "piecemeal" to effect redemption—and he cannot—the converse is equally true, and a purchaser at the tax sale cannot proceed by "piecemeal" to cut off the right of redemption of each part owner. The statute contemplates but one sale of the parcel sold, and but one redemption—a sale of the whole estate in its entirety and a redemption, if any be made, of the estate in its entirety. So that, if the whole estate be owned in common by two or more as cotenants, and if any one of them retains the right to redeem—his right of redemption not having been cut off by a sufficient notice—all may redeem. That is, until the purchaser has complied with the statute as to all the co-owners, the right of redemption remains to all—to those actually served with

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notice as well as to those not served. White v. Shaw, 150 Mich. 270, 114 N. W. 210.

[9] A notice of redemption must "set forth"—that is, fix—"the time when the purchaser will apply to the tax collector for a deed." The time fixed must be definite and certain. A notice that at an indefinite time the purchaser will apply for a deed fixes no time when the right to redeem will expire. Railroad Company v. Mecartney, 104 Cal. 621, 38 Pac. 448.

Tested by these principles, it must be held that the right of redemption of the co-owners, Robert H. Punter and Rebecca Punter, has not been cut off. If the first notice—the notice served on Rebecca Punter—be regarded as superseded by the second—that served on Robert—then the case stands as though Rebecca Punter had never been served with any notice. And if all co-owners are not served with notice, the time for redemption remains for all. If the first notice be regarded as not superseded by the second, then the two notices must be read together, just as though they were contained in one document. So considered, the notices are in irreconcilable conflict—one giving notice that redemption might be made at any time on or after August 7th, and the other that redemption might be made at any time on or after August 31st. Such a notice does not set forth or fix "the time" when the purchaser will apply for a deed. A notice so indefinite is no notice at all. This conclusion makes it unnecessary to consider whether notice should have been served upon Krug, the purchaser at the foreclosure sale.

If the foregoing is the only fatal objection to plaintiff's title—and our attention has not been called to any other—then, though appellant has not become the owner of the property, she is, nevertheless, still left with the lien of the assessment. Upon filing the copy of the certificate of sale in the tax collector's office, "the lien of the assessment shall vest in the purchaser, and is only divested by a redemption of the property as in this act provided." Section 15. Had the judgment of the trial court simply adjudged that plaintiff is not the owner, an affirmance of the judgment, under the views above set forth, would be in order. But defendants, in their answer, pray for affirmative relief. In compliance with their prayer for such relief, the judgment adjudges defendant Krug to be the owner by virtue of the sheriff's certificate of sale issued to him upon the foreclosure sale, and defendants Robert and Rebecca Punter to be entitled to redeem from such sale to Krug. In granting affirmative relief to defendants, the trial court should have adjudged that any title that is in Krug, as purchaser at the sheriff's sale, or in Robert and Rebecca Punter, as the original co-owners, is subject and subordinate to plaintiff's lien of assessment, vested in her by reason of the tax collector's sale of the property to her to pay the delinquent street assessment. The findings do not find any fact upon which such a judgment may rest. On the contrary, the court found that "it is not true that plaintiff acquired an interest in said property by reason of a sale by the city tax and license collector." For these reasons the case must be sent back for a new trial.

Judgment reversed.

We concur: SLOANE, J.; THOMAS, J.

(41 Cal. App. 59)

HIBERNIAN PETROLEUM CO. v. DAVIES.

(Civ. 2883.)

(District Court of Appeal, Second District, Division 2, California. May 2, 1919.)

1. FRAUDS, STATUTE OF ⊂⇒103(1)—"MEMORANDUM"—SUFFICIENCY.

Acceptance by defendant of checks with memoranda indorsed thereon to the effect that checks were from plaintiff company on account of first installment of bonus on lease that S. had contracted for and indorsements of defendant "in full settlement of within account," the checks being approved by S. as president and countersigned by secretary, did not constitute a memorandum within the statute of frauds sufficient to evidence a contract to execute a lease to plaintiff company.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Memorandum.]

2. LANDLORD AND TENANT ⊂⇒22(4)—AGREEMENT TO EXECUTE LEASE—EVIDENCE.

In action to recover $5,000 paid as a bonus for a lease and costs of improvements made on the premises, *held*, court was justified in finding that defendant at no time contracted to execute a lease to plaintiff company, and was at no time obligated to do so.

3. APPEAL AND ERROR ⊂⇒1071(5) — ERRONEOUS FINDING—HARMLESS ERROR.

A finding that defendant was unaware that the sum of $5,000 received by him from S. was the money of the plaintiff, though erroneous, is without prejudice, since the fact that a third person was paying the obligation did not alter the contractual relations so far as defendant is concerned.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by the Hibernian Petroleum Company against J. F. Davies. Judgment for defendant, and plaintiff appeals. Affirmed.

E. L. Foster and Chas. A. Barnhart, both of Bakersfield, for appellant.

Geo. E. Whitaker and T. N. Harvey, both of Bakersfield, for respondent.

⊂⇒For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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SLOANE, J. The complaint in this action alleges that the plaintiff is a corporation, and that in May, 1911, the defendant entered into a contract in writing with the plaintiff whereby he agreed, that upon the payment to him of a bonus of $10,000, he would execute and deliver to plaintiff a lease of certain land for oil and mineral purposes; that during the said month of May the plaintiff paid defendant $5,000 of this bonus, and that on the 30th day of September, 1911, it tendered to the defendant the remaining $5,000 of the stipulated bonus, and demanded the execution and delivery of the lease; that defendant refused, and has ever since refused, to make such lease; and that plaintiff, relying on the agreement with defendant, entered into possession of the lands in question and expended $20,000 thereon in improvements.

The action is brought to recover the $5,000 paid on the bonus and the cost of the improvements made.

The case was tried on the issues made by the complaint and the denials of the answer, and the court found that it was not true that defendant entered into a contract with the plaintiff in writing, or at all, but that it was true that the defendant was paid by one H. E. Sinclair the sum of $5,000 on account of a bonus for a lease of the premises in question, which sum of $5,000 was the money of plaintiff, but that defendant was not aware that it was plaintiff's money. There are other collateral matters covered by the pleadings and findings, but the facts as stated cover the gist of the action.

Judgment was given for the defendant, and the appeal is taken by plaintiff on the judgment roll, supported by a bill of exceptions, on the insufficiency of the evidence to support the findings of the court.

The only evidence introduced tending to show any privity of contract between the plaintiff and defendant was the checks by which the $5,000 bonus payment was made, and certain memoranda thereon written. There were two checks, one of date of May 15, 1911, for $1,000 and one of May 31, 1911, for $4,000. The first check or order was as follows:

"Bakersfield, Cal., May 15th, 1911. Hibernian Petroleum Company: Pay to the order of J. F. Davies, one thousand dollars ($1,000.00). Approved: Harry E. Sinclair, President, Countersigned: Cecil H. Soltau, Sec'y. To Bank of Bakersfield, Bakersfield, Calif."

This check contained the following memorandum, indorsed upon it at the time it was drawn, or at least before delivery to payee:

"Hibernian Petroleum Company $1,000, to J. F. Davies, Dr. Bakersfield, Cal., May 15th —first installment of bonus on lease in Sunset Field, northwest quarter and west half of northeast quarter of the northeast quarter of Sec. 4, township 11 north, range 23 W., S. B. & M., sixty acres more or less."

Also indorsement:

"In full settlement of within account. [Signed] J. F. Davies"

—and further indorsements not relevant to this case. The second check, for $4,000 and indorsements thereon, was in the same form, excepting for the date and amount.

The evidence discloses that the only negotiations which were had with the defendant up to a period some time after the making and delivery of these checks, with regard to this mining property lease, were by one H. E. Sinclair. So far as disclosed, he appeared to the defendant to be acting for himself, though the defendant admitted on the trial that he understood that Sinclair was getting the lease to sell or negotiate. But up to the time of these payments, nothing is shown to have occurred to give the defendant notice that any one but Sinclair was immediately concerned in the transaction. The record discloses that the defendant was not himself the owner of this property, but was acting under an agreement whereby he was obtaining a lease from the owner to a larger tract, including the land in question, subject to a $10,000 bonus on his part; and he proposed to turn over to Sinclair 60 acres of this land, as described in the pleadings, in consideration of Sinclair paying to him the bonus, which he, in turn, was to pay to the owner, and to execute to Sinclair a lease to the 60 acres. Sinclair, in his own name, accepted this proposition, and thereafter made the payments heretofore referred to by orders or checks on the plaintiff company, and a lease was executed to him on the first payment of $1,000, with the knowledge on his part that the lease would not be effective until he had paid all of the stipulated bonus and a like amount had in turn been paid to the owner of the land. Sinclair was, at the time, a stockholder and the president of the plaintiff company, and, as we glean from the rather obscure evidence in the record, had been let in as a stockholder and made president of the company because of his undertaking to secure for the company valuable leases. It is probably true that he was acting as trustee for the corporation in negotiating and obtaining this lease; but the court finds that defendant had no notice or knowledge of this fact at the time the $1,000 and $4,000 bonus payments were made. This finding is supported by the evidence, excepting as to such notice as was given by the checks themselves and the indorsements thereon.

The lease to Sinclair bears date May 12, 1911, and is acknowledged as of date May 16, 1911. The defendant testified that the lease was delivered to Sinclair on May 16, 1911. This was after defendant had received the first bonus check of $1,000 from Sinclair. He will be presumed, therefore, to have had at that time such notice of the con-

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nection of the plaintiff corporation with the transaction as this check and its contents imported.

[1] The principal question on this appeal arises on this point: Did the acceptance of these checks, with the recitals therein that they were from the Hibernian Petroleum Company, and on account of bonus on the lease that Sinclair had contracted for, and the fact that they were approved by Sinclair as president and countersigned by the secretary of the company, create any liability on the part of the defendant, Davies, to the plaintiff company?

Plaintiff's counsel contend that these checks, either or both of them, with defendant's indorsement and signature thereon, constitute a memorandum in writing, signed by the party to be charged, sufficient to evidence a contract to execute a lease to the plaintiff company of the lands in question, and within the statute of frauds. No justification in law is shown in support of such a conclusion. The memoranda indorsed on the checks does not indicate to whom the lease was to be executed, and it was not signed by the defendant, the party to be charged. His signature on the back of the check was an acknowledgment of receipt of the payments "in settlement of the account," referring, we must assume, to the installments on the bonus agreement he had entered into with H. E. Sinclair personally. The evidence justifies the conclusion that he accepted these checks as payment of the obligation of Sinclair, and in pursuance of his agreement to execute a lease to Sinclair; but there is nothing in the transaction to indicate that Sinclair, or the defendant, or the plaintiff company itself, understood as intended by this memorandum anything more than a direction of the payment of this money on account of the agreement previously made between Sinclair and the defendant. It is true, as appellant sets forth in its brief, that defendant was notified by the contents of these checks that Sinclair and the secretary of the corporation had drawn them on the Hibernian Petroleum Company, and that they had no implied authority to use the corporation's funds for Sinclair's personal contracts; but he might properly assume, what doubtless is a fact, that the corporation was acquiring an interest in this lease through and in the name of Sinclair, as it legitimately could have done.

[2] In pursuance of the agreement with Sinclair, and on the payment of the first $1,000 of the stipulated bonus, the defendant executed the lease in question to Sinclair. He was under no obligation to make the lease until the entire bonus of $10,000 was paid; but, as he testifies, he made it at this time with notice to Sinclair that it would not be effective until the remaining payments were made, and defendant's obligations to the owner of the property, from whom he in turn was leasing, had thereby been met. Soon after the payment of $4,000 by the second check had been made, Sinclair seems to have severed his connection with the plaintiff corporation, which had, in the meantime, entered into the possession of the leased property, and apparently by virtue of this lease. In any event, the officers of the corporation came into the possession of this lease long before the alleged tender and demand on defendant. There is nothing to indicate that the improvements and development work made by plaintiff on this property were not under and in reliance on this lease. It is not until later, when the corporation had evidently become financially involved and had defaulted in the conditions contained in the lease agreement, and a surrender of the premises had been demanded by defendant, that steps were taken to assert an independent contractual relation with the defendant, and to demand the execution of a new lease directly to the plaintiff corporation. A written offer was made to pay to defendant the remaining $5,000 of the bonus, on condition of the execution of a lease directly to the corporation. This defendant refused to do, on the ground that he had already made the lease to Sinclair in pursuance of his contract. Previous to this time the lease had become effective by the performance by defendant of the conditions of his contract with the owner of the premises; the plaintiff company was in possession under it, and was doubtless entitled to all its benefits, both as against Sinclair and the defendant. There is no reason to doubt, under the facts disclosed by the record, that the plaintiff company authorized the payments made to the defendant out of the company's funds; that in taking the lease in his own name, whether with or without the company's consent, Sinclair was acting as plaintiff's agent, and held the lease in trust for its benefit; and no reason is shown, unless it was financial inability, why the plaintiff did not or could not have secured to itself all the benefits of this lease that it would have been entitled to had it been named therein as lessee, providing it had complied with the terms of the contract with defendant. The court was justified in its findings that the defendant at no time had contracted to execute a lease to plaintiff, and was at no time obligated so to do.

[3] The third finding of the trial court, to the effect that the defendant was unaware that the sum of $5,000 received by him from Sinclair was the money of plaintiff, is probably not justified by the evidence, in view of the fact that it was paid by checks drawn on the plaintiff company by its president and secretary. But a finding in favor of plaintiff as to such knowledge would not alter the liability of the defendant. His contract was with Sinclair, and the fact that a third party was paying the obligation did not alter these

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contractual relations, so far as defendant was concerned. The finding, if erroneous, was without prejudice.

The same may be said as to other specifications as to unsupported findings. They were all collateral to the main issue of a contractual relation between the plaintiff company and the defendant, and, in the absence of such relation, are not material to the decision.

Judgment affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

(41 Cal. App. 88)

DENEHY v. STEWART et al. (Civ. 1966.)

(District Court of Appeal, Third District, California. May 6, 1919. Rehearing Denied by Supreme Court July 3, 1919.)

1. FRAUDULENT CONVEYANCES ⟸263(2)—CONSTRUCTIVE FRAUD — FRAUDULENT INTENT.

In view of Civ. Code, § 1573, and under section 3442, declaring that any transfer or incumbrance of property made or given voluntarily or without a valuable consideration by party while insolvent shall be fraudulent and void as to existing creditors, it is necessary where constructive fraud is relied on to allege fraudulent intent.

2. FRAUDULENT CONVEYANCES ⟸278—FRAUDULENT INTENT—PRESUMPTION.

While a transfer of property with intent to delay or defraud creditor is void under Civ. Code, § 3439, as to creditors, intent to delay or defraud will not be presumed from the fact of transfer, for section 3432 allows a debtor to prefer one creditor over others, and under section 3442 it is only where the transfer is made or given voluntarily or without a valuable consideration by a party while insolvent that the transfer is deemed to be fraudulent and void as to creditors.

3. FRAUDULENT CONVEYANCES ⟸87(1)—"VOLUNTARY TRANSFER."

Where a mortgagee demanded payment and the mortgagor to satisfy him conveyed his equity of redemption, *held* that the conveyance cannot be deemed voluntary within Civ. Code, § 3442, declaring that where a transfer is made or given voluntarily or without valuable consideration it shall be void as to existing creditors.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Voluntary Transfer.]

4. FRAUDULENT CONVEYANCES ⟸76(2)—"VALUABLE CONSIDERATION."

Within Civ. Code, § 3442, providing that, where transfer is made voluntarily or without valuable consideration by a party while insolvent, it shall be void as to existing creditors, a valuable consideration is such as money or the like, and the adequacy or the inadequacy of the amount or its disproportion to the actual value of the property does not affect the kind of consideration.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Valuable Consideration.]

5. FRAUDULENT CONVEYANCES ⟸273 — ACTIONS—BURDEN OF PROOF.

Where a deed was supported by a valuable consideration, the burden of showing that it was made with fraudulent intent is upon creditors of the grantor attacking it.

6. FRAUDULENT CONVEYANCES ⟸115(1), 156(1)—VALIDITY—PREFERENTIAL CONVEYANCE.

A conveyance is not open to attack as fraudulent because by means thereof the debtor prefers one creditor over another, and to successfully attack such conveyance it must be shown that the grantee had knowledge of the grantor's insolvency and of his intention to defraud other creditors, or of facts sufficient to put a reasonable man on inquiry.

7. FRAUDULENT CONVEYANCES ⟸74(2)—INADEQUACY OF PRICE.

Proof of inadequacy of price will not alone establish a fraudulent intent on the part of the grantor, participated in by the grantee, which will allow creditors of the grantor to attack the conveyance as fraudulent, unless the inadequacy is so glaring as to stamp the transaction with fraud.

8. FRAUDULENT CONVEYANCES ⟸301(1)—ACTIONS—EVIDENCE—SUFFICIENCY.

In a suit by creditors of a grantor to set aside a conveyance as fraudulent, where it appeared that he conveyed the equity of redemption to the mortgagee upon demand for payment, and that the land was estimated to be worth $5,000, the mortgage being for about $1,800, evidence *held* insufficient to establish grantee's knowledge of grantor's insolvency, or to show fraudulent intent on part of the grantee.

Appeal from Superior Court, Modoc County; Clarence A. Raker, Judge.

Action by D. S. Denehy against John Stewart and wife and Mary E. Wyckliffe. From a judgment for plaintiff, defendants appeal. Reversed.

Daly B. Robnett, of Alturas, for appellants.

Jamison & Wylie, of Alturas, for respondent.

CHIPMAN, P. J. Plaintiff is a judgment creditor of John Stewart, and brings the action to set aside a deed made by said Stewart and wife to their codefendant, Mary E. Wyckliffe, conveying to her certain land described in the complaint. It is alleged in the complaint that, at the time said deed was executed, to wit, December 22, 1915, defendant Stewart was wholly insolvent, and "the consideration named in said deed was the sum of $10," and that the land so conveyed was then and is now "reasonably

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worth the sum of $5,000." It is further alleged, on information and belief, that said deed was executed "for a grossly inadequate consideration, with intent to hinder, delay, and defraud the creditors of the said John Stewart, including this plaintiff, and that the said defendant Mary E. Wyckliffe accepted and received the said deed with knowledge of said fraudulent intent on the part of the said John Stewart, and with the intent upon her part to assist the said John Stewart in his said fraudulent purpose, and to hold the said land as a secret trust for the said John Stewart in order that he might occupy the same and receive benefits therefrom, regardless of his said creditors and their claims, including the claim of this plaintiff as aforesaid"; that the said John Stewart "has no other property, other than the aforesaid lands out of which this plaintiff can realize and collect his said judgments or any part thereof."

Defendants demurred to the complaint on the grounds: (1) Insufficiency of facts; (2) that two causes of action have been improperly united in this that an attempt is made to set forth a cause of action to set aside a deed on the alleged ground that it was given in constructive fraud of creditors, united with an alleged ground of actual fraud of creditors; (3) that the complaint is uncertain, in that it cannot be ascertained therefrom whether or not the plaintiff (defendant Stewart) executed said deed in constructive fraud of creditors or in actual fraud of creditors; (4) that the complaint is uncertain in this, that it cannot be ascertained therefrom whether plaintiff is attempting to set aside said deed on the ground that it was given without consideration and when the grantors were insolvent or on the ground that there was no consideration, and that the deed was given with fraudulent knowledge and intent on the part of the grantors to defraud existing creditors; nor can it be ascertained from said complaint whether or not defendant Wyckliffe had any knowledge of the existence of any other creditors of defendants the Stewarts when she accepted said deed.

The demurrer was overruled. Defendants the Stewarts answered: Admitted the execution of the said deed, but alleged that $10 was not the true and sole consideration therefor; that these defendants executed and delivered said deed "to said Mary E. Wycliffe at the instance and request of one D. O'Brien, and in satisfaction of a certain note and mortgage held by said D. O'Brien, assignee of Julia O'Brien, on the said property so deeded from these defendants, which said mortgage was for the principal sum of $1,600 and these defendants further allege that there was at said time due said D. O'Brien from these defendants on account of said note and mortgage the sum of $1,795, and that said deed was given by these defendants in payment and discharge of said note and mortgage and of the amounts so due thereon, to wit, $1,795, and the sum of $5 cash" denied that said lands were reasonably worth the sum of $5,000, or any sum in excess of $1,800; denied specifically the averments of the complaint alleging inadequacy of consideration for said deed, or that it was executed to hinder, delay, or defraud creditors or plaintiff, or that defendant Wycliffe received said deed with knowledge of any fraudulent intent on the part of the grantors, or that she held said lands as a secret trust.

Defendant Wyckliffe answered, and, among other things, alleged that the consideration for said deed was as stated in the answer of her codefendants; denied that the consideration for said deed was inadequate, or that the deed was executed with fraudulent intent, or to hinder, delay, or defraud creditors, or that this defendant had any knowledge of such intent; and denied that when said deed was executed she had any knowledge of the existence of any creditors of said Stewarts or of the claim of plaintiff.

The court made the following findings of fact:

I. That plaintiff recovered judgment against the defendant John Stewart on October 28, 1916, as alleged in the complaint, for the sum of $3,232.23;

II. That, prior to December 22, 1915, defendant John Stewart, and wife executed and delivered to Julia O'Brien their note for $1,600, secured by mortgage on said land, and that subsequently, prior to December 22, 1915, she assigned said note and mortgage to her father, Dennis O'Brien.

III. That, on December 22, 1915, defendants Stewart and wife executed and delivered to defendant Mary E. Wyckliffe, daughter of Dennis O'Brien, "their deed to the lands described in the said complaint at and for an alleged consideration of $10."

IV. "That at the time the said deed last aforesaid was executed to the said Mary E. Wyckliffe there was due and owing to the said Dennis O'Brien, upon said note and mortgage the sum of $1,795, and that at or about the time of the execution of said deed the said Dennis O'Brien paid to the said John Stewart the sum of $5 in cash, and released and satisfied the said note and mortgage. And thereupon the said Mary E. Wyckliffe went into the possession of said lands and the whole thereof, and has remained in possession thereof ever since the execution of said deed, receiving the rents and profits thereof, and that the full amount for which said mortgage is a lien upon said property against the said judgments of plaintiff is the said sum of $1,795, with no accrued interest since December 22, 1915."

V. That, at the time the Stewarts executed said deed, "the said John Stewart was indebted to plaintiff in a large sum of money, to wit, the amounts set forth in the aforesaid judgments," and at that time the said John Stewart had no property subject to execution except said

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lands, but was then and ever since has been, and now is, insolvent.

VI. That said land, at the time of the execution of said deed and ever since, has been of the value of $5,000, and "that the equity of redemption owned by the said defendant John Stewart in the said land at the date of the execution of the said last-named deed was, ever since has been, and now is of the value of $3,200."

VII. "That the only consideration that was paid to the said John Stewart for the conveyance of said land to the said Mary E. Wyckliffe, or ever received by him for said conveyance was the sum of $5 and the said last-named sum was received and accepted by the said John Stewart in full settlement and satisfaction for all his right, title, and interest in said lands over and above said mortgage lien and debt; that is to say, for his equity of redemption in the said lands."

VIII. "That the said conveyance and deed was executed by the said John Stewart and Ida E. Stewart, his wife, to the said Mary E. Wickliffe for a grossly inadequate consideration, with the intent upon their part to hinder, delay, and defraud the creditors of the said John Stewart, including this plaintiff, and that the said defendant Mary E. Wyckliffe accepted and received the said deed with knowledge of said fraudulent intent, and with the intent upon her part of assisting the said John Stewart and the said Ida E. Stewart, his wife, in such fraudulent purpose, and to hold the said lands in secret trust for the said John Stewart and Ida E. Stewart in order that they might occupy the same and receive benefits therefrom regardless of the creditors of the said John Stewart, including this plaintiff."

As conclusions of law the court found that defendant John Stewart is the owner of the lands in question; that he is now and was, when he and his wife executed the deed referred to, indebted to plaintiff as alleged in the complaint; that Stewart and his wife executed and delivered the aforesaid deed to defendant Wyckliffe, with intent to hinder, delay, and defraud his creditors, and particularly to defraud this plaintiff, "and that said Mary E. Wyckliffe accepted and received the said deed with the knowledge of the fraudulent intent on the part of the said John Stewart and Ida Stewart, with the intent upon her part to assist the said John Stewart and Ida E. Stewart in said fraudulent purpose, and to hold the said lands as a secret trust for the said John Stewart, in order that he might occupy the same and receive the benefits therefrom, regardless of his creditors and their claims, including the claim of this plaintiff"; that the defendants the Stewarts at the date of the execution of said deed, were, ever since have been, and now are insolvent; that the said deed is fraudulent and void; that plaintiff is entitled to a decree adjudging that said deed is void, "and that the said lands be sold, subject to the said mortgage, and the proceeds thereof applied in satisfaction upon the said judgments, interest, and costs, and that plaintiff have judgment" for costs of this suit. Judgment was accordingly entered, from which defendants appeal.

In presenting his case, plaintiff introduced the judgment roll, showing defendant John Stewart's indebtedness to plaintiff as alleged; also execution issued on said judgment, showing return, judgment wholly unsatisfied; also deed of Stewart and wife to Mary E. Wyckliffe, dated December 22, 1915, referred to in the complaint. Plaintiff testified as a witness in his own behalf that said judgment is wholly unpaid; that defendant John Stewart, at the time said deed was recorded, owned no property other than the land in question, and has had no property since, and has none now out of which said judgment or any part of it could be satisfied; that the land consisted of 80 acres near Cedarville, "worth about $60 an acre," and 80 acres of timber land, worth $10 per acre. Other witnesses testified to the value of the land, placing it at a figure justifying the finding of the court as to value. Upon this evidence the plaintiff rested.

Defendants moved for a nonsuit on the ground "that plaintiff has failed to show any fraud in this transaction, showing the deed was made to defraud any creditor or for the purpose of hindering or delaying any creditor of John Stewart or Ida E. Stewart; and particularly that they have failed to show that Mary E. Wyckliffe had knowledge of any such design to defraud any creditor whatever"; that plaintiff has "failed to show that the deed was given in constructive fraud of creditors as defined by the Civil Code in section 3442, that it is a voluntary transfer without any consideration by the party who contemplates such fraud.

"The Court: I will hear the evidence in this case, and see what you have got. The motion for a nonsuit is denied."

We will not stop to consider the ruling of the court upon the motion for a nonsuit, inasmuch as the subsequent proceedings disclosed the facts as to the transaction in its entirety and furnish a safe basis on which to rest the decision.

It appeared, without conflicting evidence that Stewart had been indebted to O'Brien for some time, and, on August 1, 1912, the note and mortgage were executed to cover the indebtedness, including interest and also taxes paid by O'Brien, amounting in all to $1,600. The note was made payable to Julia O'Brien, daughter of Dennis O'Brien, and by her later transferred to him. The note being past due and no part of the interest having been paid, O'Brien wrote Stewart that a settlement must be made. Stewart went to Alturas and met O'Brien, and it was agreed that Stewart and wife would convey the land to O'Brien in discharge of the note and mortgage and $5 in money. On December 22, 1915, the indebtedness amounted to

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$1,795. O'Brien paid Stewart $5 in money, surrendered the note to Stewart, and canceled the mortgage of record and by his direction Stewart and wife deeded the property to O'Brien's daughter, defendant, Mrs. Wyckliffe, the consideration being in fact $1,800, although the deed mentioned $10 as the consideration. Both O'Brien and his daughter, Mrs. Wyckliffe, testified that they knew nothing of Stewart's indebtedness to any person other than O'Brien, and that they had no intention of defrauding any creditor of Stewart. Mrs. Wyckliffe testified that she received the deed as a gift of the land from her father, and he testified that in other transactions he had made like gifts to others of his children, stating instances. Stewart testified that he made the transfer because he could not pay the principal or interest, and he wanted to avoid expense of foreclosure, and both he and O'Brien testified that they were acting in good faith, with no intention to hinder or delay or defraud other creditors. O'Brien testified that he believed he was making a fair settlement and allowing a fair value for the land. On his cross-examination, defendant John Stewart was asked the following questions:

"Now, you owed Mr. O'Brien $1,790 on the mortgage, so you sold your right of redemption in that land for $5, didn't you? A. I don't know what you call it, I just gave him the ranch to pay the mortgage, that was the only thing I done, I wanted to pay the mortgage."

O'Brien's testimony was that Stewart and wife conveyed the title to the land in consideration of $5 in money and the surrender of the note given by Stewart and wife and the cancellation of the mortgage. On cross-examination he testified:

"Q. Didn't you agree with John Stewart at the time this deed was made that he should remain in possession of the property a certain length of time? A. No, sir; we had no agreement at all about that."

Stewart testified, on cross-examination:

"Q. What was the arrangement between you and Dennis O'Brien by which you remained in possession of this property? A. There was no arrangement at all, only I turned the deed over to him. Q. You had been living on the property ever since? A. I rented it. Q. Where is your lease, if you rented it? A. Well, I guess it is right here. I think it is."

It appeared that some time after the deed was delivered Mrs. Wyckliffe leased the land to Stewart for the term of five years at the annual rental of $250. The lease contained the following provision:

"The said lessee, as the lessee, has the privilege of buying the above-described property at any time during the duration of this lease."

The testimony of the parties to the transfer of the premises was that the leasing of the property was arranged after the transfer of the title, and that there was no understanding as part of the transaction that Stewart was to have the property back on payment of the debt. Stewart testified that he wanted a place for his family while he was away at work in Nevada, and he turned the place over to his son, who paid the rent. Mrs. Wyckliffe testified that Mr. Stewart's son paid the rental. The testimony was that there was no definite agreement as to what Stewart was to pay in repurchasing the land. The matter seems to have been left as stated in the lease. The deed was acknowledged December 22, 1915, and was recorded December 24, 1915; the present action was commenced January 11, 1917.

The evidence in rebuttal consisted exclusively of testimony of the value of the land. On this question there was a conflict, but, as before remarked, there was sufficient to justify the finding of the court.

It remains to apply the law to the foregoing facts. While the complaint seems to combine charges of constructive fraud and actual fraud, the case was tried and decided, as the findings of fact show, upon the issue of actual fraud.

[1, 2] We had occasion to consider the question of constructive fraud in Hopkins v. White, 20 Cal. App. 234, 246, 128 Pac. 780, 785. We there said:

"In a case where constructive fraud is relied on, it is necessary to allege the fraudulent intent, under section 3442. Schell v. Gamble, 153 Cal. 448, 95 Pac. 870. It is only by reason of the proviso in that section that fraud becomes established constructively or as a matter of law. Cook v. Cockins, 117 Cal. 140, 48 Pac. 1025; Gray v. Brunold, 140 Cal. 615, 74 Pac. 303. Section 1573 of the Civil Code provides that constructive fraud is 'any such act or omission as the law specially declares to be fraudulent. The transfer of property with intent to delay or defraud creditors is declared by section 3439 of the Civil Code to be void as to creditors. But the intent in such a case is a question of fact, and is not to be presumed from the mere fact of the transfer, for section 3432 expressly provides that 'a debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another.' McKee v. Title Ins. & Trust Co., 159 Cal. 206–217, 113 Pac. 140. It is only where the transfer is 'made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency,' that the statute declares such transfer to 'be fraudulent and void as to existing creditors.' Civ. Code, § 3442."

[3, 4] In no legal sense can the deed in the instant case be said to have been made voluntarily. And we think it quite clear that it was supported by a valuable consideration. "A valuable consideration is such as money or the like, and the adequacy or inadequacy of the amount, or its disproportion to the actual value of the property, does not affect the

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* * * kind of consideration. The adequacy of the consideration is an element of the good faith of the transaction, and has no bearing upon whether the consideration is a valuable or good one." Lindley v. Blumberg, 7 Cal. App. 140, 147, 93 Pac. 894, 897, citing cases. Respondent contends that the words "valuable consideration," as found in section 3442 of the Civil Code, "could have but one meaning, and that was, a value commensurate with that of the property conveyed," citing Carter v. Richardson (Ky.) 60 S. W. 397. In that case the sale was for cash of a stock of sample goods for what the court felt authorized to assume was 50 per cent. of their value. The conduct of the vendor, at the time and immediately after receiving the pay check, together with other circumstances mentioned in the opinion, led the court to conclude that the consideration was not a "valuable" one. Among the circumstances, the court stated that the vendee learned of the fraudulent intention of the vendor shortly after delivering his check in payment, and had ample time to stop payment, but did not. A large part of the goods was new; the vendee had the invoices, showing values, before him. It was in view, we think, of the circumstances shown, as well as the fact that the purchase price was but 50 per cent. of the value, which led the court to say that the price was so inadequate as to "cause surprise, or warrant a suspicion of fraud or contrivance, on the part of the purchaser."

[5, 6] The deed being supported by a valuable consideration, the burden of showing that it was made with fraudulent intent was upon the plaintiff. Goldner v. Spencer, 163 Cal. 317, 125 Pac. 847. We are unable to discover sufficient evidence to justify the finding of fraudulent intent upon the part of Stewart and wife in making the deed. And there is not the slightest evidence tending to show that either O'Brien or his daughter, Mrs. Wyckliffe, knew of Stewart's insolvency, or that he was seeking to hinder, delay, or defraud his creditors in making the deed. The intent of Stewart to prefer O'Brien as a creditor, if shown, would not be sufficient to justify the findings of the court, for it has frequently been held that a debtor may exercise a preference in the payment of creditors. It was essential to show that O'Brien and Mrs. Wyckliffe had actual knowledge of Stewart's insolvency and of his intention to defraud his creditors (Goldner v. Spencer, supra; Scholle v. Finnell, 167 Cal. 90, 138 Pac. 746), or that they had knowledge of facts sufficient to put an ordinarily prudent man upon inquiry.

[7] The rule as to inadequacy of consideration is variously stated in the books, but with substantial agreement:

"Proof of inadequacy of price is not alone sufficient to establish fraudulent intent on the part of the vendor, participated in by the vendee, which will invalidate the transaction, unless the inadequacy is so manifest as to shock the moral sense and create on its mere mention a suspicion of fraud. 12 R. C. L. 542. "Inadequacy of price may be evidence of fraud which, however, in order to avoid a deed, must be so glaring as to stamp the transaction with fraud and to shock the commonest sense of honesty, as coupled with such facts as that the vendor was illiterate, weak-minded, or in necessitous circumstances." 8 R. C. L. 963.

In support of the text, Feigley v. Feigley, 7 Md. 537, 61 Am. Dec. 375, 379, is cited. In that case there was no evidence in the record as to the fraudulent participation of the grantee of the deed other than the mere inadequacy of consideration contained in the deed. The consideration on which the deed rested was $200 while the property conveyed was estimated as worth $700 or $800. Said the court:

"It is not such glaring inadequacy as of itself to stamp the transaction with fraud, by shocking the common sense of honesty, and thereby render the deed void."

The rule stated in Am. & Eng. Ency. of Law, vol. XIV, p. 516, is as follows:

"Inadequacy of consideration where the vendor is greatly indebted is recognized as a mark of fraud, and while it is not of itself, unless very great, sufficient even as against creditors of an insolvent vendor to authorize the court to find fraud as a conclusion of law, it is one of the circumstances which may be considered by the jury in determining the question of fraud in fact, and may become a controlling force coupled with other circumstances tending to prove fraud."

[8] We do not think the disproportion alone of the price paid in the present case to the value of the property as found by the court is so great as to justify an inference that O'Brien or Mrs. Wyckliffe knew of or was put upon inquiry as to Stewart's insolvency, or that he intended by the conveyance to hinder, delay, or defraud his creditors. There was no evidence that O'Brien knew or had reason to believe that he was getting property worth $5,000 for $1,800. His testimony was that he believed he was allowing a fair price for it. It would seem to us that before fraud should be imputed to him it should appear that he knew or had reason to believe that the consideration was grossly inadequate. Nor do we think that any of the circumstances shown attending the transfer were of a character calculated to arouse suspicion that fraud was intended. The circumstance, aside from inadequacy of price, relied upon by respondent is the fact that Stewart remained in possession under the lease above referred to, which is spoken of as a "secret arrangement" because not recorded. If as a condition to passing the title it had been agreed that Stewart was to remain in possession with the right to a reconveyance upon payment of the debt, it would have changed the com-

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plexion of the transaction, and would have amounted to no more than a mortgage. But there was no evidence that such was the case. The undisputed testimony was that the agreement to lease with the privilege of purchase was made after the sale, and had nothing to do with the transfer of the title. It is not reasonable, under the circumstances appearing, that O'Brien would have taken a deed which amounted to no more than a mortgage. It was perfectly legitimate for the grantee after absolute title passed to lease the land to Stewart or any one else with the privilege of purchase.

The finding, marked VII, that the only consideration paid Stewart for the conveyance was $5, and that said sum was received by him "for his equity of redemption in the said land," is wholly unsupported. The undisputed evidence was that Stewart received, not only $5 in money, but the discharge of his indebtedness to O'Brien. In the transaction nothing was said or done with reference to any equity of redemption.

We are unable to find in the record support of the findings of fraud, whether considered as constructive or actual.

The judgment is reversed.

We concur: HART, J.; BURNETT, J.

(40 Cal. App. 700)

MANFORD v. MEMIL SINGH. (Civ. 1910.)

(District Court of Appeal, Third District, California. April 17, 1919.)

1. CONSTITUTIONAL LAW ⟸204, 251—PRIVILEGES AND IMMUNITIES OF CITIZENS—DUE PROCESS.

Const. art. 1, § 1, relating to inalienable rights, and section 13, relating to due process of law, prescribe nothing not contemplated by the federal Constitution, and in no degree enlarge or abridge the civil immunities of a citizen, nor operate to increase the authority of the legislative department of the state government.

2. MASTER AND SERVANT ⟸69—WAGES—STATUTORY REGULATION—VALIDITY.

Prompt payment of employés' wages, regulated by St. 1911, p. 1268, as amended by St. 1915, p. 299, is a matter within the police power of the Legislature, and the legislation is valid and applicable to corporations and to individuals who are employers.

Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

Action by L. V. Manford against Memil Singh. Judgment for plaintiff, and defendant appeals on the judgment roll. Affirmed.

Claude F. Purkitt, of Willows, for appellant.

George R. Freeman, of Willows, for respondent.

BURNETT, J. The appeal is on the judgment roll and involves the construction of "An act providing for the payment of wages," approved May 1, 1911 (Stats. 1911, p. 1268), and the amendment thereof, approved April 28, 1915 (Stats. 1915, p. 299). The question was carefully considered by this court in Moore v. Indian Spring Channel Gold Mining Co., 174 Pac. 378, and the legislation was upheld as within the constitutional authority of the lawmaking power. Therein many decisions are reviewed, and the reasons justifying such legislation are clearly stated. Our faith in the legal soundness of that decision has not been shaken, and its authority is of controlling force in the instant case.

[1] Appellant, however, contends that a distinction exists between a corporation and a natural person as to the operation of the law, which was not urged or considered in the Moore Case, and that, while the statute may be and is valid as to the former, it must fail when challenged by an individual as violative of his fundamental rights expressed in section 1, art 1 of our state Constitution as follows: "All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness"—and also section 13 of said article, "* * * nor be deprived of life, liberty of property without due process of law." It is claimed that due consideration of these primary maxims in connection with the Fourteenth Amendment to the federal Constitution will furnish protection to the individual employer against the application of the drastic penalty of said law. It is manifest, though, that as far as any substantial right or privilege of the citizen is concerned and the protection which must be accorded to it by the law, said provision of the state Constitution prescribes nothing that is not comprehended by said section of the federal Constitution. Of course, the sonorous phrasing of the inalienable rights of the individual in said section is felicitous and impressive, but it effects in no degree an enlargement or abridgment of the civil immunities of the citizen, nor does it operate to limit or increase the authority of the legislative department of the state government. And said section 13 is manifestly in scope and purpose identical with said provision of the federal Constitution. It may be said, therefore, that the principle of constitutional law invoked by appellant was the subject of

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earnest attention in the Moore Case, supra.

In support of his contention that such legislation may be upheld as against a corporation, but not against an individual, appellant cites the case of Leep v. St. Louis, Iron Mountain & Southern R. Co., 58 Ark. 407, 25 S. W. 75, 23 L. R. A. 264, 41 Am. St. Rep. 109, wherein the Supreme Court of Arkansas held that such legislation was valid as to a corporation by reason of the fact that under the act or charter of incorporation there was reserved the power in the Legislature to amend the corporate charter. It was concluded that in the case of a railroad company the Legislature in its wisdom, finding that "better servants and service could be secured by the prompt payment of their wages on the termination of their employment," and that thereby the legitimate purpose of the corporation would be promoted, might require the company to pay its employés at the termination of their employment, although such legislation might interfere with contracts purely and exclusively private. As against the railroad corporation the statute involved in that case was upheld for the reason stated, while it was declared to be unconstitutional as applied to the individual for the reason that it was an unwarranted interference with the constitutional right to make contracts.

The opinion discusses interestingly and persuasively the essential principles involved in such inquiry, and it is well worth careful consideration, although, manifestly, it is not of authority here. Moreover, there is to be said of the decision that the discussion as to the effect of the law upon natural persons was somewhat gratuitous, since the action was against a corporation solely. Besides, the statute therein construed differed materially from our law on the subject, in that it penalized the employer for discharging the employé either with or without cause, and by implication at least it denied the employer the ordinary defenses for the misconduct of the employé or his failure to comply with the terms of his contract. Under the peculiar terms of the statute of Arkansas it would not be surprising if the Supreme Court had declared it to be invalid even as against a corporation.

[2] But appellant concedes that our statute is within the sanction of the Constitution if it can be reasonably held that the prompt payment of employé's wages is a matter that affects the public generally and is within the police power of the Legislature. That suggests the very reason why such legislation is permissible, imposing, as it does, a certain limitation upon the right to contract.

This consideration is fully set forth in the Moore decision, supra, and there is no necessity for further specific attention to it.

We may add that, manifestly, the statute should have reasonable construction. Its design is to protect the employé and to promote the welfare of the community. Without defeating that purpose, it should be construed so as to hamper as little as possible the valuable right and privilege of making contracts. But it is to be observed that the most formidable objection to the statute derives its principal force from the supposed hardships of a hypothetical case wherein the employer is without fault or the employé is guilty of culpable conduct. The statute is not subject to such reproach. It contemplates that the penalty shall be enforced against an employer who is at fault. It must be shown that he owes the debt and refuses to pay it. He is not denied any legal defense to the validity of the claim. Indeed, the fullest right to contract as to payment is but slightly restricted, and an employer can easily provide in advance for the contingencies that may arise under the statute. If he refuses to pay what is due as therein provided, it is not unjust that he should be subjected to a penalty.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(41 Cal. App. 13)

CRAWFORD v. MEADOWS. (Civ. 2884.)

(District Court of Appeal, Second District, Division 2, California. April 29, 1919. On Petition for Rehearing, May 28, 1919; Denied by Supreme Court June 26, 1919.)

1. SALES ⟸480(4) — CONDITIONAL SALE — EVIDENCE.

Evidence *held* to establish conditional sale of automobile sought to be recovered by seller in claim and delivery.

2. SALES ⟸480(1)—CLAIM AND DELIVERY—CONDITIONAL SALES CONTRACT—DEFAULT.

Where automobile was delivered on express condition that title was not to pass until payment of at least $100, and default was made in payment, and automobile removed from county without seller's consent, seller could recover automobile in an action of claim and delivery.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Harry J. Crawford against Rebecca Meadows, administratrix of the estate of Mobley Meadows, deceased. Judgment for defendant, and plaintiff appeals. Reversed.

Alfred M. MacDonald, Samuel J. Crawford, and John S. Cooper, all of Los Angeles, for appellant.

Thomas A. Sanson and Duke Stone, both of Los Angeles, for respondent.

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THOMAS, J. This is an action in claim and delivery. Plaintiff alleged ownership of a certain automobile and the right of possession thereof in himself. This was denied by defendant. After trial judgment went for defendant. From that judgment, plaintiff appeals.

Appellant claims that "the evidence is insufficient to justify the decision" and that "the findings of fact do not justify the conclusions reached." The last contention need not be considered if the first is established. Primarily, at least, therefore, there is only one point made, viz., insufficiency of the evidence to support the findings.

Counsel admit and recognize the rule that, when there is any evidence to support the findings, this court will not disturb the judgment thereon. In this case, however, there is no conflict in the evidence as to the ownership and the right of possession to the said automobile at the time this action was commenced. Plaintiff's testimony shows clearly the ownership of the property and the right of possession thereof in himself at the time this action was commenced. Respondent has not pointed out to us any testimony which in the least conflicts therewith. Lest, however, an injustice might be done by respondent's failure to point out such testimony, if the record contained it, every member of this court has, regardless of the rule which makes such labor on our part unnecessary, read the entire record. It wholly fails to disclose anything derogatory to plaintiff's proven ownership and right of possession.

It was stipulated that plaintiff was the owner of the automobile in question on the 17th day of June, 1914. Plaintiff also testified, among other things, as follows:

"At the time this lease contract was signed, which bears date July 22d, the car belonged to me. It also belonged to me when it was changed from $100 to $800 in September, 1914. At the time the lease contract was changed in September, I had not received the purchase price."

There is absolutely nothing in the record which contradicts this, or which is in any way in conflict therewith.

We are satisfied that the findings are not supported by the evidence. In view of that fact, therefore, it is unnecessary to discuss the second proposition referred to above.

Judgment reversed.

We concur: FINLAYSON, P. J.; SLOANE, J.

On Petition for Rehearing.

PER CURIAM. Respondent has petitioned for a rehearing on this appeal, and suggests that we have overlooked the contention of her counsel that there had been a completed sale and delivery by plaintiff of the automobile in question. This is precisely what we think the evidence failed to show.

The only evidence before the court as to the contract under which, if at all, respondent has any claim, was the written instrument itself and the testimony of plaintiff and his brother. It is admitted that, at the time the contract was entered into, plaintiff was the owner of the automobile. The contract in itself, which is in the form of a memorandum of lease, acknowledges that one Williams, under whom respondent claims, has hired the automobile from plaintiff; that Williams was to pay rental as follows: "$——— in advance this day 7—22—1914, and the further sum of $100.00, on the 22d day of each month thereafter, during the said term, until the full sum of $800.00 is paid;" that in case of default of any payment or removal of the property from Los Angeles county without written consent of the plaintiff, the latter would be entitled to retake possession of the machine; and "that under no conditions shall any title vest in the hirer." The uncontradicted testimony of both witnesses was that the consideration for this transaction was the transfer to plaintiff of certain equities in real estate and the payment of $100 for tires, and certain advances in money to meet required expenditures on or concerning the automobile; that all of this occurred before the delivery to Williams of the automobile, and on the express condition that no title was to pass until the $100 was paid, and until plaintiff had satisfied himself that the liabilities against the real property did not exceed a certain sum; that on the discovery, as claimed, that there were $700 of liabilities beyond the amount represented, this $700, by agreement with Williams, was added to the original $100 still owing, and the total amount named in the contract was raised from $100 to $800.

[1, 2] All the evidence as to the terms of the contract was to this effect. It clearly establishes a conditional sale contract. Even conceding that the alteration of the lease memorandum, by including the extra $700, was unwarranted, the original $100 still remains. Eliminating the $700, we have this situation: A conditional sale contract for a consideration, of which full payment was acknowledged, excepting $100, which the lessee agreed to pay, and the payment of which was a condition precedent to his obtaining title. There seems to be no question, under the evidence, that the automobile was delivered to Williams on the express condition that the title was not to pass until he paid, at least, this $100. The undisputed testimony is that this payment was never made, that defendant was in default, and that he had removed the property without plaintiff's consent from Los Angeles county. This gave to plaintiff his right of action to recover possession of the automobile.

Petition for rehearing denied.

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(40 Cal. App. 723)

MEYER et al. v. SULLIVAN et al.
(Civ. 2647.)

(District Court of Appeal, First District, Division 1, California. April 19, 1919. Rehearing Denied May 19, 1919; Denied by Supreme Court June 16, 1919.)

1. CUSTOMS AND USAGES ⟸15(1) — ACTION FOR FAILURE TO DELIVER—EXPLANATION OF CONTRACT.

In an action for failure to deliver wheat sold, evidence of usage and custom was properly considered by the trial court in determining the place of delivery of the wheat contemplated by the parties under the f. o. b. steamship clauses of the contracts.

2. SALES ⟸88 — INTERPRETATION OF CONTRACT—PROVINCE OF COURT.

It was the province of the court to apply its knowledge, gained from the testimony of witnesses as to the meaning of "f. o. b." steamship, used in the contract of sale, breach of which was sued for, to the surrounding circumstances in which the parties were placed, and to find and determine what the term as used in the contract implied.

3. SALES ⟸79—CONSTRUCTION OF CONTRACT —F. O. B.

Generally, if the agreement is to sell goods "f. o. b." at a designated place, such place will ordinarily be regarded as the place of delivery, but the effect of the "f. o. b." depends on the connection in which it is used, and, if used in connection with words fixing price only, it will not be construed in fixing place of delivery.

4. SALES ⟸87(3)—CONTRACT—TERM AS REFERRING TO PRICE — SUFFICIENCY OF EVIDENCE.

In an action for failure to deliver wheat sold, evidence *held* to support the trial court's finding that the term "$1.43⅓ per 100 lbs. f. o. b. Kosmos steamer at Seattle" referred to the price of the wheat and not to the place of delivery.

5. SALES ⟸87(1)—OBLIGATION OF SELLERS—TRANSFER OF GOODS—WAIVER.

The buyers of wheat free on board a steamship, if the sellers were obligated to transfer the wheat from the dock to the deck of the steamship, could waive such covenant for their benefit.

6. SALES ⟸172—IMPOSSIBILITY OF PERFORMANCE—WAR.

The sellers of wheat at a price f. o. b. the steamer of a certain line at a specified port were not released from liability to the buyers, nor the buyers from liability to them, because war conditions rendered it impossible to furnish a steamer of the line specified.

7. SALES ⟸418(2)—FAILURE TO DELIVER—DAMAGES—STATUTE.

In arriving at the amount of damages suffered by the buyers of wheat from the sellers' failure to deliver, the court properly considered the difference between the price agreed to be paid by the buyers and the market price, which might be taken as the value of the same wheat in the contemplated port of delivery during the month when delivery was called for; the excess of the value of the wheat to the buyers during such time over what would have been due to the sellers as the price being the detriment, under Civ. Code, § 3308, caused to the buyers by the sellers' breach.

Appeal from Superior Court, City and County of San Francisco; Geo. E. Crothers, Judge.

Action by George H. C. Meyer and others against F. J. Sullivan and others. From judgment for plaintiffs, defendants appeal. Affirmed.

Andros & Hengstler and Louis T. Hengstler, all of San Francisco, and Golden W. Bell, of Berkeley, for appellants.

McCutchen, Olney & Willard and J. M. Mannon, Jr., all of San Francisco, for respondents.

WASTE, P. J. This is an appeal by the defendants from a judgment in the sum of $2,613.30, entered in favor of plaintiffs for damages alleged to have been suffered by reason of the breach of defendants to deliver a cargo of wheat to plaintiffs at Seattle during the month of September, 1914.

After negotiations between the parties looking to the purchase and sale of a quantity of wheat, the plaintiffs wrote to defendants two letters, which were as follows:

454 California St.
San Francisco, Cal., June 26th, 1914.
Friday.
Sept. Shipt. Received June 27, 1914.
Answered .....

Messrs. F. J. Sullivan & Co., 310 California St., City—Dear Sirs: It is hereby confirmed that you have sold us and that we have bought from you, two hundred and fifty (250) long tons of No. 1 white Walla Walla wheat, for shipment in September, doubtless early in September, from Seattle, in double bags, at one dollar forty-three and one-third cents ($1.43⅓) per 100 lbs. f. o. b. Kosmos steamer at Seattle, with the usual official certificate of the grain inspector to accompany the draft on us from the north.

We send you this in duplicate. Kindly return one copy to us with your signature.

We are, dear sirs, yours very truly,
GM/P Meyer, Wilson & Co.
Approved: F. J. Sullivan & Co.

454 California St.,
San Francisco, Cal., July 1st, 1914.
Wednesday.

Messrs. F. J. Sullivan & Co., 310 California St., City—Dear Sirs: It is hereby confirmed that you have sold us, and that we have bought from you, two hundred and fifty (250) tons of No. 1 white Walla Walla wheat, for shipment in September, doubtless early in September, from Seattle, in double bags, at one dollar, forty-one and two-thirds cents ($1.41⅔) per 100 lbs. f. o. b. Kosmos steamer at Seattle, you to accom-

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pany your invoice for the grain with the usual certificate of the grain inspector.

We shall in due course give you the marks for this lot, as well as the prior lot of 250 tons for September shipment.

We send you this in duplicate. Kindly return one copy to us with your signature.

We are, dear sirs, yours very truly,

GM/P Meyer, Wilson & Co.

Approved and accepted: F. J. Sullivan & Co.

The letters were duly received by the defendants, who thereupon indorsed their approval upon each of the letters as above appears, and each of the letters, containing the approval of the defendants indorsed thereon, was returned to, and duly received by, plaintiffs. On the respective dates of the letters, plaintiffs engaged space from the management of the Kosmos line, for the shipment of the wheat referred to, in the steamer of that company, leaving Seattle in September. This fact was not communicated to defendants by plaintiffs, but on July 20th defendants were directly informed by the Kosmos line that the wheat was to be taken on board the steamer Karnak; leaving Seattle in September, 1914. Plaintiffs at no time furnished, or designated, or named, any vessel or vessels, or any Kosmos steamer, at Seattle or elsewhere, on board which the wheat would be placed, loaded, or shipped, or to which said wheat should be delivered.

Subsequently, owing to the war conditions then prevailing, the Kosmos Line canceled their sailing schedule. On August 13th defendants notified plaintiffs of that fact and requested to know their position with regard to the two contracts for purchase of the wheat. Not receiving a reply to their communication, defendants wrote to plaintiffs again on August 22d, making similar request. In the meantime, wheat had advanced in price. On August 26th, not having replied to these letters, plaintiffs informed defendants that the wheat bought from them had been sold, on a c. i. f. basis, to a firm in Valparaiso, not at all desirous of canceling, but, on the contrary, desirous of more business, and requested that defendants make a proposition as favorable as the then higher market would permit, which plaintiffs might cable to its Valparaiso correspondent. This proposition was stated to be "a merely tentative idea advanced without prejudice, and not to be regarded as in any way affecting our (plaintiffs') rights in the premises." Defendants made no counter proposition for either compromise, or cancellation, in the matter, and on September 5th plaintiffs wrote defendants, stating they would require defendants to deliver the wheat, "in the manner customary on Puget Sound, viz., in warehouse there." Further details of the delivery were referred to in the letter. This communication was followed by another letter on September 8th, in which plaintiffs demanded that defendants deliver "the said 500 long tons in warehouse at Seattle." On September 16th defendants replied, and, referring to the previous letters from plaintiffs relative to delivery of the wheat, stated that, on account of the circumstances mentioned in the correspondence, they must decline to make delivery of the same. The receipt of this letter from the defendants was followed by two letters from plaintiffs, which were personally handed to defendants, demanding, respectively, the fulfillment of each of the contracts for sale of the wheat and suggesting that the delivery might be made to plaintiffs at the warehouse on Arlington dock, Seattle, as that was the usual pier at which the Kosmos steamer loaded, or, if more convenient to defendants, delivery might be made to plaintiffs at any other warehouse in Seattle harbor, where grain was customarily received and loaded on steamers. At the time of handing these letters to defendants, plaintiffs produced and tendered to defendants in gold coin the purchase price of the wheat referred to in the contracts, which tender the defendants declined and refused, basing their action in so doing solely upon the ground that no Kosmos steamer was available at Seattle upon which said wheat could be loaded. The refusal of the tender was followed by a letter dated the last day of September, delivered to plaintiffs, which was as follows:

September 30, 1914.

Messrs. Meyer, Wilson & Co., San Francisco, Calif.—Gentlemen: Referring to your letters of September 22, 1914, and your demand for a fulfillment of the contracts mentioned therein, we are now in a position to state positively that, owing to the fact that no Kosmos steamer has been available for shipment in September, we consider the said contracts as canceled.

Yours very truly,

F. J. Sullivan & Co.,

By F. J. S.

After notifying defendants that plaintiffs would hold them responsible in damages for failure to carry out the contracts, plaintiffs brought this action.

The sole issue on this appeal narrows down to an examination of the question: Were the defendants justified in refusing to deliver the wheat, solely upon the ground that no Kosmos steamer was available at Seattle during the month of September, upon which the wheat could be loaded? The answer to the question appears to depend upon the interpretation that shall be placed upon the language in the two contracts, "f. o. b. Kosmos steamer at Seattle."

Appellants contend that these words (the term, f. o. b., meaning "free on board") implied a condition as to the place of delivery of the wheat, and limited such delivery to the deck of a Kosmos steamer, and nowhere else; that, the limitation and condition being impossible of fulfillment, they were ab-

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solved from the contract. The trial court took the counter view of the respondents, and found that the f. o. b. clauses were used in connection with the price of the wheat, and not the place of delivery; that, in view of the established custom of the trade, prevailing on the Pacific Coast, and which was and is well known to the parties, the place of delivery contemplated by them was the Arlington dock in Seattle, the dock at which the Kosmos steamers customarily loaded, and not the deck of the vessel itself; that therefore plaintiffs' offer to receive the wheat at the dock, coupled with the tender of, and ability to make, full payment of the contract price, was sufficient and full compliance, on their part, of the contract. The court further found that, if the said clauses of the contracts implied any covenant on the part of the defendants to transfer the wheat from the dock to the deck of the vessel, such covenant was solely for the benefit of the plaintiffs, and could be waived by them.

In order to determine whether or not delivery was to be made on the deck of the Kosmos steamer, as contended for by defendants, or merely on the Arlington dock, in Seattle, as claimed by plaintiffs, the trial court admitted evidence of the nature of the transaction, and the usages and custom of the trade in such matters. Appellants vigorously attack the findings and conclusions of the court, and particularly its action in admitting testimony in proof of the custom of the trade.

[1] We are satisfied of the correctness of the trial court's findings in these matters. The fact that the parties to this action have come to such a vigorous disagreement over the meaning of the terms of the contracts is some indication that the court might be compelled to look to other sources of information than the contracts themselves in order to arrive at a proper interpretation of the disputed point. That the evidence of usage and custom was properly considered by the trial court in determining the place of delivery of the wheat contemplated by the parties under the f. o. b. clauses of the contracts is borne out by the authorities. Cowas-Jee v. Thompson, 5 Moore P. C. 165, 13 Eng. Reps. 454; Stock v. Inglis, 5 Asp. M. C. 294; George v. Glass, 14 U. Can. Q. B. 514; Marshall v. Jamieson, 42 U. Can. Q. B. 115.

The admitted evidence fully supports the court's finding that it was and is a general custom, among buyers, sellers, and shippers of wheat in the city of Seattle, and in the city of San Francisco, and, generally, in Pacific Coast ports, "under contracts for the sale of wheat f. o. b. steamer, or f. o. b. designated steamer, for the seller to deliver, and for the buyer to receive and accept, the wheat upon the dock alongside of ship's tackle."

R. D. Girvin, a grain merchant on the Pacific Coast for 35 years testified that, by sale of grain "f. o. b. steamer," the obligation of the seller is to deliver the grain to the buyer, free of cost, at the ship's tackle, that is, delivery at ship's side ready to be hoisted into the vessel, and not that the seller has to put it on board the vessel. Otto Hillefeld, shipping agent and grain broker on the Pacific Coast for 16 years, testified that, under a contract of sale "f. o. b. steamer," the custom is for the seller to deliver the goods to the dock, and that neither the buyer nor the seller delivers the goods on the steamer; that the steamship company issues a receipt therefor, and the cost of taking the goods from the ship's tackle, or from the dock, into the steamer is borne by the steamship company, and the dock is the point at which the buyer receives the goods from the seller. R. D. Bird, freight agent, engaged in the business of shipping and the operation of steamers on the Pacific Coast for many years, testified that it is a universal rule, and the custom, to take delivery on the dock. Other witnesses, including a general agent of the Kosmos Line, testified that the shipper had nothing whatever to do with loading the cargo from the dock into the vessel; that work being done by the vessel, or the vessel's agents.

The witnesses on the part of the defendants testified as to the use of the terms f. o. b. and "f. a. s." (free-along-side) in contracts. The evidence discloses that contracts might be made, between buyer and seller, using either of these terms, although sales f. a. s. seem to be of infrequent occurrence, and not readily made in the community. In both f. a. s. sales and f. o. b. sales, however, the seller of the goods pays the cost of all handling on the dock; and the cost of stevedoring, or transferring the cargo from the dock to the ship, is paid and absorbed by the shipowner from the freight, which in turn is paid by the buyer. The only distinction between the two kinds of sales appears to be as to the time when the responsibility of the seller ends. In the case of f. a. s. sales, it seems to end with delivery on the dock. In the case of f. o. b. sales, the responsibility of the seller appears to end when the commodity is on board ship. The element of cost, to either buyer or seller, does not appear to enter into the matter at all.

[2-4] It was the province of the trial court to apply the knowledge, gained from the testimony of these witnesses, to the surrounding circumstances in which the parties were placed, and to find and determine what the term "f. o. b. Kosmos steamer at Seattle," as used in the contracts, implied. It duly determined that it was used therein in connection with the price of the grain only, and not as fixing the exact place at which it should be delivered. In arriving at this

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conclusion, the trial court was assisted by the position of the clause in the contracts, used, as it was, in connection with the words fixing the price of the wheat sold. The general rule seems to be that—

"If the agreement is to sell goods 'f. o. b.' at a designated place, such place will ordinarily be regarded as the place of delivery; but the effect of the 'f. o. b.' depends on the connection in which it is used and if used in connection with the words fixing the price only it will not be construed as fixing the place of delivery." 35 Cyc. 174; Neimeyer Lumber Co. v. Burlington & M. R. R. Co., 54 Neb. 321, 74 N. W. 670, 40 L. R. A. 534; Burton et al. v. Nacogdoches Lumber Co. (Tex. Civ. App.) 161 S. W. 25.

In Dannemiller v. Kirkpatrick, 201 Pa. 218, 50 Atl. 928, the contract read: "Bill the cargo of coffee 'at the same price, f. o. b. Pittsburgh.'" It was held that whether or not delivery was to be made at Pittsburgh was a question of fact. To like effect are Consolidated Coal Co. v. Schneider, 163 Ill. 393, 45 N. E. 126; Davis v. Alpha Portland Cement Co. (C. C.) 134 Fed. 274; U. S. Smelting Co. v. American Galvanizing Co. (D. C.) 236 Fed. 596. These authorities seem to firmly establish the rule that the f. o. b. clause may be used solely with reference to the price. The finding of the court that the term "$1.43⅛ per 100 lbs. f. o. b. Kosmos steamer, Seattle," in one contract, and the like clause in the other, as between plaintiffs and defendants, must be held to refer to the price and not to the place of delivery, seems to us to be fully supported by the testimony.

[5] Appellants attack the court's finding on the second point, which is that even if it be assumed that defendants had agreed and were obligated by the contracts, to transfer the wheat from the dock in Seattle to the deck of the Kosmos vessel, that this provision was in the nature of a covenant for the benefit of the plaintiffs, which they could, and did, waive. This finding, we believe, should also be upheld. Neill v. Whitworth, 18 C. B. (N. S.) 435, 144 Eng. Reps. 513. Paraphrasing the language of the case just cited, we cannot see how it can be of any importance to the defendants whether they delivered the wheat on the Arlington, or some other dock in Seattle, as directed by plaintiffs, or on board a Kosmos steamer, provided such delivery did not impose on them any additional expense or undue delay. It seems to be clear to us that, even if the contracts so implied, it was a stipulation inserted for the benefit of the vendees, which they could, and under the facts of this case did, waive. That a party to a contract may waive a provision intended for his benefit, see Ellsworth v. Knowles, 8 Cal. App. 630, 97 Pac. 690. Counsel for both sides discuss in their briefs a recent case bearing upon the subject of the waiver of a covenant similar to the one under consideration here, to wit: Comyn & Mackel v. Douglas Fir Exploitation & Export Co., in the United States District Court for the Northern District of California, October 21, 1918. In that case the contract was for the sale of four cargoes of lumber. The vessels on which the cargoes were to be shipped were designated, and the further stipulation of the contract was:

"Delivery f. o. b. mill wharf, Knappton, within reach of vessel's tackles and/or on barges A. S. T. (at ship's tackles), mill wharf, Knappton, Washington."

One of the vessels, the W. H. Marston, never came to Knappton. The seller claimed that this was a breach of condition precedent, and that the buyer could not claim the right of delivery on barges, or at the dock, as the contract contemplated the presence of the vessel, W. H. Marston, ready to receive the lumber, in order to bind the seller to the obligation to deliver. Mr. Justice Van Fleet held that the provision, as to the lumber being delivered convenient to the ship's tackle was for the benefit of the purchaser, which he could waive, and was not one on which the defendant might rely.

[6] Defendants contend that both buyers and sellers were excused from performance of the contracts, by reason of the fact that war conditions rendered the contemplated means of performance unavailable; that is, because it was impossible to furnish a Kosmos steamer, both parties were released from all liability in the matter. We cannot agree with such contention. It is admitted that the plaintiffs were at all times ready, willing, and able, and attempted, to perform their part of the contract. There is no showing but that defendants were fully able to deliver the wheat contracted for, and as directed by the plaintiffs, at the place designated.

[7] In arriving at the amount of damages suffered by the plaintiffs, by reason of the breach of the contract, it was proper for the court to take into consideration the difference between the contract price agreed to be paid for the wheat by plaintiffs, and the market price, which may be taken as the value, of the same wheat in Seattle, during the month of September, 1914. The excess of the value of said wheat to the plaintiffs during that time, over and above the amount which would have been due to the defendants under the contract as the purchase price thereof, if it had been fulfilled, was the detriment caused by the breach of the defendants' agreement to deliver. Section 3308, Civ. Code.

We have considered the other points made by the appellants and have examined many cases cited in their briefs. We see no merit in the points presented on this appeal. Neither do we feel justified in attempting to

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distinguish the many cases cited by appellants. They are not sufficient, in our judgment, to overturn the legal conclusions arrived at by the trial court on the facts of this case.

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The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

(40 Cal. App. 703)

BAKERSFIELD IMPROVEMENT CO. v. BAKERSFIELD THEATER CO. et al.

(Civ. 2760.)

(District Court of Appeal, First District, Division 2, California. April 18, 1919.)

1. PROCESS ⟸59 — PARTIES NOT SERVED WITH PROCESS.

In action against corporation and two individuals, sureties on its bond, on their joint and several liability, where corporation was never served with summons and did not appear, Code Civ. Proc. § 414, providing that, where summons is served on one or more, plaintiff may proceed against the defendants served as if they were the only defendants, applies.

2. JUDGMENT ⟸240 — SEVERAL LIABILITY —SEVERAL JUDGMENT.

Where there is a several liability, the court may render a several judgment against any defendant without regard to the liability of any other defendant.

3. LANDLORD AND TENANT ⟸184(1)—SURETY BOND FOR PAYMENT OF RENT—EXTENSION OF TIME FOR EXECUTING BOND.

Where plaintiff's lease to defendant corporation, dated August 7, 1913, was not to begin until July 1, 1914, and required a bond to secure rent to be executed on or before January 1, 1914, and made a bond a condition precedent to taking effect of lease, a bond executed March 27, 1914, was good, as lessor might enlarge time for giving bond.

4. LANDLORD AND TENANT ⟸184(1)—SURETY BOND TO SECURE RENT—CONSIDERATION.

Consideration for such bond was execution and delivery of lease.

5. LANDLORD AND TENANT ⟸184(1)—OPERATION OF LEASE—"CONDITION PRECEDENT."

The parties did not intend that such lease should go into effect when it was signed, but it was not to go into effect until all conditions precedent were performed by lessee; a "condition precedent" being one which must be performed in order to have any rights vest.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Condition Precedent.]

6. LANDLORD AND TENANT ⟸184(1)—CONDITIONS OF LEASE—CONSTRUCTION.

The provision did not limit or enlarge rights of lessor or lessee, as, regardless of such provision, the agreement to provide security was a condition and not a covenant, permitting lessor to insist upon performance of condition or to waive it.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by the Bakersfield Improvement Company against the Bakersfield Theater Company and F. A. Giesea and Irving C. Ackerman as its sureties. Judgment for plaintiff against defendants Giesea and Ackerman, and Ackerman appeals. Affirmed.

Leon E. Morris, of San Francisco, for appellant.

Purcell Rowe, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the defendant Irving C. Ackerman from a judgment in favor of the plaintiff in the sum of $3,000 against him and the defendant F. A. Giesea, as sureties for the payment of rent under a lease in which the defendant corporation was the lessee.

[1, 2] Appellant contends, first, that, as the corporation defendant was never served with summons and did not appear, the action was never at issue and a trial was improper. The action was prosecuted against the several defendants upon their joint and several liability. Section 414, Code of Civil Procedure, applies to such a situation, and provides that, when summons is served on one or more, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants. Where there is a several liability, the court has a right to render a several judgment against any defendant, without regard to the liability of any other defendant. Anderson v. Nawa, 25 Cal. App. 151, 156, 157, 143 Pac. 555.

[3, 4] The appellant next presents the argument that the bond was given without consideration, and relies for this contention upon the following facts: The lease between the plaintiff and the corporation defendant was dated August 7, 1913. It provided that a bond should be executed on or before January 1, 1914, guaranteeing the payment of the rent thereunder. The term of the lease was not to begin until July 1, 1914. It was provided in the lease that the execution and delivery of the bond should, at the option of the lessor, be a condition precedent to the taking effect of the lease. The bond was not executed on January 1st. The bond in suit, in accordance with the requirements of the lease and in terms referring to the lease and guaranteeing its performance, was executed on March 27, 1914. The appellant insists that, as the bond was not executed contemporaneously with the lease, it required an independent consideration. Counsel for appellant admits that under the rule laid down in the case of Stroud v. Thomas, 139 Cal. 275, 72 Pac. 1008, 96 Am. St. Rep. 111, the execution of the lease would furnish a

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good consideration for the bond, even though they were not executed contemporaneously, where the lease itself, as in this case, provides for the execution of the bond at some future time. In order, however, to escape the operation of this rule, counsel urges that there was a special time limit placed upon the lessee within which to give the bond, and that, if it was not executed within that time, the privilege of exacting the bond came to an end, and the lessor was compelled either to avoid the lease under its option or to permit it to become effective without the giving of the bond. And this places counsel in a position where he must insist—as indeed he does—that the lessor could not enlarge the time for the giving of the bond, and could not indulge the lessee in further time without sacrificing his substantial rights.

The provision requiring a bond was clearly for the benefit of the lessor; the lessee was not to be given possession under the lease until six months after the time originally provided for the giving of the bond, and we know of no rule of law which would prevent the lessor from extending the time for the giving of the bond. It appears this was what was done in the present case. Under the lease, the Bakersfield Theater Company went into possession of the premises on July 1, 1914; the bond guaranteeing the payment of the rent having been executed and delivered prior thereto, to wit, March 27, 1914. This was the bond required by the lease, and the consideration therefor was the execution and delivery of the lease. While it is true that the lease provides that the bond shall be given on or before January 1, 1914, time was not made of the essence of the contract, and the lease does not provide at what date the option of the lessor to make the giving of the bond a condition precedent to the taking effect of the lease must be exercised. No time being provided within which this option might be exercised, it will be presumed that it was to be exercised within a reasonable time. Therefore it would seem that the lessor might be indulgent with the lessee in the matter of extending his time without waiving the option reserved to the lessor. The trial court found that the bond was executed and delivered for a good and valuable consideration, to wit, the execution and delivery of the lease, and that the plaintiff did not, prior to the execution and delivery of the bond to it, waive any of its rights or any option secured to it under said lease, and that said lease did not become binding and effective as an agreement between the parties until the execution and delivery of the bond. We think these findings are sustained by the evidence.

[5] Furthermore, and approaching the matter from another angle: It appears to us, from an examination of the entire lease, that the lease was never intended by the parties to go into effect until the various conditions precedent provided therein had either been fulfilled by the lessee or waived by the lessor. There was no oral evidence offered in the trial court, and we have before us for consideration merely the written instruments involved in the controversy. The lease provides that the execution of the bond shall be a condition precedent, at the option of the lessor, to the lease taking effect. It also provides that the expenditure of a certain sum of money by the lessee upon the premises for lights, display signs, etc., shall at the option of the lessor be a condition precedent to the lease taking effect. These provisions indicate to our minds that the parties did not intend the lease to go into effect at the time it was signed. A condition precedent is one which must be performed in order to have any rights vest. The lease, then, did not go into effect, and the lessee had no rights in the premises, until all conditions precedent to be performed by it had been performed or waived.

[6] The condition in the lease regarding the bond is as follows:

"It is further agreed that the second party will execute and deliver to the first party on or before the 1st day of January, 1914, a good and sufficient undertaking, with two or more sureties satisfactory to the first party, in the sum of three thousand dollars, conditioned for the payment of the rent hereinbefore reserved, and for the performance of the other covenants in this lease specified to be performed by said second party."

However, the appellant contends that the words which follow the above-quoted condition, and which read:

"The executing and delivery of said bond as is herein provided for, shall at the option of the first party be a condition precedent to this lease taking effect"

—limit and restrict the rights of the lessor in some way so as to put upon said lessor the duty of taking some affirmative action, failing in which he must give up the right to insist upon the condition. We think that this last-quoted sentence neither limited nor enlarged the rights of the lessor or the lessee, for even without the express stipulation that this agreement should be a condition precedent, such an agreement to provide security for the payment of the rent stipulated in the lease is a condition and not a covenant. Knight v. Black, 19 Cal. App. 518, 126 Pac. 512.

"There is a decided distinction between the creation and effect of a condition and a covenant. * * * A breach of a condition upon which an estate is granted works a forfeiture of the estate, while a breach of a covenant is merely ground for a recovery of damages." Knight v. Black, supra.

In view of the right given by the law to insist upon the performance of the condition, and in view of the further right given by the

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law to the lessor to waive this condition if he so desired, this sentence expresses nothing more than what the law would imply, viz., that the lessor might insist upon the performance of the condition, but that he might waive that condition if he wished. This being true, the burden is upon the defendant and appellant here to show such waiver. He has not shown it. On the contrary, it appears that the defendant executed and delivered a bond to secure the payment of the rent to become due under the lease, and that the lease went into effect at the commencement of the term thereof. This bond is the one originally provided for, and has the same force and effect as if given at the time originally contemplated by the parties. This being true, the bond relates back to and takes effect in pursuance of the original agreement, and is supported by the original consideration. Stroud v. Thomas, 139 Cal. 274, 72 Pac. 1008, 96 Am. St. Rep. 111.

The judgment is affirmed.

We concur: HAVEN, J.; BRITTAIN, J.

(107 Wash. 221)

WALTERS v. SIEVERS et al. (No. 15155.)

(Supreme Court of Washington. May 28, 1919.)

1. MASTER AND SERVANT ⟸217(17)—INJURIES SUSTAINED IN CARE OF VICIOUS ANIMALS.

Generally one employed to care for a vicious and dangerous animal, which he knows to be such, cannot recover for an injury, though the animal be of a species that is domestic and ordinarily docile.

2. MASTER AND SERVANT ⟸222(2) — DIRECTION OF MASTER—CARE OF VICIOUS COW.

A servant employed to care for an animal known to be vicious may recover for an injury received in the performance of an act, though directed by the master, if the servant acts with that degree of prudence which an ordinarily prudent man would exercise under the circumstances; but, if the act be one which no reasonably prudent person would undertake, he cannot recover.

3. MASTER AND SERVANT ⟸288(16)—QUESTION FOR JURY—DANGER OF ACT DIRECTED BY MASTER.

If there is room for two opinions concerning the dangers of an act directed by the master, it is for the jury to say whether the act was such that no reasonably prudent person would undertake it, regardless of the assurances given.

4. MASTER AND SERVANT ⟸288(16) — QUESTION FOR JURY—DANGER OF ACT DIRECTED BY MASTER.

Where a laborer knew that a cow was not docile, but had milked and tended her for some weeks without injury, it could not be said, as a matter of law, that he assumed the risk of injury when, in obedience to the owner's direction, he undertook to remove a halter.

Chadwick, C. J., and Mount, J., dissent.

Department 2.

Appeal from Superior Court, Adams County; John Truax, Judge.

Action by W. S. Walters against Nick Sievers and others. From judgment for plaintiff, defendants appeal. Affirmed.

Adams & Naef, of Ritzville, for appellants.

G. E. Lovell, of Ritzville, for respondent.

FULLERTON, J. The respondent brought this action against the appellants to recover in damages for personal injuries received from a bunt of a "muley" or dehorned cow.

The evidence over which there is no dispute discloses that the appellants are farmers, engaged in conducting a large farm on which they keep the domestic animals usual in such cases. The respondent was employed by the appellants to care for the animals, a part of his duty being to milk the cows. The cow causing the injury was one of those he was required to milk. This cow had become fresh about a month before the injury, and was kept in a stall in a stable, to the manger of which stall she was fastened with a halter and chain. From the time of becoming fresh to the time of the injury the cow was not turned out of the stall, but was fed and watered while therein by the respondent. She had a propensity to kick when being milked, and to prevent or check this the respondent fastened a strap around her body immediately in front of her udder. The strap was not removed from the cow between milking times, and the evidence is silent as to whether it was even loosened between these intervals.

The evidence concerning the transactions at the time of the injury is widely divergent. The respondent testified that on the evening of the injury, after the cow had been milked, he returned to the stable and found the cow bellowing and pawing and striking with her front feet; that he called to one of the appellants who came into the stable and looked at the cow; that the appellant, after looking at her for a moment, told him to remove the halter and turn her loose and not try to milk her any longer; that he objected to going into the stall while the cow was in her enraged condition, but was assured by the appellant that she would not harm him; that he went into the stall on receiving that assurance and was attempting to remove the halter when the cow lunged at him, catching his leg between her head and the manger and causing the injury for which he sues. He further testified that the cow was vicious and dangerous, and that he had at various times, protested to the appellants against

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milking her because of her disposition, but was told each time to milk her a little longer, when she would be turned out to pasture.

The particular appellant to whom the respondent referred testified that he was called into the stable for an entirely different purpose than that stated by the respondent; that another cow which had recently calved was in the stable, whose udder was so swollen and sore that she would not nurse her calf; and that he was called in to advise some form of relief for her. He further testified that the cow of which the respondent complains was quiet when he entered the stable; that he entered her stall for the purpose of removing the strap from her body, intending to use it on the other cow; that the cow turned her heels toward him causing him to "jump back," when the respondent told him to stay out of the stall, as he was like a stranger there and proceeded to remove the strap himself, when he was bunted as he testified. He denied that the cow was vicious or dangerous, or that the respondent had ever complained to him that she was so. Others of the appellants also testified to the disposition of the cow, stating that she was neither vicious nor dangerous, and that no complaints had been made to them by the respondent concerning her disposition.

The jury returned a general verdict finding in favor of the respondent in the sum of $181. They also returned the following special verdict:

"We, the jury, duly impaneled and sworn to try and determine the special questions of fact in the above-entitled cause submitted to us, and to render a special verdict therein, do find, in answer to the special interrogatories submitted to us, as follows, to wit:

"Interrogatory 1. Was the cow in question vicious or dangerous? And, if so, did Nick Sievers or any of the defendants know that fact? (Answer fully.) Answer. Yes.

"Interrogatory 2. Did the plaintiff remove a strap from the cow in question? And, if so, was he commanded or directed to do so by one of the defendants, or did he do so voluntarily, of his own free will and accord? (Answer fully.) Answer. No. No; he was not commanded to do so.

"Interrogatory 3. Was plaintiff injured as he claims? And, if so, do you find that he is entitled to recover in this action? Answer. Yes.

"If so, how much is he entitled to recover on account of expenses for medical attendance, if anything? Answer. $31.00.

"If so, how much, if anything, is he entitled to recover on account of loss of earnings? Answer. Three months' salary at 50 per month, $150.00.

"If so, how much should he recover, if anything, because of pain and physical suffering? Answer. None.

"If so, has plaintiff suffered injuries of a permanent character? And how much, if anything, do you award him on this ground? Answer. None.

"Dated this 20 day of June, 1918.

"J. C. Koch, Foreman."

At the close of the respondent's case in chief, the appellants moved for a dismissal of his action on the ground of insufficiency of the evidence, and, after the return of the verdict and before judgment was entered thereon, moved for judgment notwithstanding the verdicts, and, in the alternative, for a new trial. These motions the trial court overruled, and the assignments of error on this appeal are based on the rulings of the court denying the motions.

[1] In this court the appellants do not argue their assignments of error separately. It is contended, or if not contended assumed, that the answer of the jury to the second interrogatory negatives the respondent's contention that he was directed by the appellant, whom he called to the stable at the time of the injury, to remove the halter from the cow and turn her loose, and argue that this finding, taken with the respondent's testimony to the effect that he knew the cow was vicious and dangerous, precludes a recovery by him. If the contention with reference to the answer has foundation in fact, there is much force in the argument. It is the general rule undoubtedly, although perhaps not sustained by all of the cases, that one employed by an owner to care for a vicious and dangerous animal, which he knows to be such, cannot recover from the owner for an injury received while in the exercise of such care, even though the animal be of a species that is domestic and ordinarily docile. But we cannot thus interpret the jury's finding. It will be remembered that the witnesses were widely divergent as to the occurrences at the time of the injury. Both the appellant and the respondent testify that the cow had a halter on her head, with which she was tied to the manger, and that she had a strap around her body, placed thereon to prevent kicking while she was being milked. The respondent's version of the transaction was that he was directed to remove the halter from the cow's head and turn her loose, and emphatically denied that he was directed to remove the strap which was around her body. The appellant witness' version was that the removal of the strap from around the cow's body was the object sought to be accomplished, and that nothing was said about removing and no attempt was made to remove the halter. An inspection of the interrogatory will disclose that the jury were asked concerning the removal of the strap, not the removal of the halter, and that their answer is plainly in accord with the evidence concerning the strap. They were not required to, nor did they, answer specially with reference to the fact whether the respondent was directed to remove the halter.

The jury therefore found with the respondent's version of the transaction; that is, they found that the respondent was directed to remove the halter, not the strap, and that he

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was directed so to do by the appellant whom he called into the stable. This they did, not only by their general verdict in favor of the respondent, but also by their special verdict in answer to the third interrogatory, where they found that the respondent was "injured as he claims" and "is entitled to recover in this action."

[2, 3] The question for determination as we view it then is: Can an employé, employed by an owner, to care for an animal known by the employé to be vicious and dangerous, recover for an injury received by him while performing an act in the care of such animal, which is performed under the immediate supervision and direction of the owner. The answer to this question, it is clear, must depend upon the facts of the particular case. A servant cannot recover from the master for an injury received in the performance of an act, although directed by the master, if the act directed be one which no reasonably prudent person, having regard for his own safety, would undertake; or, to state the proposition in another way, where the dangers of performance are so apparent that there can be no room for two opinions concerning it. On the other hand, a servant may recover for an injury received in the performance of an act directed by the master, even if the servant has some knowledge of the dangers of performance, if he acts with that degree of prudence which an ordinarily prudent man would exercise under the circumstances. This latter rule is founded on plain principles of justice. The master and servant are not altogether upon an equal footing. It is the right of the master to direct his servant, and the primary duty of the servant is to obey. The master ordinarily has superior knowledge of the facts and conditions, and the servant has a right to assume that the master will not expose him to unnecessary perils. Hence if there is room for two opinions concerning the dangers of the particular act directed, it is for the jury to say whether the servant acted with that degree of prudence which will permit a recovery when injury ensues, or whether the act was such that no reasonably prudent person would undertake it, regardless of the assurances that were given him.

[4] In the present instance we think the question of the appellants' liability was properly submitted to the jury. The animal the respondent was employed to tend was not one belonging to a species wild and ferocious by nature; one which it could reasonably be supposed he was employed to care for because of his expert knowledge or special fitness for the purpose. On the contrary, the animal was an ordinary domestic animal of a species usually mild and docile. While he had learned in the course of his employment that the particular animal was not of that docile character usual in animals of this class, yet he had milked and otherwise tended her for some weeks without being injured by her, and we think it too much to say that as a matter of law he assumed the risk of injury when in obedience to the direction of the owner he undertook to remove the halter with which she was tied at the time in question.

The judgment is affirmed.

HOLCOMB and PARKER, JJ., concur.

CHADWICK, C. J., and MOUNT, J. The character and disposition of the animal was apparent, and for that reason the respondent assumed the risk. We therefore dissent.

(107 Wash. 282)

STATE ex rel. DYSART et al. v. GAGE, County Auditor. (No. 15242.)

(Supreme Court of Washington. May 31, 1919.)

SCHOOLS AND SCHOOL DISTRICTS ⟹79 — AUTHORITY TO EMPLOY COUNSEL—STATUTES.

Under Laws 1909, p. 265, § 2, delegating broad corporate powers to school districts, despite Rem. Code 1915, § 116, directors of a school district, on the advice of the prosecuting attorney of the county, had authority to employ attorneys to protect the rights of the district and to straighten out its affairs, greatly involved on account of it and other districts, acting on the advice of the prosecuting attorney, having attempted to form a consolidated district, etc.; prosecuting attorney being unable to act, and necessity of legal aid being urgent.

Department 1.

Appeal from Superior Court, Lewis County; W. A. Reynolds, Judge.

Petition for mandamus by the State, on the relation of George Dysart and others, against Bertha S. Gage, as Auditor of Lewis County, etc. Judgment for relators, and defendant appeals. Affirmed.

Herman Allen, of Chehalis, and J. H. Jahnke, of Centralia, for appellant.

A. A. Hull, of Chehalis, for respondents.

MACKINTOSH, J. The relators ask for a writ of mandate to compel the auditor of Lewis county to issue warrants to them in compensation for legal services performed for school district No. 78, of Lewis county; these services having been rendered at the request of the directors of that district. School districts Nos. 35, 57, and 78, acting upon the advice of the prosecuting attorney of the county, attempted to form a consolidated district, as provided by law, and in pur-

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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suance of that advice held an election to vote upon that consolidation and attempted to bond the consolidated district, and, still in compliance with the advice of the prosecuting attorney, built a schoolhouse, which was situated in district No. 78, and incurred an indebtedness therefor of approximately $10,000. When the bonds had been voted upon, and the schoolhouse had been nearly completed, the officers of the consolidated district were advised that the bonds were illegal, and that the purported consolidated district had been illegally formed. Thereafter the directors of school district No. 78 consulted with the relators, and upon the advice of the prosecuting attorney employed the relators to protect the rights of the district and to straighten out its affairs. Pursuant to that employment the relators commenced actions, which resulted in the restraining of the officers of the purported consolidated district from any further functions, and rendered such further legal services as to result in the taking over of the schoolhouse by district No. 78, and validating the indebtedness of that district. Further legal services were rendered, which resulted in unraveling the tangle in which the district affairs had become involved. The directors of the school district approved of the bill rendered by the relators for their services, and requested the appellant, as auditor of Lewis county, to sign and register the warrants drawn in payment of such services. The appellant refused to comply with that request. This action having been commenced, the appellant demurred to the complaint, and, the demurrer having been overruled, brings this appeal.

The appellant asserts her refusal to sign and register the warrants to be based upon the fact that section 116, Rem. Code, provides:

"The prosecuting attorney of each county shall have authority and it shall be his duty, subject to the supervisory control and direction of the Attorney General, to appear for and represent the state and the county and all school districts in the county in which he is a prosecuting attorney, in all criminal and civil actions and proceedings in such county in which the state or such county or such school district is a party"

—and that under this section directors of school districts are not authorized to employ counsel, but must rely upon the services of the prosecuting attorney of the county, and claims that this case is not to be distinguished from the case of State ex rel. State Board of Medical Examiners v. Clausen, 84 Wash. 279, 146 Pac. 630, where we held that the state board of medical examiners had no authority to employ special counsel to prosecute violations of the statute relating to the practice of medicine.

It would seem that the power of the state board of medical examiners and the power of directors of school districts to employ counsel are not on a parity. The state board of medical examiners is not a municipal corporation, but is a board in the nature of a state office, and the act creating it gave it no authority greater than that possessed by all state officers, who must look to the Attorney General as their legal adviser. Moreover, in the case of State ex rel. State Board of Medical Examiners v. Clausen, above, the state board of medical examiners was shown to be endeavoring to employ private counsel to prosecute criminally those whom the board claimed were violating the criminal statutes. This it could not do, for the prosecution of criminal actions has been placed in the hands of the Attorney General, and the various prosecuting attorneys of the state. The act which creates school districts constitutes them municipal corporations. Title 3, chapter 2, article 2, section 2, chapter 97, Laws 1909, provides:

"A school district shall constitute a body corporate and shall possess all the usual powers of a corporation for public purposes, and in that name and style may sue and be sued, purchase, hold and sell such personal and real estate, and enter into such obligations as are authorized by law; and the title to all school buildings or other property, real or personal, owned by any such school district shall, upon the organization of a district under the provisions of this act, vest immediately in the new district, and the board of directors of such school district shall have exclusive control of the same for all purposes herein contemplated."

This is a delegation of broad corporate powers, and must include the right to employ special counsel when, as here, the prosecuting attorney cannot act and the necessity for legal aid is urgent. The statute heretofore referred to regarding the prosecuting attorneys is merely a definition of their powers, and does not attempt to restrain, modify, or define the powers of boards of school directors.

In the case at bar a recital of the facts demonstrates the fact that the prosecuting attorney advised the board of school directors of district No. 78 to employ the relators, and it is apparent that the proper attention to the affairs of the district demanded that counsel be procured to represent it, and the prosecuting attorney, being the adviser of all the school districts, could not, in the nature of things, properly represent the interests of this district, when they had become antagonistic to the interests of the two other districts with which a consolidation had been attempted. An urgent necessity existed for procuring special assistance, and it was only in meeting this necessity and upon the advice of the prosecuting attorney that the relators were employed. Under such circumstances the board of school directors had authority to enter into the con-

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tract of employment, and the relators are entitled to their compensation, which it is admitted, is in a reasonable sum. The reasoning in the case of Wiley v. Seattle, 7 Wash. 576, 35 Pac. 415, 38 Am. St. Rep. 905, and Reed v. Gormley, 47 Wash. 355, 91 Pac. 1093, would seem to confirm our position in this case.

The judgment of the lower court is affirmed.

MITCHELL, MAIN, FULLERTON, and TOLMAN, JJ., concur.

(104 Wash. 21)

ROCHE et al. v. MADAR et al. (No. 14798.)

(Supreme Court of Washington. June 28, 1919.)

En Banc.

Appeal from Superior Court, Spokane County; Hugo E. Oswald, Judge.

On rehearing. Affirmed.

For former opinion, see 175 Pac. 314.

Allen, Winston & Allen and B. B. Adams, all of Spokane, for appellants.

F. C. Highsmith, F. W. Girard, and John H. Roche, of Spokane, in propria personæ.

PER CURIAM. Upon a rehearing en banc, a majority of the court still adhere to the opinion heretofore filed herein, as reported in 175 Pac. 314, and for the reasons there stated the judgment is affirmed.

CHADWICK, C. J. (dissenting). While we have not been inclined to apply the doctrine of laches within the period of statutory limitation, we have, in common with other courts, held that the doctrine is peculiarly applicable where mining property is involved.

"The doctrine has been applied in such cases because the character of the property or the manner of its transfer, and all the incidents attending its use and ownership, are circumstances to be considered." Gray v. Reeves, 69 Wash. 374, 125 Pac. 162.

It is because mining property is speculative in character and subject to sudden and violent fluctuations in value, and what may be worthless to-day may become of great worth through the faith and industry of one owner as against a lagging, noncontributing partner.

"Property worth thousands to-day is worth nothing to-morrow; and that which would to-day sell for $1,000 as its fair value may, by the natural changes of a week or the energy and courage of desperate enterprise, in the same time be made to yield that much every day. The injustice, therefore, is obvious of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit." Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 592, 593 (23 L. Ed. 328).

See, also, 3 Lindley on Mines, § 782; 18 R. C. L. title "Mines," § 149, pp. 1253, 1254.

Granting all that respondents claim, I cannot distinguish this case from Patterson v. Hewitt, 195 U. S. 309, 25 Sup. Ct. 35, 49 L. Ed. 214; Johnston v. Standard Mining Co., 148 U. S. 360, 13 Sup. Ct. 585, 37 L. Ed. 480; Waterman v. Banks, 144 U. S. 394, 12 Sup. Ct. 646, 36 L. Ed. 479; Steinbeck v. Bon Hommé Mining Co., 152 Fed. 333, 81 C. C. A. 441; Jackson v. Jackson, 175 Fed. 710, 99 C. C. A. 286; Cunningham v. Independence Con. Mining Co., 58 Wash. 371, 108 Pac. 956; Ferrell v. Lord, 43 Wash. 667, 86 Pac. 1060; Gamble v. Silver Peak, 34 Nev. 351, 432, 126 Pac. 111; Great Western Min. Co. v. Woodmas, 14 Colo. 90, 23 Pac. 908; Graff v. Portland T. & M. Co., 12 Colo. App. 106, 54 Pac. 854; Rogers v. Van Nortwick, 87 Wis. 414, 58 N. W. 757, and the decision of this court in Florence-Rae Copper Co. v. Iowa Mining Co., 178 Pac. 462, which was decided after our opinion in the principal case was handed down; and, with all due respect to the decision of the court, the cases I have cited are not distinguished, although we were invited to do so by counsel.

There are other grounds which, in my judgment, justify an overruling of our former opinion and a reversal of the case. They are not discussed in the opinion, and, the court being disinclined to treat them as worthy of comment, it would avail nothing for me to discuss them; but, if respondents are to recover, it would seem to be no more than just to compel a payment pro tanto on the cost of proving the mining claim, and because of which respondents now see fit to assert an interest in it. They have eaten their cake and have it, and of this can any man say more?

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(107 Wash. 430)

GREENE v. CARRISON et al. (No. 15290.)

(Supreme Court of Washington. June 24, 1919.)

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LANDLORD AND TENANT ⟸291(7)—UNLAWFUL DETAINER—PREMATURE ACTION.

Where plaintiff, having a lease ending August 31st, sublet to defendants to August 15th, with provision for renewal if plaintiff got one, action in unlawful detainer, brought August 17th, was not premature; plaintiff having, prior to August 15th, been notified an extension would not be given, and in turn having so notified defendants.

Department 1.

Appeal from Superior Court, King County; Clay Allen, Judge.

Action by Irving Greene against John Carrison and others. From an adverse judgment, plaintiff appeals. Reversed.

Elias A. Wright and Sam A. Wright, both of Seattle, for appellant.

Van C. Griffin, of Seattle, for respondents.

MITCHELL, J. By a written lease plaintiff became a tenant of a storeroom in the Liberty Building, in Seattle, for a term commencing March 10, 1917, and ending August 31, 1918. On August 18, 1917, by an agreement in writing he sublet a portion of the premises from that date to August 15, 1918, to persons who transferred their rights and possession to defendants, with the consent of plaintiff. Upon refusal of defendants to vacate the premises on August 15, 1918, plaintiff instituted this action in unlawful detainer on August 17, 1918, wherein, by a writ of restitution executed by the sheriff, the premises occupied by defendants were restored to plaintiff on August 22, 1918. In the agreement by which defendants held the premises, plaintiff represented he had the privilege, in a certain manner, of a renewal of the lease under which he held, and agreed that, in the event he succeeded in getting a renewal of his lease, the privilege of an extension would be given the sublessees.

At the trial, on November 15, 1918, the evidence showed that plaintiff had relied upon an oral promise of his lessor for the extension of his lease referred to, but that prior to August 15, 1918, he was notified by his lessor an extension of his tenancy could not, and would not, be given, and plaintiff in turn so notified defendants some time prior to the expiration of their subtenancy. Plaintiff surrendered possession to his lessor on August 31, 1918, as provided by the terms of the lease. At the conclusion of plaintiff's proof, the trial court granted a nonsuit against plaintiff, holding that whatever rights he had from his lessor would pass to defendants as to that portion of the property sublet to them, thus entitling defendants to the right of possession until August 31, 1918, and entered judgment accordingly. Plaintiff has appealed.

The agreement by which respondents held the property specifically provided for a tenancy ending August 15, 1918. True, the sublease provided:

"And it is agreed that in the event the lessor, or his assignee, succeeds in renewing his original lease, that the lessees herein named shall likewise have the privilege of renewing this lease. * * *"

But, as already noticed, appellant was unable to get an extension, and seasonably notified respondents to that effect.

The action was not prematurely brought, and the judgment is reversed.

HOLCOMB, C. J., and MAIN and MACKINTOSH, JJ., concur.

(105 Wash. 508)

FARMERS' GRAIN & SUPPLY CO. v. LEMLEY. (No. 14883.)

(Supreme Court of Washington. May 31, 1919.)

1. EVIDENCE ⟸18—JUDICIAL NOTICE—BULK AND SACK WHEAT—VALUE.

The court will take judicial notice that bulk wheat differs from sack wheat, in that the latter includes the labor of sacking and the cost of the sacks and commands a higher price in the market than bulk wheat.

2. SALES ⟸83—CONTRACT TO SELL AND DELIVER BULK WHEAT — DUTY TO DELIVER SACKED WHEAT.

Where defendant, a farmer, contracted to sell wheat to plaintiff, a grain buyer, to be delivered at a particular place in bulk, the defendant was under no duty in any event to deliver the wheat sacked.

3. SALES ⟸87(1)—CONTRACT—PLACE OF DELIVERY—PRESUMPTION.

Where the place of delivery of wheat sold was mutually agreed upon and named in the contract, it is immaterial which party first proposed it, and it will be presumed a public warehouse, as it cannot be assumed that the parties contracted for delivery at a private warehouse controlled by neither, without consulting the party in control.

4. SALES ⟸201(4)—PASSING OF TITLE ON DELIVERY—DELIVERY TO AGREED WAREHOUSE.

Under contract to sell and deliver wheat at a specified warehouse, when wheat was there delivered it would belong to buyer, and the warehouseman would become buyer's agent to care for it, and not the agent of the seller whose interest would cease on delivery.

5. SALES ⟸153—DELIVERY—TENDER.

Where seller informed buyer that the warehouse at which wheat was to be delivered was

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unable to receive same and that he was ready to make delivery, and he waited a reasonable time thereafter for buyer to furnish a place of delivery without additional labor or expense, there was a sufficient tender if tender was required.

6. SALES ⟸172 — DELIVERY OF GRAIN—CHANGE OF PLACE OF DELIVERY—INSUFFICIENT PROPOSALS OF BUYER — BREACH OF CONTRACT.

Where a warehouse at which wheat was to be delivered under sale contract was unable to receive the same within the time contracted for delivery, and the buyer proposed that the wheat be sacked, but did not offer to furnish sacks, or labor of sacking and offered to pay for the wheat and permit the seller to make delivery later, but refused to permit immediate grading and weighing to prevent subsequent loss in quantity or quality from falling upon the seller, seller was justified in abandoning the contract.

En Banc.

On rehearing. Former opinion reversed, and judgment affirmed.

For former opinion, see 178 Pac. 640.

PER CURIAM. Upon a rehearing en banc, a majority of the court adopts the dissenting opinion heretofore filed in this case and published in 178 Pac. 640, as the opinion of the court; and the judgment appealed from will be affirmed.

(107 Wash. 274)

MILLER v. KEMPER. (No. 15101.)

(Supreme Court of Washington. May 31, 1919.)

1. PARTNERSHIP ⟸108 — SUIT BETWEEN PARTNERS BEFORE DISSOLUTION—ADVANCEMENTS.

While there is an exception to the rule that one partner cannot sue another before partnership dissolution, under which a partner may sue another for advancements which he has made to the other, such exception does not include advancements constituting a loan from a partner to the partnership, which cannot be collected until after accounting has been had, primary creditors protected, and the partnership dissolved.

2. PLEADING ⟸205(1)—COMPLAINT—SUFFICIENCY AGAINST GENERAL DEMURRER.

A general demurrer to a complaint should have been sustained, where the complaint was insufficient without a wrong interpretation which the pleader put upon a written instrument.

Chadwick, C. J., dissenting.

Department 1.

Appeal from Superior Court, Thurston County; John R. Mitchell, Judge.

Action by John R. Miller against George H. Kemper. Defendant's demurrer to complaint being overruled, and he standing upon it, judgment was entered for plaintiff, and the defendant appeals. Judgment reversed.

Parr & Marts, of Olympia, for appellant.

Thomas M. Vance, of Olympia, for respondent.

MACKINTOSH, J. The respondent and appellant and George B. Branch entered into a partnership agreement looking towards the operation of a farm owned by them, the agreement providing, among other things, that:

"* * * During the absence of said Kemper the other partners may expend such amounts as may be necessary to the upkeep or improvement of the place, notifying said Kemper of such expenditures. If they pay out their own private funds, they are to be allowed 6 per cent. interest on such amounts expended until reimbursed, but under no circumstances are they, or either of them, to buy goods on credit, or in any way obligate the ranch for supplies to an amount over $250, unless the funds are on hand to pay such obligations, either of their own or the company's funds."

The complaint, after calling attention to this agreement, states that the partnership is still continuing, not having been dissolved, and that the respondent "has advanced to the said partnership and for its use and benefit in the upkeep and improvement of the farm property a total sum of $14,171.03." It is then alleged that the three partners have contributed the sum of $36,008.75, and that each partner's contribution should be one-third of that sum, and that the respondent by reason of his advancement has contributed more than his share, and that the sum of $399.91 "represents the contribution to the partnership capital made by the respondent to the benefit individually of the appellant." To this complaint the appellant demurred, and, the demurrer being overruled, and he standing upon it, judgment was entered in accordance with the prayer of the complaint.

[1] The complaint attempts to interpret the portion of the partnership agreement which we have quoted in this manner:

"* * * That by the terms of the partnership agreement each partner was authorized to advance moneys for the use and benefit of the said partnership as might become necessary in the improvement or upkeep of the said farm, and when such advancement was made the partner so making the advancement was and is to be allowed 6 per cent. interest on such advancements, the same becoming a charge against the other two partners in proportion to their interest and investment."

Respondent concedes the rule to be that one partner cannot sue another before dissolution of the partnership on a claim growing out of the partnership business. The appellant asserts his right to be relieved from the

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operation of this rule of law by resort to the exception that one partner may sue another on an obligation which does not grow out of the partnership, although it may in some degree relate to the partnership, the appellant claiming that the advancement was not made to the partnership, but was an advancement to his partners as individuals. It is, of course, true that there obtains such an exception to the rule, and one partner may sue another for advancements which he has made to the other, which advancements may have been used in the partnership business, but this exception cannot be invoked in the present case, for, as we read the contract, the advancements which are sought to be recovered here are, by the terms of the agreement, advancements made to the partnership, and constitute a loan on the part of the respondent to the partnership which cannot be collected until after an accounting has been had and primary creditors have been protected and the partnership dissolved.

[2] That portion of the complaint which seeks to charge the advancement against the appellants individually is not good against the demurrer for the reason that it is an interpretation which the pleader has put upon a written instrument, an interpretation contrary to our view of the agreement. The complaint, disregarding this improper interpretation, does not state facts sufficient to constitute a cause of action, and the demurrer should have been sustained.

The judgment of the lower court will be reversed.

MAIN, TOLMAN, and FULLERTON, JJ., concur.

CHADWICK, C. J. (dissenting). By articles signed December 10, 1910, the three parties became equal in a partnership of indeterminate duration. There is no provision in the contract fixing or limiting the amount of capital to be employed, nor any provision as to when or how contributions shall be made, other than the one quoted in the majority opinion. It is clear the partners knew Kemper, the appellant, was to be absent a part of the time, during which Miller, the respondent, was authorized to advance money for the benefit of the business, with the agreement if he did so out of his private funds he should be reimbursed therefor, with interest at 6 per cent. There can be no reasonable and natural understanding of the contract other than that permitting Miller to recover from Kemper whatever amount he advanced, with interest, for Kemper's benefit, keeping in mind the equality of their relations to the partnership business. Any other construction of the contract would impose upon respondent a greater risk than he assumed in the agreement that the partners were to share equally in the losses. Indeed, all the parties so understood it, because the complaint specifically alleges "that about May 4, 1912, a settlement was had between the partners and a balance struck." Immediately the complaint then sets out the total amount invested in the business, the amount paid in by each that the amount furnished by each of the others is less than one-third of the total, and that respondent's overpayment was to the advantage of appellant in the sum of $399.91, for which judgment was demanded. Appellant's demurrer admits this. There is no necessity to invoke the liberality enjoined by section 285, Rem. Code, in the construction of pleadings, to observe that the effect of the allegations of the whole complaint (notwithstanding some portions thereof in the nature of conclusions or surplusage that were not moved against by appellant) is to recover for an oversubscription to the capital of the partnership made by respondent for appellant's benefit, according to the terms of the covenants in the contract, due upon a settlement between the parties and a balance struck. In such case the rule admitted in the majority opinion is:

"An action may be brought on a note or other obligation, given by one partner to another for a valid consideration, although the transaction may inure to the benefit of the firm. * * *" 30 Cyc. 467.

Story on Partnership (7th Ed.) p. 345, § 219, states the rule to be as follows:

"It is true that one partner may maintain an action at law against the other partners or any one or more of them for moneys advanced or paid or contributed at their request for their separate and distinct account and benefit."

2 Bates, Partnership, § 878, says:

"The real test is not solely whether the action can be tried without going into the partnership accounts, but whether the defendant has bound himself personally to the plaintiff."

Among other authorities to the same effect are Ryder v. Wilcox, 103 Mass. 24; Benton v. Hunter, 119 Ga. 381, 46 S. E. 414; Wright v. Michie, 6 Grat. (Va.) 354; Carpenter v. Greenop, 74 Mich. 664, 42 N. W. 276, 4 L. R. A. 241, 16 Am. St. Rep. 662; Bates v. Lane, 62 Mich. 132, 28 N. W. 753; and Mitchell v. Wells, 54 Mich. 127, 19 N. W. 777.

An action of this kind in no sense disturbs the rights of creditors with reference to the partnership assets or its liabilities, or the liabilities of the partners.

The judgment of the lower court should be affirmed.

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(107 Wash. 280)

APPLETON v. APPLETON. (No. 15231.)

(Supreme Court of Washington. May 31, 1919.)

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DIVORCE ⟸133(3)—ATTEMPTED RECONCILIATION—EVIDENCE.

Plaintiff in divorce *held* not to have sustained the burden of proof of bona fides of his alleged attempt at reconciliation and offer to resume marital relations, made shortly after defendant, in prior action by plaintiff for divorce, was decreed separate maintenance.

Department 1.

Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Action by Wilbur H. Appleton against Adelaide Appleton. From adverse judgment, plaintiff appeals. Affirmed.

Robertson & Miller and Rosenhaupt & Grant, all of Spokane, for appellant.

Merritt, Lantry & Merritt, of Spokane, for respondent.

PER CURIAM. This action follows Appleton v. Appleton, 97 Wash. 199, 166 Pac. 61. Plaintiff began this action for divorce, alleging defendant's repudiation of a bona fide attempt to reconcile their differences and to live together as husband and wife. The court found as a fact that the efforts and offer of the plaintiff were not in good faith, and denied a divorce.

The question of good faith is a question of fact. We have read the record, and, having in mind that in the former action the plaintiff's prayer for a divorce was denied; that the defendant was given a decree of separate maintenance, thus establishing that the fault up to that time was in plaintiff; that the burden of proof is upon plaintiff to establish that his offer to resume marital relations with his wife was made in good faith, with an honest intention that it should be accepted, and with the further honest intention of fulfilling his marital duties, and not for the purpose of laying a foundation for a future suit for divorce, we cannot say that plaintiff has sustained the burden. The evidence is practically one against the other, and in view of the decree in the preceding case and the finding of the trial judge, who had both parties before him and could measure their conduct and attitude when upon the witness stand, and in view of the fact that the offer was made within two weeks after the decree in the former case, while the smart of the former trial was still burning and was possibly a matter of public comment and gossip, it would seem that defendant would have the right to require some evidence of good intention other than the mere word of plaintiff. It would serve no end to rehearse the testimony in detail. It is enough to say that it is our judgment plaintiff has not sustained the burden of proof that the law puts upon him.

Affirmed.

(107 Wash. 306)

BRENGMAN v. KING COUNTY. (No. 15328.)

(Supreme Court of Washington. May 31, 1919.)

1. HIGHWAYS ⟸194 — COUNTY HIGHWAY — OBSTRUCTIONS—DUTY OF COUNTY—SHOWING LIGHTS.

It is the duty of a county to show such lights, around a place where an obstruction exists and where automobiles are accustomed to pass, that one approaching can see that a dangerous condition exists.

2. HIGHWAYS ⟸213(2)—OBSTRUCTION—ACTION FOR INJURIES—QUESTION FOR JURY—PLACING LIGHTS.

In action for injuries received from running into a barricade in a county highway at night, question whether the barricade had been so constructed and the lights so placed that automobile drivers would not be liable to destroy the lights in passing *held* to be a question of fact for the jury, in view of testimony that lights so placed had been twice destroyed before the injury.

3. HIGHWAYS ⟸213(2)—OBSTRUCTIONS—ACTION FOR INJURIES—QUESTION FOR JURY—DUTY OF COUNTY—WARNING.

In action for injuries received from running into a barricade on county highway at night, whether, in view of the destruction of lights at the barricade by passing automobiles prior to the injury, the county had done its full duty in giving sufficient warning to protect the public from possible injury was not a matter of law for the court's determination, but a question of fact for the jury.

4. TRIAL ⟸139(1)—QUESTIONS OF LAW OR FACT.

Where the whole situation in a given case does not point so conclusively to the conclusion that there can be no chance for dispute or argument, the question should not be decided by the court as a matter of law, but should be submitted to the jury as one of fact.

5. APPEAL AND ERROR ⟸169 — QUESTIONS NOT RAISED BELOW.

A point which was not raised in the lower court cannot be presented on appeal for the first time.

Department 1.

Appeal from Superior Court, King County; Walter M. Freud, Judge.

Action by Alice A. Brengman against King County. From a judgment for the county, plaintiff appeals. Reversed and remanded.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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Ballinger, Battle, Hulberts & Shortt, of Seattle, for appellant.

Fred C. Brown and Wm. Parmerlee, both of Seattle, for respondent.

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MACKINTOSH, J. On August 12, 1917, a portion of the Pacific Highway located in King county, lying between the cities of Seattle and Tacoma, was being repaired by contractors in the employ of the county. At the conclusion of work on that day a barricade was erected around a section of the road which had been torn up, and lights were placed at the north and south ends of the barricade. At about 9 o'clock in the evening a passing automobile struck the north end of the barricade and destroyed the light which was placed there. A witness who observed the occurrence took the lantern from the south end of the barricade and placed it in the same position which had been occupied by the lantern just destroyed, and within an hour or two thereafter the second lantern was destroyed in the same manner as had been the first. Thereafter the plaintiff, approaching from the north, ran into the barricade, there being no warning of its presence, and received injuries for which he brought this action.

It was admitted that the lights themselves were sufficient as lights had they been properly placed and protected by a sufficient barricade. At the conclusion of the case the trial court directed the jury to return a verdict for the county.

[1] The obstruction of the highway existing at a point where a great many automobiles pass during both daylight and dark, and at a point where they are permitted to travel at considerable speed, the county was under an obligation to show such lights, protected by a barricade around the place being repaired, as that one approaching could see that a dangerous condition existed.

[2] In placing lights upon this barricade it was necessary that they be so placed that automobile drivers would not be liable to destroy them in passing, and the question as to whether the barricade had been so constructed and the lights so placed is a question of fact for the jury, in view of the testimony which disclosed that the lights so placed had been twice destroyed within a short period preceding the plaintiff's injury.

[3] The trial court was in error in determining, as a matter of law, that the county had done its full duty, and should have submitted to the jury the question as to whether the placing of the lights, under all the circumstances and conditions testified to, was the giving of a sufficient and proper warning to protect the public upon the highway from possible injury.

Sutton v. City of Snohomish, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847, decides that a question is presented for the jury's determination when it has been shown that barricades constructed were "liable to be thrown down at any moment by the mere carelessness or thoughtlessness of persons passing along."

Reed v. City of Spokane, 21 Wash. 218, 57 Pac. 803, approves as correct an instruction, submitting to the jury in a case similar to this a question as to whether the municipality had originally constructed, "sufficient barriers, guards, and beacons or danger lights" to protect any reasonably careful person from danger.

The later case of Tagge v. Roslyn, 51 Wash. 258, 98 Pac. 668, relied upon by the respondent, is one in which the lower court was justified in determining, as a matter of law, that the barriers placed around an excavation were sufficient, the court saying:

"Considering the nature of the excavation and the temporary character of the barriers placed around it, they having been placed there simply to guard the excavation overnight, we feel constrained to hold that the court did not err in holding that the barriers were legally sufficient;" the barriers having been securely fastened and there being enough light to enable one to see them.

The barricade in the Sutton Case was for the protection of pedestrians only, and was not subject to the destruction which comes to barricades placed upon the traveled highway, over which rapidly moving automobiles are constantly coming and going.

[4] The whole situation here does not point so conclusively to the conclusion that there can be no chance for dispute or argument, and therefore the question should not have been decided by the court as a matter of law, but should have been submitted to the jury as one of fact.

[5] The respondent objects to the suit by reason of some alleged deficiencies in the claim presented to the county commissioners. We cannot consider this point, for the reason that it was not raised in the lower court and is presented here for the first time.

For the reasons stated, the judgment will be reversed, and the cause remanded for a new trial.

CHADWICK, C. J., and MAIN, TOLMAN, and MITCHELL, JJ., concur.

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(107 Wash. 347)

HOOD MFG. CO. v. MATZGER et al.
(No. 15188.)

(Supreme Court of Washington. May 31, 1919.)

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1. LANDLORD AND TENANT ⟸200(1)—BASIS OF RENT—COST OF BUILDING.

Within the contract of defendants to erect and lease to plaintiff a building, rent to be based on cost of building, the architect's service and wages paid by defendants to their adult son for keeping the books, overseeing work, etc., *held* taxable to cost.

2. APPEAL AND ERROR ⟸1011(1)—REVIEW—FINDINGS OF FACT.

Trial court's findings based on conflicting evidence will not be disturbed unless contrary to the great weight of evidence.

Department 2.

Appeal from Superior Court, King County; 6 per cent. interest.

Action by the Hood Manufacturing Company against J. Matzger and others. From judgment awarding plaintiff relief less than prayed, plaintiff appeals. Affirmed.

Max Hardman, of Seattle, for appellant.

Revelle & Revelle, of Seattle, for respondents.

HOLCOMB, J. Respondents J. Matzger and wife entered into a written agreement and lease with appellant manufacturing company on April 2, 1917, by the terms of which respondents agreed to erect a building at the northwest corner of First Avenue South and Horton street, in the city of Seattle, and lease the same to appellant for a period of ten years from the completion of the building. It was further agreed that the amount of the monthly rental should be figured upon the basis of the cost of the building to respondents, that is, if the erection of the building cost respondents less than the sum of $6,500, the monthly rental payable by appellant was to be $125; in the event that the cost of the building should be more than $6,500, the rental was to be $137.50 per month. Among certain other covenants contained in this lease, it is material to notice one which provided that the lessors gave the lessee an option (to be exercised by the lessee within two years from the date of the completion of the building) to purchase the property (realty and building) at the price of $22,000, payable $5,000 cash and the balance in 120 monthly payments of $141.66, with 6 per cent. interest.

Thereafter Matzger and wife erected a building at the agreed site, and the appellant moved in and took possession thereof. On May 31, 1917, appellant wrote respondents in part as follows:

"Referring to the building which you have erected for us at the northwest corner of First Avenue South and Horton street, this city, we wish to call attention to the fact that the building has not been erected by you as agreed upon, and is deficient in many respects, correction of some of which we are willing to waive, but we do insist that the following matters be corrected: [Then follow 11 items of alleged necessary corrections, the whole concluding with a statement that appellant company presumes that the incompleted work such as wiring, plumbing, etc., will be properly performed before respondents' men leave the work.]"

On June 20, 1917, appellant company again wrote respondents in part as follows:

"However, unless we hear from you to the contrary promptly, we will take it for granted that your letter of June 5th is intended as a refusal on your part to make good any of these defects that have been called to your attention, and we will proceed to take such steps to enforce our rights as may be necessary.

"Incidentally, we wish to advise you that we are not willing to accept your statement as to the cost of the building, and we demand that you at once furnish us with an itemized statement showing in detail the cost of the various items involved in the construction of the building, supported by proper vouchers."

The dispute of which these letters are the obvious evidence culminated in an action by appellant, setting up the lease and agreement and alleging that Matzger and wife had refused to account for the cost of the building, that the building had not cost more than the sum of $6,500, that the reasonable rental value of the building erected by the Matzgers was less than the rental value of the building agreed to be erected by them in the sum of $35 per month, that the building erected was of a less value than the building agreed to be erected, and praying that the Matzgers be required to account for the cost of the building, that the court determine the amount of the rental to be paid on the actual valuation, and that the lease be reformed as to the option price of $22,000 at which appellant might purchase the property, changing to the sum of $18,500, and asking judgment for excess of rental already paid over the amount which the court should determine properly to be paid.

Trial in the lower court without a jury resulted in findings that the building had cost more than the sum of $6,500, but that it had not been erected according to the agreement, whereby the manufacturing company (appellant here) was damaged in the sum of $1,200, that sum representing what it would cost to install a floor in the working part of the building such as was called for by the plan, and distributed that amount through the 120 months of the lease at the rate of $10 per month, making a rental to be paid in the sum of $127.50, and gave the plaintiff judgment for the sum of $120, repre-

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senting the excess of $10 per month already paid for 12 months. The trial court refused to modify or reform the lease in any particular, including the option price of $22,000 therein agreed on.

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[1] The crux of the whole matter is clearly the cost of the building, for that is made the basis of the monthly rental, and is urged as a reason for the requested modification of the option price. The question as to the actual construction of the building differing from certain agreed plans is secondary even to this matter, such variance justifying, according to appellant manufacturing company, not the surrender of its lease, which it did not desire or attempt, but merely a modification of the rental terms. This difference, and it is agreed that there is a difference between the plan and the construction of this building, is but an angle of the larger question as to the initial cost of the building.

It is incontrovertible that the agreement between the parties contemplated the construction of a building as cheaply as possible, it having been estimated that a building such as appellant desired would cost about $8,000, and, it being desired by both parties to bring the cost of the building down to $6,500, or as near thereto as possible, it was understood and agreed that secondhand material should be used in the construction of the building as far as practicable, and that changes should be made and were made by agreement of the parties to reduce the cost of the building. The architect who drew the plans drew them from a rough sketch prepared by appellant's president as to the kind of building desired for his purposes, and it was understood and agreed that a plan with specifications had to be presented to the city authorities in order to obtain a building permit, but that neither party understood or agreed that such plans and specifications were to be rigidly adhered to, but only followed in general outline. The original agreement between the parties, it should be noted, had stipulated that the building should be constructed according to "a sketch O. K.'d" by appellant. Much contention is made against the payment of the bill for the architect's services, amounting to $450, which amount the respondents obligated themselves to pay. While it is true that the plans and specifications as submitted by the architect were substantially departed from, it is not true that the plans and specifications contemplated by the parties, based upon the "sketch as O. K.'d" by appellant, and according to which the architect's more comprehensive plans and specifications were made, were departed from. For this reason the architect's services chargeable to the owner are also chargeable to the lessee under the agreement. We have held that architect's services are even lienable against a building, and, even though they may not have been strictly followed, they are nevertheless recoverable.

Another item of the cost of construction vigorously contested by appellant was that of the son of respondents who was paid wages aggregating $225 for nine weeks' work. It appears that the son kept the books, helped his father in negotiations with contractors concerning the letting of portions of the work, purchasing lumber, keeping the time of employés, overseeing the work and doing general clerical work. He was of full age, and his parents were not entitled to his services. The lower court held that the wages of the son were properly chargeable to the cost of construction, and we see nothing in the record to show to the contrary.

The claim of J. Matzger, one of the respondents, for wages and car fare in the amount of $250, in overseeing the construction, was disallowed by the trial court, and therefore is not to be considered.

Various other items were allowed by the court which we think properly entered into the cost of the building, and no just reason is shown to the contrary.

Appellant showed that a firm of contractors bid $5,300 to construct the building, arguing therefrom that $5,300 was properly the cost of construction of the building. This by no means follows, and, moreover this bid did not include plumbing, wiring, roofing, and painting, which cost the respondents $1217; this added to the bid would bring the total amount over $6,500. Also it did not include the sheet metal skylights and architect's fee, which would have made in all more than $7,000.

[2] Upon an examination of the whole record, while at first blush we were inclined to the opinion that some of the items disallowed by the trial court to appellant and allowed to respondents as properly chargeable to the cost of construction should not have been allowed respondents, but should have been deducted, we are now of the opinion that appellant did not sustain the burden of proof as to those items, and that the court was generous rather than exactly just in allowing $1,200 on account of defective flooring. The court found that the building cost in excess of $6,900, and, while this may not be exactly correct, it is certainly correct that it cost in excess of $6,500. Unless it cost less than $6,500, the provision as to the rental of $125 per month could not apply, and the court's deduction and apportionment of the rent from the $1,200 damages allowed on the rental value to respondents awards substantial justice. There is no basis for the reformation of the lease. The findings of the trial court were based on conflicting evidence, and will not be disturbed unless contrary to the great weight of

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evidence, and this we cannot find to be the case.

The judgment is affirmed.

MOUNT, FULLERTON, and PARKER, JJ., concur.

(107 Wash. 432)

WOODS v. YOUNG LUMBER CO.
(No. 15334.)

(Supreme Court of Washington. June 24, 1919.)

CHATTEL MORTGAGES ⟸63—AFFIDAVIT—NOTARIAL CERTIFICATE—SUFFICIENCY.

Where a notary's certificate of acknowledgment of a chattel mortgage and his jurat, certifying to the subscribing and swearing to an affidavit in good faith, both of which were made by the mortgagor's president, were each signed by the notary and were on the same instrument, *held* that, though but one impression of the notarial seal was made, the instrument was valid within Rem. Code 1915, § 3660, declaring that a mortgage of personal property is void unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, without design, delay, or to defraud creditors, etc.

Department 2.

Appeal from Superior Court, Pierce County; John D. Fletcher, Judge.

Action by B. T. Woods, as receiver of the Mountain Mill Company, against the Young Lumber Company. From a judgment dismissing the complaint, plaintiff appeals. Affirmed.

Leopold M. Stern, of Seattle, for appellant.
Davis & Neal, of Tacoma, for respondent.

PARKER, J. The plaintiff, Woods, as receiver of the Mountain Mill Company, seeks recovery of a money judgment against the defendant Young Lumber Company, upon the ground that it has received a preference payment as a creditor of the Mountain Mill Company, after the company became insolvent. The lumber company demurred to the receiver's complaint upon the ground that it did not state a cause of action, which demurrer was sustained by the superior court; and, the receiver electing to stand upon his complaint and not plead further, judgment of dismissal was rendered against him, from which he has appealed to this court.

The only question necessary for us to notice is as to whether or not the chattel mortgage executed by the mill company, under which a sale of certain of its property was had in satisfaction of the lumber company's claim, after the mill company's insolvency, was void for want of the attaching of the notary's official seal to his jurat, certifying to the subscribing and swearing to the affidavit of good faith made by the president of the mill company, the mortgagor. The acknowledgment and the affidavit of good faith were both made by the president of the mill company in its behalf before the same notary. The notary's certificate of acknowledgment and his jurat certifying to the subscribing and swearing to the affidavit of good faith by the president were separate certificates; each being separately signed by the notary. Near to his signature upon the certificate of acknowledgment he placed in the usual position an impression of his official seal. There was no other impression of his official seal elsewhere upon the instrument. The affidavit of good faith immediately followed the certificate of acknowledgment, and the notary's jurat, certifying to the subscribing and swearing to the affidavit, followed the president's signature thereto. The mortgage, certificate of acknowledgment, affidavit of good faith, and certificate of the notary of the making of the latter, manifestly constitute one instrument, executed in all its parts at the same time.

Counsel for appellant invokes the general rule that the absence of an impression of a notary's official seal from the certificate of his performance of an official act, except in cases wherein the statute expressly dispenses with the necessity of a seal, renders the certificate of no effect, as held in Gates v. Brown, 1 Wash. 470, 25 Pac. 914, and Stetson & Post Mill Co. v. McDonald, 5 Wash. 496, 32 Pac. 108. The real controversy here is whether or not there is such an absence of an impression of the notary's official seal from his jurat certifying to the subscribing and swearing to the affidavit of good faith as to render that certificate of no effect. In other words, can it be held that the one impression of the notary's official seal near his signature to the certificate of acknowledgment is sufficient in law to render both certificates effective, under the facts in this case. It is plain that this mortgage was made with a view, not only of its becoming a good mortgage, as between the mortgagor and mortgagee, but with a view of its becoming a good mortgage as against all persons who might, after its execution, become interested in the mortgaged property. This was manifestly the intent and purpose at the time of its execution; and, as we have noticed, all acts of the parties, including those of the notary, having to do with its execution, were concurrent as to time, and constitute in effect one transaction. This, we think, is plainly evidenced upon the face of the instrument as a whole. In section 3660, Rem. Code, relating to the manner of executing chattel mortgages, we read:

"A mortgage of personal property is void * * * unless it is accompanied by the affidavit

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⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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of the mortgagor that it is made in good faith, and without any design to hinder, delay, or defraud creditors, and unless it is acknowledged. * * *"

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It is plain that both the acknowledgment and the affidavit of good faith are necessary to a complete execution of the mortgage, except as between the mortgagor and mortgagee. These two acts are so intimately related to each other in their purpose that the evidencing thereof by the notary might well be done by the notary in one certificate, especially when the instrument is acknowledged and the affidavit made by the same person. Plainly there is nothing in the statute requiring him to evidence the two acts by two separate certificates. We are of the opinion that, in view of the concurrence of all the acts on the part of the mortgagor, mortgagee, and the notary, the acknowledgment and affidavit of good faith being made by the same person in behalf of the lumber company, the two certificates of the notary may be considered as one act; and the attaching of the seal to the certificate of acknowledgment be also deemed an attaching of it to the jurat, certifying to the president's subscribing and swearing to the affidavit in good faith.

We have not had brought to our attention any authorities that we regard as exactly in point. It seems, however, that the reasoning of the decision of the New York Court of Appeals in Olcott v. Tioga R. Co., 27 N. Y. 546, 84 Am. Dec. 298, supports the conclusion we here reach. In that case there was involved a notary's certificate of protest, and another separate certificate by him upon the same paper, of the mailing of notices of the protest on the same day; the notary's seal being attached in the usual position near his signature to one certificate, but not elsewhere upon the paper. In holding that the one seal was sufficient to satisfy the law as to both certificates, and that it might be regarded as attached to both, Judge Selden, speaking for the court, all the other judges concurring, said:

"The statute contemplates but a single certificate as evidence of the presentment of a note or bill for payment, its protest, and the giving of notice of its dishonor. The language of the statute is this: 'The certificate of a notary, under his hand and seal of office, of the presentment by him of any promissory note or bill of exchange for acceptance or payment, and of any protest of such bill or note for nonacceptance or nonpayment, and of the service of notice thereof on any or all of the parties,' etc., 'shall be presumptive evidence of the facts contained in such certificate.' 3 R. S. (5th Ed.) 474. The notary may undoubtedly certify to each of the acts separately, but he may also, by one certificate, verify them all. If the certificate be 'under his hand and seal of office,' it is sufficient, and it cannot be of any importance where the seal is affixed. It may be at the beginning, at the end, or anywhere upon the margin, or it might be appended by a ribbon, after the manner of the sealing of ancient charters. The officer is not required to certify to the sealing, but it is sufficient if the seal be, in fact, affixed, and the name signed. Unquestionably, therefore, if the seal had been placed where it is, and the signature only at the bottom of the last part of the certificate, the whole would have been sufficiently verified. I do not think it is any the less so by reason of the words, '*In testimonium veritatis*,' with the signature opposite the seal, between the two parts of the certificate. The whole may, with propriety, be regarded as one certificate, once sealed and twice signed. *I adopt this conclusion the more readily, because the objection is merely formal, the certificate, in its present form, furnishing all the security against error, and imposing upon the notary all the responsibility which it could do if another seal were added.*"

We have italicized the portion of the language used by the learned judge which we think furnishes the key to the solution of our problem. The only difference, we think, between the situation there involved and that here involved is that there the statute seems to have contemplated evidencing the facts by a single certificate of the notary, while here our statute is silent upon the question of whether the notary shall evidence the taking of the acknowledgment and the subscribing and swearing to the affidavit of good faith, by one or two certificates. We are quite convinced, however, that under our statute there is nothing preventing the notary evidencing the two acts by one certificate, and that under the circumstances here shown, he may be considered as having done so, in so far as the attaching of his official seal is concerned. The only decision coming to our notice which we regard as being authority to the contrary is that of De Graw v. King, 28 Minn. 118, 9 N. W. 636.

The judgment is affirmed.

HOLCOMB, C. J., and MOUNT and FULLERTON, JJ., concur.

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(107 Wash. 406)

RALEY v. SCHRAM & WARE. (No. 15345.)

(Supreme Court of Washington. June 12, 1919.)

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GUARANTY ⟸36(5) — GUARANTY OF CREDIT EXTENDED.

Though an agent who sold beds for the principal agreed that credit in excess of $1,500 should not be extended to any one company, and to reimburse his principal for all losses in excess of three-fourths of one per cent., *held* that, where the agent referred the sale of a very large quantity of goods to the principal, and the principal, after being fully informed in the matter, directed the agent to make delivery, the sale was one by the principal, and the agent is not bound to make good losses in excess of three-fourths of one per cent.

Department 2.

Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by J. G. Raley against Schram & Ware. From a judgment for defendant, plaintiff appeals. Affirmed.

Gill, Hoyt & Frye, Walter Schaffner, and R. L. Blewett, all of Seattle, for appellant.

J. P. Wall, of Seattle, for respondent.

HOLCOMB, C. J. On December 1, 1909, the Marion Iron & Brass Bed Company, an Indiana corporation, contracted with the Manufacturer's Distributing Company, a domestic corporation, by which the latter became agents of the former in the distribution of the former's product. The principal agreed to pay its agent 15 per cent. commission on sales. As to the terms at which sales might be made by an agent, the agreement provided that the agent should follow instructions sent it from time to time as to such terms of sale; that no sale should be made below the list price unless expressly authorized; that the basis of credit was to be the ratings contained in the latest published book of the Bradstreet Mercantile Agency; that credit in excess of the sum of $1,500 could not be extended to any one customer; and that the agent would pay to its principal all losses in excess of three-fourths of one per cent. sustained by the principal.

In May, 1911, there was an accumulation of about 400 beds in the warehouse of the agent, these being the property of the principal, awaiting disposal in the course of trade. At that time the Grand Rapids Furniture Agency of Seattle was about to open a retail furniture business in Seattle, and was approached by the Manufacturer's Distributing Company with a view to the sale of the 400 beds then on hand. The result of those negotiations was that on May 5, 1918, the distributing company (as we will call the Manufacturer's Distributing Company) telegraphed the Marion Iron & Brass Bed Company calling attention to the opening of the Grand Rapids Agency's store and asking that a special price be put upon the stock of beds owned by the Marion Iron & Brass Bed Company in the distributing company's warehouse, so that a "close-out" sale of the entire stock to the proposed new concern might be made. To this the Marion Company answered:

"Cut ten per cent. if absolutely necessary account clearing up stock."

May 18, 1911, the distributing company reported by letter as follows:

"We have closed a deal with the Grand Rapids Furniture Agency of this city, a new firm just opening up, on the entire lot of iron beds in Seattle stock. Terms one-third net September, October and November 1st. They hope to open some time next month or probably not until July 1st."

May 29, 1911, the Marion Company replied to this letter:

"Please furnish us all the information you can possibly secure relative to the Grand Rapids Furniture Agency, to whom you have sold the Seattle stock. As this is a new concern we would like to get a line on their credit standing before making delivery of beds to them. We have asked the Dun agency for a special report on them."

May 31st, telegram of distributing company to Marion Company:

"See our letter of the eighteenth (above). Have you secured rating to warrant us delivery entire shipment. We believe account O. K. Wire at once."

June 1st, reply telegram of Marion Company to distributing company:

"Have wired for rating don't deliver goods until we instruct."

June 2d, telegram from Marion Company to distributing company:

"Dun wires no rating assigned you see local representative of Duns and when satisfactory rating for this amount of credit is assigned deliver stock."

No further communications appear to have been exchanged by those parties until June 9th, when the Marion Company wired the distributing company: "Deliver stock to Grand Rapids Furniture Agency."

Obeying this instruction, the beds were accordingly delivered to the Grand Rapids Company by the distributing company. On June 12th, certain of the principal stockholders of the Grand Rapids Furniture Agency entered into a written guaranty of the Grand

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Rapids account, which guaranty was forwarded by the distributing company to the Marion Company.

The question as to whether this was a sale by the principal, the Marion Company, or by the agent, the distributing company, to the Grand Rapids Furniture Agency, arose by reason of the bankruptcy of the Grand Rapids Furniture Agency while still a debtor of the bed company. In the bankruptcy proceedings, the Marion Company secured a portion of its claim, and thereafter sued the distributing company for the balance between the sale price and the sum recovered from the trustee, basing such action upon the clause of the contract of agency stipulating that the agent should recoup the principal for losses in excess of three-fourths of one per cent. on the total sales. The distributing company denied that this was a sale within the terms of the agency contract, the principal itself having assumed the responsibility of determining the financial status of the prospective purchaser, and denied making the sale or extending any credit to the purchaser, within the meaning of the contract of agency between the parties.

Trial without a jury resulted in judgment for the distributing company. The appellant here asks us to reverse the result reached by the trial court and find that such sale was made by the agent as would obligate it to the principal within the loss guaranty clause of its agreement.

This we are unable to do as a conclusion from the facts which we have reviewed above. It is clear to us, as it apparently was to the trial court, that the exchange of correspondence preceding the sale to the Grand Rapids Furniture Agency amounted to the extension of credit to that concern by the Marion Iron & Brass Bed Company, and not by the Manufacturer's Distributing Company. That this was not a sale within the terms of the agency agreement is obvious from the fact that the amount of merchandise sold to the Grand Rapids Furniture Agency was much in excess of the credit limitation of $1,500 in the contract; beyond this sum, as we have noticed, the agreement expressly provided that the agent should have no authority to extend credit. By the principal's action in accepting an account in excess of that sum, knowingly and after diligent inquiry into the prospective purchaser's financial responsibility, we are impelled to hold that the sale in question was one which, although originally an incident of the parties' relationship, was not within the terms of the agency contract to the extent of obligating the agent for the losses sustained by the principal in the transaction.

The judgment is affirmed.

MOUNT, FULLERTON, and PARKER, JJ., concur.

(107 Wash. 264)

NORTHERN PAC. RY. CO. v. BOARD OF COUNTY COM'RS OF YAKIMA COUNTY et al. (No. 15087.)

(Supreme Court of Washington. May 31, 1919.)

1. DRAINS ⟸71—DRAINAGE DISTRICT—ASSESSMENT OF BENEFITS—VALIDITY.

Where drainage district was organized under Laws 1913, p. 611 (Rem. Code 1915, §§ 4226, 1-41), with an area of 7,800 acres at a cost of $153,193, the levy of special assessment by assessing farm lands and town lots to one-third of increased market value, and finding that actual cost of improvement, so far as directly benefiting county highways and railroad right of way for six miles covering 62 acres, would be a certain sum as to each, one-third of which was charged to county and railroad respectively, instead of determining increased market values, resulting in assessment of $14,700 against right of way which was greatly benefited, was upon a proper and valid basis.

2. DRAINS ⟸91—SPECIAL ASSESSMENT—ARBITRARY ACTION OF ASSESSMENTS — EVIDENCE.

Evidence, in proceeding by railroad to cancel and enjoin collection of a special drainage tax on its right of way, held not to show with a conclusiveness required in such cases that the assessment was capriciously or arbitrarily made by the assessing officers without the exercise of their honest judgment, or was excessive or inequitably apportioned.

Chadwick, C. J., and Main, Mackintosh, and Mitchell, JJ., dissenting.

En Banc.

Appeal from Superior Court, Yakima County; E. B. Preble, Judge.

Action by the Northern Pacific Railway Company against the Board of County Commissioners and the County Treasurer of Yakima County. Judgment for defendants, and plaintiff appeals. Affirmed.

Geo. T. Reid, J. W. Quick, L. B. da Ponte, and C. A. Murray, all of Tacoma, for appellant.

W. B. Bridgman, of Sunnyside, for respondents.

PARKER, J. The plaintiff railway commenced this action in the superior court for Yakima county, seeking the cancellation, and enjoining the collection, of a special assessment tax, levied upon 6½ miles of the right of way of the Sunnyside division or branch line of its railway, situated in drainage district No. 2, of Yakima county, to aid in the payment of the cost of the construction of drains in that district; the railway company having tendered to the county treasurer a sum which it claims is sufficient to pay an assessment lawfully chargeable to it, measured by the benefits of the improvement to its right of way. Trial in that court

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resulted in judgment denying to the railway company the relief prayed for, from which it has appealed to this court.

[1] The drainage district was duly organized under chapter 176, Laws of 1913, which is also found in section 4226—1 et seq., Rem. Code. The total area of the district, including farm lands, town lots, county roads, and appellant's right of way, is approximately 7,800 acres. The total cost of the improvement was $153,193, which was assessed and apportioned against all of the lands within the district, of which $14,700 was assessed against the appellant's right of way consisting of approximately 62 acres. Appellant's railway and right of way lies along a draw, in an easterly and westerly direction, clear across the district, for a distance of approximately 6 miles, which draw forms the natural main drainage course of the district. Along this draw, at all points very near to appellant's railway, was constructed the main drainage ditch of this improvement, into which were run lateral ditches from higher ground to the north, which bring to the main ditch water which would by natural drainage reach the draw. Prior to the construction of this improvement, such natural drainage seriously injured the lower lands along and to the north of the draw, causing them to be wet and so impregnated with alkali as to render them unfit for farming. When this railway line was constructed, about the year 1905, and up until the construction of this improvement, the draw was wet, soft ground along practically the entire course of the railway through the district, the water interfering with the railway by the rendering of the roadbed soft and unsubstantial, suitable only for comparatively light and slow traffic. This portion of the railway was originally constructed only as a branch to the main transcontinental line of the company; but the roadbed along the draw was later so improved that it can be, and has to some considerable extent been, used for heavy main line traffic. The construction of this improvement, especially the construction of the main line ditch along and near to the railway, has, the evidence tends strongly to show, very materially contributed to the improved condition of the roadbed, and become a factor of some considerable moment in making the roadbed suitable for heavy main line traffic. Some two miles to the north, and approximately parallel with this portion of the railway, and on ground about 100 feet higher, runs the main Sunnyside irrigation canal, carrying a large quantity of water. This canal was there, and in use some years before the construction of the railway along this draw, which is the natural course of the drainage from the rising ground for several miles beyond and above, as well as below, the Sunnyside canal, which ground rises above the canal, and at a point several miles to the north at the summit of Rattlesnake ridge or mountain, attains a height of some 1,500 feet or more above the canal, all forming a watershed of some considerable proportions, naturally draining into the draw along which the railway runs. The whole of this region is more or less arid, and the water which this improvement was designed to carry off comes largely from seepage from the Sunnyside canal, though at certain seasons of the year there comes upon the lower lands and into the draw, from natural causes, a considerable quantity of other water. There have been occasions before the construction of this improvement when this water caused considerable damage to the lower lands and the railway, which the improvement renders practically certain will not occur in the future.

There is no controversy here over the regularity of the proceedings leading up to the making of the assessments to pay the cost of the improvement; the only contention here made in behalf of appellant railway company being that the assessment levied upon its right of way was measured and apportioned upon a fundamentally wrong basis, and is so clearly excessive as to show arbitrary action on the part of the assessing officers. The 62 acres of railway right of way being charged with $14,700 of the cost of the improvement, it will be noticed that such assessment was at an average rate of about $235 per acre. The farm lands bordering upon appellant's right of way were assessed at an average rate of about $15 per acre, while other farm lands on ground a little higher were assessed at an average of about $20 per acre. Town lots were assessed somewhat higher, in proportion to area, than farm land; a few of them being assessed as high as $200 per acre. The assessment against Yakima county for the improvement of its highways by drainage within the district was approximately $90 per acre of the area of such highways. The evidence produced upon the trial in the superior court, we think, warrants the conclusion that the assessing officers arrived at the amounts they charged against the several properties within the district, and measured the benefits resulting thereto from the construction of the improvement, substantially as follows: The assessing officers concluded from their investigations that the actual total benefits resulting from the improvement to all the lands and roads in the district was approximately three times the total cost of the improvement. They then charged against the farm lands and town lots the several amounts they concluded would equal one-third of the increased market value of such lands and lots, resulting from the improvement. We note that they charged the lowest lands along the railway proportionately less per acre than those lying a little higher for the reason that the lowest

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lands were impregnated with alkali to a greater extent than those a little higher, and were therefore less valuable, even though drained, than the higher lands; and also for the reason that the draining of the lowest lands constituted only a comparatively small part of the work of completely reclaiming them as agricultural lands, it being necessary to thereafter work the alkali out of them. In determining the amounts to be charged against the county highways, and appellant's right of way, the assessing officers concluded from their investigations that the actual cost of an improvement of this nature, in so far as it resulted in direct benefit to the county highways and appellant's right of way, would be a certain sum as to each, one-third of which they charged to the county and the railway company, respectively. They adopted this method of measuring the benefits to the county highways and to appellant's right of way, in lieu of attempting to determine the increased market values thereof, upon the theory that it was impractical to so measure benefits as to such property. The assessing officers concluded from their investigations that the improvement to appellant's right of way was one which the owners of such property, situated and menaced as it was for want of proper drainage, would be reasonably expected to make, and that to make such an improvement to the extent of the portion thereof that this improvement benefited appellant's right of way would have cost appellant approximately three times the amount assessed against it.

The act of 1913, under which this drainage district was created, the improvement constructed, and the assessment levied to pay the cost thereof, does not prescribe any rule or method for the measuring and apportioning of the benefits to the several properties within the district; the only requirement in that respect being that found in section 25 of the act, that the appraisers, whose duty it is to make and apportion the assessments, after the determination of the total cost of the improvement, "shall proceed to carefully examine the drainage system and the public and private property within the district and fairly, justly and equitably apportion the grand total cost of the improvement against the property and the county or counties, cities and towns within the district, in proportion to the benefits accruing thereto." Laws of 1913, p. 629, § 25. Section 29 of the act expressly authorizes the assessing of railroads, as well as public highways and other property in the district, in proportion to the benefits accruing thereto from the improvement.

The contention that the assessment of appellant's right of way was made and apportioned by the assessing officers upon a fundamentally wrong basis is rested upon the theory that it was erroneous to measure the benefits resulting to appellant's right of way, by taking into consideration the actual cost of the improvement, in so far as the portion thereof which benented the right of way is concerned, and then charging one-third of such cost against the right of way. We are unable to see anything inequitable in this manner of arriving at the proportional benefits resulting to the right of way, in view of the fact that it was practically impossible to arrive at the proportional benefits resulting to the right of way, by looking merely to the increased market value thereof resulting from the improvement, as was practical with reference to the farm lands and lots, the fact that the cost of that portion of the improvement directly benefiting the right of way could be approximately determined, and the fact that it was such an improvement as was reasonably necessary to the railway company in the light of existing conditions; all of which facts are not only to be presumed in aid of the conclusions of the assessing officers, but which conclusions we think are amply supported by the evidence produced upon the trial of the case in the superior court. Counsel for appellant cite and rely upon our recent decision in Oregon-Washington R. & N. Co. v. Commissioners of Yakima County, 103 Wash. 480, 175 Pac. 37. A critical reading of that decision will show that, in making the assessment there in question "before proceeding to the levy, an arbitrary sum was agreed upon" by the assessing officers, "to be assessed against appellant"; that the assessing officers, in assessing appellant's right of way, took into consideration the fact "that the drainage will dry up and make the country roads in the vicinity more accessible so that the patrons of appellant's road may more conveniently patronize it"; and that these considerations on the part of the assessing officers caused them to materially increase the assessment they laid upon appellant's right of way. We think this record fails to show that any such considerations, or others of a similar import, were entertained by the assessing officers in making this assessment, in the sense that they were thereby influenced to add to the assessment against appellant's right of way.

[2] Nor do we think that the evidence in this case shows, with that conclusiveness required in such cases to defeat assessments of this nature, that it warrants the court in holding that this assessment upon appellant's right of way was capriciously or arbitrarily made by the assessing officers, without the exercise of honest judgment on their part, or that such assessment is excessive or inequitably apportioned as against appellant's right of way. The mere fact that the assessment against the right of way is higher than upon adjoining farm lands, when measured merely by the acre, we think is not at all controlling in this case, in view of the na-

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ture of the improvement, and its comparative benefit to the right of way and the adjoining farm lands. Were it our duty to personally view and examine the improvement and apportion the benefits, as an original proposition, it is possible we might arrive at a different conclusion from that of the assessing officers, and one more favorable to appellant. But that is not our province. This is an original action in equity, the object of which is to set aside the assessment, upon the ground, in its last analysis, of fraud. Neither the superior court nor this court entertains this action as one upon appeal from the decision of the assessing officers. The act provides, in section 30, for a hearing upon the question of benefits and their apportionment, before the board of county commissioners, where objection by the owners to the assessments made by the appraisers shall be considered by the board, which, so far as the assessment proceeding is concerned, it the tribunal of final hearing upon the question of benefits and the apportionment thereof. There is no appeal provided by this act from the decision of that board to the courts. This leads us to remark that therefore this assessment comes to the courts with even stronger presumptions supporting the decision of that board, as to the benefits and the apportionment thereof, than in those cases of city local improvement assessments, as to which the statute expressly provides for an appeal to the courts from the decisions of city councils confirming such assessments.

We are of the opinion that, upon the showing made in this record, we would not be warranted in disturbing the judgment of the superior court, denying to appellant railway company the relief it prays for.

The judgment is affirmed.

MOUNT, FULLERTON, TOLMAN, and HOLCOMB, JJ., concur.

MAIN, J. (dissenting). In my opinion this case is controlled by the case of the Oregon, Washington, Railway & Navigation Co. v. Board of County Commissioners, 103 Wash. 480, 175 Pac. 37, and upon the authority of that case the judgment should be reversed.

In that case the railway company's right of way, figured as acreage, was assessed 5 times as much as the assessment of the adjoining property. It was there held that the assessment was upon a fundamentally wrong basis. In the present case the railway company's right of way, figured as acreage, is assessed 14 or 15 times as much as the adjoining property.

It is true that in the former case the commissioners, prior to making the assessment, had in mind an abitrary sum which was agreed upon to be assessed against the right of way; but the opinion is not rested upon this. It is stated therein that this fact would not avoid the assessment if it could be sustained in reason.

If the assessment in the former case, as there held, was upon a fundamentally wrong basis, it necessarily follows that the assessment in this case is likewise objectionable for the same reason.

I therefore dissent.

CHADWICK, C. J., and MACKINTOSH and MITCHELL, JJ., concur.

(107 Wash. 411)

ECUYER v. NEW YORK LIFE INS. CO.
(No. 15349.)

(Supreme Court of Washington. June 12, 1919.)

1. APPEAL AND ERROR ⟸1097(1)—FORMER DECISION—LAW OF CASE.

Where the facts are the same on a second trial, the decision on the former appeal is the law of the case.

2. TRIAL ⟸140(1) — QUESTION FOR JURY —CREDIBILITY OF WITNESS.

The question of the credibility of witnesses is for the jury.

3. CORPORATIONS ⟸423 — REPRESENTATION BY AGENTS—SLANDER.

Where the cashier of an office maintained by a life insurance company, as well as the company's traveling auditor, falsely stated that a clerk in the office was short in his accounts, *held*, that the company is liable for the slander, for corporations are liable for libel and slander uttered by their officers and agents within the scope of their employment, as well as for other torts.

4. LIBEL AND SLANDER ⟸121(2)—DAMAGES —MEASURE.

Though a slanderous charge that plaintiff was short in his accounts was published only to his father, *held* that, as the charge was actuated by express malice, a judgment for $3,000 damages cannot be deemed excessive, the jury having awarded $6,000 and the court having required plaintiff to remit all in excess of $3,000, for, as the charge was actuated by malice, damages may have been aggravated thereby.

Department 2.

Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by Harry P. Ecuyer against the New York Life Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

H. T. Granger, of Seattle, and Jas. H. McIntosh, of New York City, for appellant.

Jas. R. Chambers, of Seattle, for respondent.

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HOLCOMB, J. In Ecuyer v. New York Life Insurance Co., 101 Wash. 247, 172 Pac. 359, L. R. A. 1918E, 536, we reversed a judgment of nonsuit dismissing an action for slander tried to the court and a jury, and remanded the case for retrial. Upon retrial in the court below respondent recovered judgment against appellant in the sum of $6,000, whereupon appellant unsuccessfully moved for judgment notwithstanding the verdict, and moved for a new trial, which was denied upon condition that respondent remit the sum of $3,000 from the verdict in his favor, which thereafter respondent, under protest, did, and judgment was entered in the court below in the sum of $3,000 and costs against appellant, from which it has appealed.

Appellant also moved at the close of respondent's evidence that the court direct a verdict for appellant, upon the ground that the evidence was insufficient to authorize a verdict for respondent, which motion was also denied. Sixteen errors are alleged by appellant—four of them being based upon the court's refusal to direct a verdict for appellant, denying the motion for a new trial, denying the motion for judgment notwithstanding the verdict and entering judgment for respondent for $3,000 and costs, and that the verdict is excessive, alleging that it was rendered under the influence of prejudice and passion; the remaining assignment of error being based upon instructions given by the court to the jury and excepted to by the appellant.

The issues and the facts pleaded and proven are substantially the same as at the former trial, and reference is made to the former opinion, supra, for an understanding thereof. In addition to the evidence at the former trial, appellant introduced the testimony of witnesses Norton, the cashier, and Buxton, traveling auditor, of appellant, whose testimony was to the effect that neither of them accused respondent of willfully taking the money of appellant, or of having any malice or intent to injure respondent, or of having any authority on the part of appellant to make such charges.

[1] The law of the case was generally settled by the former decision. In brief, we there decided that:

"Words falsely spoken of a person, which impute to him some criminal offense involving moral turpitude, for which he, if the charge were true, might be indicted and punished, and defamatory words falsely spoken of a person, which in themselves prejudice him in his profession, trade, or vocation, are slanderous, and actionable per se. * * * It is obvious, therefore, that all four of the utterances here charged as slanders were slanderous per se, unless they were either true or privileged. Appellant contends that neither of them was either true or privileged. Respondent insists that all were true, and all were privileged, whether true or not."

It will be observed that the appellant there is the respondent here, and that respondent there is the appellant on this appeal. We also there said:

"The truth of the communication is a complete defense to the civil action for libel or slander. But defamatory words are presumed to be false until proven to be true. The onus of such proof lies on the defendant. * * * The words charged as slanderous in the first communication were proven to have been published by utterance to and in the presence of appellant's father. They were direct, unequivocal, and repeated charges that appellant had stolen the money then missing and other unnamed sums. So far as the evidence shows, the whole truth was that the receipts showed that appellant had collected the money and his cashbook showed that he had not accounted for it. Had the offending communication been confined to a statement of those facts, the evidence, which conclusively established their truth, would have made a complete defense. But it was not so confined. He was charged with stealing the money. That charge was not established by such a degree of proof that any court would be justified in saying that the minds of reasonable men might not differ as to its truth. The question was one for the jury. Appellant denied that he took the money; the key was in the lock of the cash drawer; the room was the common office room of many employés, any one of whom might have taken the money and the corresponding memorandum slips. The evidence was conclusive of appellant's carelessness, but not of his dishonesty."

Upon the trial now before us for review, the situation was the same as presented in the previous trial regarding the words spoken of and concerning the respondent in this appeal; and the respondent was subjected to a close and critical cross-examination, which did not in the slightest detract from his straightforward and convincing evidence. On the former appeal we held that, if the occasion of the use of the words was privileged at all, it needs neither argument nor citation of authority to show that the privilege was not absolute, but qualified, holding the rule of qualification to be:

"Where the communication is prompted by a duty to the public or to a third person, or is made touching a matter in which the party making it has an interest to another having a corresponding interest, it is privileged, if made in good faith and without malice. * * * Though malice is the gist of the criminal charge of libel, * * * it is not ordinarily an essential element in the civil action for slander or libel. * * * But this is not true in cases involving the qualified privilege. In such cases, actual malice must be proved, and the onus of proof is upon the plaintiff. * * * Where it is not disputed that the words were uttered, the question whether the occasion was privileged is one for the court; whether bona fides existed in the statement made, or whether it was malicious, is usually a question of fact for the jury. * * * This the jury must determine from the language itself and the surrounding circumstances."

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[2] It is now contended by appellant on this appeal that there is no evidence of malice on the part of the officers of appellant company, and that, on the other hand, they positively testified that they had no malice, but were only looking to the welfare of the company, and acted and spoke as they did in good faith. The jury, however, was competent to judge of their credibility, and, as we said on the former appeal, the jury had to determine, from the language itself and all the surrounding circumstances, whether the statements were made in good faith or were malicious. Having held before that the occasion was one of qualified privilege, the question of whether the privilege was exceeded is to be determined from the character of the charges made and of the circumstances surrounding them; and we must now hold upon the record before us that this question was foreclosed by the verdict of the jury.

[3] Appellant contends, however, that Norton and Buxton had no authority to make slanderous statements whereby the company would be bound. We are of the opinion that this question is also foreclosed by our decision on the former appeal, but, whether so or not, it was alleged and shown that appellant is a corporation organized under the laws of the state of New York, doing business in this state and conducting a branch office in Seattle; that at all the times mentioned in the complaint Norton was the cashier of the Seattle office, and in charge of all the moneyed operations of that office, and that Buxton was a branch office examiner of appellant, whose duty it was to examine the accounts and financial operations of appellant's branch offices in the city of Seattle and also in the state of Washington, and also all branch houses throughout the United States and the Dominion of Canada; that on the day (April 11, 1916) when the defamatory statements were made, Buxton and Norton, acting within their duties and the scope of their authority, were duly examining the finances of the Seattle office, including the moneyed operations and accounts handled by the respondent as assistant cashier to Norton, and that appellant through its authorized agents Norton and Buxton, both together and separately, made the slanderous statements charged by respondent. It is further alleged that thereafter other like statements were made to other people specifically named, and that thereafter, on April 15, 1916, other like slanderous statements were made to one H. H. Ward, and thereafter on April 22, 1916, other like slanderous statements were made to other parties. In its amended answer appellant admits that it is a corporation engaged in the business of life insurance; admits that respondent was in its employ at the Seattle office, as bonded clerk; admits that Buxton, acting within the duties of his employment by appellant, examined the finances of appellant's Seattle office and that as a result of such examination appellant claimed that respondent was short in his accounts.

Appellant further admits that Norton, named in the complaint, was an employé of the appellant in its Seattle office, and was known as the cashier thereof, and was charged with the same duties as respondent, but was superior in authority to respondent. Appellant also admits that Buxton, named in the complaint, was in the employ of appellant, and was engaged in auditing and checking up from time to time the accounts and records of the respondent and other employés of the Seattle office, and that Buxton demanded of the respondent that he turn over to the appellant the two sums of money of which his accounts were alleged to be short, as it was his duty then and there to do.

In Grand Union Co. v. Lord, 231 Fed. 390, 145 C. C. A. 384, Ann. Cas. 1918C, 1118, the court, in speaking of the authority of the traveling auditor to bind the company for slander, says:

"It is argued, in the first place, that defendant, a corporation, is not liable for the alleged slander because the statement concerning Lord was not made by Van Allen in the scope of his employment or in the performance of his duties, and particularly because it was not authorized by the corporation. We deem it unnecessary to review the numerous cases involving the liability of a corporation for the tortious acts of its agent, because the law is well settled that a corporation is liable for the slanderous words of its agent if the agent at the time is transacting the business of the corporation, and the slanderous words are spoken in the course of such business and in connection therewith."

See, also, Gallagher v. Singer Co., 177 Ill. App. 198, 245; Penna. Co. v. Voght Co. (Ky.) 96 S. W. 551; Fogg v. Boston & L. R. Co., 148 Mass. 513, 20 N. E. 110, 12 Am. St. Rep. 583.

In view, therefore, of the admissions and allegations of the pleadings, including those of appellant, we cannot sustain this contention of appellant. Corporations are liable for libel and slander, uttered by their officers and agents in the scope of their employment, the same as for other torts.

We have carefully examined the instructions given by the court to the jury in full, and while many objections are made to them, or to portions of them, without setting them out at length, which would make this opinion much too long, we are of the opinion that they carefully follow the law of the case as laid down in the decision upon the former appeal of this case, and in fact, in some respects, were somewhat favorable to appellant. The jury was carefully instructed that the occasion was privileged, and that respondent could not recover

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damages unless the privilege was exceeded and abused, thereby requiring respondent to show malice, and the jury was to consider all of the language spoken, and the time, place, and circumstances thereof, and all of the evidence before it, and determine therefrom whether or not the defamatory statements made by appellant's agents were made in good faith or with malice. In view of this evidence, as we have said before. there is no doubt that the jury was justified in finding that the privilege was exceeded and that there was malice.

The instructions further charged the jury that if it found that the privilege was exceeded, and malice was shown, and that the words were slanderous per se in such case, respondent was entitled to recover, and the jury was to fix his damages, within the amount demanded in the complaint, but that it could not allow any special damages, or damages for loss of employment, or failure to secure employment, as there was no evidence thereof. This, briefly, was the manner of the submission of the case to the jury under the instructions, and we think there is no just complaint to be made of them.

[4] Last. That the verdict is excessive, and that the judgment as rendered by the court, after reducing the verdict, is excessive. This is largely based upon the assertion that the defamatory statements were only made to respondent's father, were made without malice, and that there is no proof of any humiliation, mental suffering, and general damage. The evidence is, however, that respondent is an adult, 25 years of age; that the statements were made to the father of respondent, and were also repeated to other persons, and such repetition is a matter to be considered in fixing damages, for it is the rule that, although only general or compensatory damages without any special damages arising from and upon injuries flowing from the slander, may be recovered, repetition and republication of the slander by the defendant may be considered by the jury as to the question of malice and in aggravation of damages. 25 Cyc. 535; Stowell v. Beagle, 79 Ill. 525; Fowler v. Gilbert, 38 Mich. 292; Kean v. McLaughlin, 2 Serg. & R. (Pa.) 469. It has also been held that, because a libel or slander involves an injury to a plaintiff's feelings, as well as to his reputation, his injury may be greater if the defamatory words are uttered with express malice than if there is only the malice which the law implies from intentionally doing, without justification, that which in its natural tendency is injurious. 25 Cyc. 534. In this case, the words being actionable per se, without reference to the business or professional character of respondent, he was entitled to recover for the mental suffering occasioned by the publication of the defamation. Respondent testified as to his mental suffering and humiliation, and was corroborated by members of his father's family, and the lower court exercised its discretion, and reduced the damages allowed by the jury to a moderate sum. We are not now disposed to interfere with that award.

We find no error justifying reversal, and the judgment is affirmed.

PARKER and FULLERTON, JJ., concur.

(104 Wash. 315)

WILLIAMS v. DAVIDSON. (No. 14991.)

(Supreme Court of Washington. May 31, 1919.)

En Banc.

On rehearing. Opinion in department affirmed, and judgment below reversed.

For departmental opinion, see 176 Pac. 334.

PER CURIAM. Upon a rehearing en banc a majority of the court still adhere to the opinion heretofore filed herein, as reported in 176 Pac. 334, and for the reasons there stated the judgment is reversed.

CHADWICK, C. J. (dissenting). Upon a rehearing en banc a majority of the judges incline to our former opinion. 176 Pac. 334. I concurred in that opinion, but I am now convinced that the court fell into error. While there is nothing that I can say that will change the result, I feel it to be my duty to explain why I think we were wrong in the beginning, and why it is wrong to adhere to our opinion.

I am willing to subscribe to the trust fund doctrine, which this court has affirmed without material qualification, and vigorously, since Thompson v. Huron Lumber Co., 4 Wash. 600, 30 Pac. 741, 31 Pac. 25; but the trust fund theory is not substantive law ex proprio vigore. It is a rule of equity, arising first in the conscience of the chancellor, and finally recognized generally as a rule binding on all who deal with corporate assets. The power of the Legislature to limit, qualify, or negative any rule of decision cannot be questioned. The Legislature has functioned upon the precise subject-matter of this controversy. The Sales in Bulk Law (Rem. Code, § 5296) has, to the extent that it is applicable, modified the trust fund theory as applied to the sale of corporate assets, if those assets be a "stock of goods, wares or merchandise." By that act the right of an individual or a corporation to sell a stock of goods is recognized. The Legislature must have had in mind the hardship that had come all too often to innocent buyers of stocks of goods, as our Reports will show. That the innocent buyer might have protection, and the sale and transfer of goods might go on as a favored relation under the law, as it has ever been, it is provided:

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"It shall be the duty of every person who shall bargain for, or purchase any stock of goods, wares or merchandise in bulk, * * * for cash, or on credit, before paying to the vendor, or his agent, or representative, or delivering to the vendor, or his agent, any part of the purchase price thereof, or any promissory note, or other evidence therefor, to demand of and receive from such vendor, or agent, or if the vendor or agent be a corporation, then from the president, vice president, secretary, or managing agent of such corporation, a written statement, sworn to substantially as hereinafter provided, of the names and addresses of all the creditors of said vendor, to whom said vendor may be indebted, together with the amount of the indebtedness due or owing, and to become due or owing, by said vendor to each of such creditors; and it shall be the duty of said vendor, or agent, to furnish such statement, which shall be verified by an oath to the following effect." Rem. Code, § 5296.

Now, if the rule of the majority obtains, the words "or if the vendor or agent be a corporation, then from the president, vice president, secretary, treasurer or managing agent of such corporation" are without meaning, and lumber the statute without having a place therein, for it would follow that, whatever the good faith of the purchaser of a stock of goods may be, however careful he may have been to protect himself under the law, however literally he may have followed the terms of the statute, the affidavit which the statute says may be made by the president, vice president, secretary, treasurer, or managing agent of such corporation, if the vendor be a corporation, will not protect him, if the corporation has other debts than those scheduled by the agent of the corporation.

What means the language, "It shall be the duty" of one who buys a stock of goods to do certain things? Unless we abandon all rules of construction, it means that, if the legal duty imposed as a condition precedent to a sale in bulk is performed, title will pass to the innocent purchaser. The innocence and good faith of respondent are not impeached. She is drawn into a pit of our own making, after she has done all that the written law of this state says that she should have done.

If it were not for the trust fund theory, which does not obtain in all of the states, but which we confess to be the rule here, a sale by an insolvent corporation would be good, if made to an innocent purchaser without notice. It is only because the courts have said the assets of a corporation are a trust fund for all creditors that it is so, not because of any statute; therefore it would seem to follow that when the Legislature, having notice of our holdings, passes a law which says that a purchaser who complies with its terms, whether the sale be made by a corporation or by an individual, is good, I cannot understand why it should not be so.

The act is drawn for the announced purpose of protecting a vendee and it provides the manner of that protection. It is drawn with a like intent to compel a truthful deliverance on the part of the seller. It fixes a penalty for the false swearer. It makes him guilty of perjury, and provides for imprisonment in the penitentiary or a fine not exceeding the sum of $1,000.

In the instant case the respondent was a heavy creditor of the corporation. To save herself she agreed to buy the stock and to pay the debts, which had been listed for her benefit. She was willing to pay that price for the stock, and we are not in a position to assume that she would have paid more. She took every precaution that the law demanded, and is now compelled to pay that which she would not have paid if she had known of other debts.

It may be said that because respondent was a creditor she cannot claim the protection of the statute. My answer to this is that the statute makes no such exception. It applies to all who are in good faith. It seems to me that the statute settles the case, but if the statute permitted of any doubt or required any construction all question is foreclosed. This case falls squarely upon the foundation and fits completely the superstructure of Friend v. Rosenfeld-Rovig Co., 87 Wash. 329, 151 Pac. 776:

"As we understand the argument of the appellant, it is not claimed that there was any actual fraud in the transfer from Leo Lynch to the respondent. But it is argued that the transfer was a fraud in law, because one of the creditors was omitted from the affidavit. Upon the trial, Leo Lynch testified that he had previously informed the respondent Rosenfeld-Rovig Company that he owed his sister some money; but at the time he made the affidavit, stating the names of his creditors, he made no such statement. The persons present at the time the affidavit was made testified that he made no statement to the effect that he owed his sister anything. The trial court found that, at the time of the transfer, the respondent had no notice or knowledge that there was any debt owing by Leo Lynch to his sister; that the first notice the respondents had of this fact was after they had taken possession of the stock of goods and were negotiating for the sale thereof, when Miss Lynch stated that she was a creditor of her brother. She permitted the property to be sold and the debts to be paid before any action was taken by her to avoid the sale."

It may be said of that case that the vendee had no notice that the party was insolvent and it may be contended that the respondent knew that her vendor was insolvent, but that is not controlling, for the Sales in Bulk Law was enacted for the protection of those who buy of insolvent vendors, as well as solvent vendors. If all purchases were made from solvent firms, there would be no reason for the enactment. But knowledge of insolvency would not deny respondent her legal right for another reason. She was buying under a

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contract which bound her to pay all the disclosed liabilities of the vendor.

I have extended my views merely for the purpose of writing it into the books as one of the last acts of my judicial career that I was wrong. I believe that respondent has been undone of her rights, and, while it affords poor consolation, I can do no more in the way of correcting my error than to confess my fault.

FULLERTON, J. For the reasons stated by Judge CHADWICK, I think the majority err in the conclusions reached in this case. I therefore dissent from the judgment directed.

(107 Wash. 243)

LINDHOLM et ux. v. PATRICK. (No. 15200.)

(Supreme Court of Washington. May 29, 1919.)

1. SPECIFIC PERFORMANCE ⟸121(11)—REFUSAL OF DEMAND—BURDEN OF PROOF.

In an action for specific performance of a contract by which mortgagor was to purchase from mortgagee the certificate of sale of the mortgaged premises on foreclosure, *held*, that plaintiffs had sustained the burden of proof with regard to defendant mortgagor's refusal of demand for specific performance as found by the court.

2. ACTION ⟸25(2) — RECOVERY OF MONEY—SPECIFIC PERFORMANCE OF CONTRACT.

An action to compel payment of money under contract for purchase of a certificate of sale on foreclosure is not an action in damages in the sense of excluding equitable jurisdiction.

3. SPECIFIC PERFORMANCE ⟸97(3)—TENDER—NECESSITY OF CONTINUING TENDER AFTER DEFENDANT'S REPUDIATION OF CONTRACT.

In an action for specific performance of a contract to purchase a certificate of sale on mortgage foreclosure, defendant's refusal to perform was sufficient, and it was not necessary that plaintiff continue the tender after defendant's repudiation of the contract.

4. SPECIFIC PERFORMANCE ⟸101—CONTRACT TO PURCHASE CERTIFICATE OF SALE—FAILURE OF TITLE IN PLAINTIFF SELLER.

The rule that an action for specific performance of a contract to convey real property will not lie in favor of one who knows prior to commencement of such action that defendant is incapable of performing the contract for want of title does not apply to the specific performance of the contract by which the mortgagor agreed to purchase a certificate of sale upon foreclosure of second mortgage, from the mortgagee, where prior to the commencement of the action the land was sold under the first mortgage.

Department 2.

Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by Maurice S. Lindholm and wife against E. A. Patrick. Judgment for plaintiffs, and defendant appeals. Affirmed.

John M. Gleeson, of Spokane, for appellant.

A. E. Gallagher, of Spokane, for respondents.

HOLCOMB, J. Appellant, Patrick, was the owner of certain land situated in Lincoln county, Wash., on which was a first mortgage lien. In consideration of the loan of certain money by the respondent Lindholm, the appellant executed to Lindholm a second mortgage upon the same premises. Upon the commencement of an action to foreclose this second mortgage by Lindholm an agreement was entered into between Patrick and Lindholm, the general terms of which were that Lindholm and wife agreed to bid in the property at the ensuing foreclosure sale at the amount due upon the second mortgage, and that, if the property were sold to Lindholm for the amount of such second mortgage, Lindholm would sell and assign the certificate of sale to Patrick at any time within 12 months thereafter, upon the payment by appellant to respondent of the amount bid by the respondent and any interest, taxes, or sum that respondent might pay on a prior mortgage on the land, the agreement further stipulating as follows:

"* * * Said E. A. Patrick agrees and binds himself absolutely to purchase said certificate of sale from the plaintiff [Lindholm] in case said property or any part thereof is sold to the plaintiff at said sale, and to pay the plaintiff above named therefor in cash the sum for which said property is sold to plaintiff on or before twelve months from the date of such sale of said land to plaintiff in said foreclosure proceedings, together with interest on the sum for which said land may be sold to the plaintiff from the date of such sale at the rate of 8 per cent. per annum until paid."

At the sheriff's sale, pursuant to the foreclosure proceedings on the second mortgage, Lindholm bid in the property at the sum of $1,019, and received the sheriff's certificate of sale.

[1] During the ensuing 12 months appellant paid to respondent no part of the sum so paid by respondent, as he had agreed in the foregoing instrument. The evidence shows that shortly after the expiration of the period provided for in the contract demand was made upon Patrick for the performance of his part of the agreement. Although it is denied, we view the evidence as showing that Gallagher, as attorney for Lindholm, made a specific demand upon Patrick for performance within a reasonable time after the lapse of the contractual period, which demand was accompanied by an offer on respondents' part to specifically perform their obligation under the contract by assigning the certificate of

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sale to Patrick, which offer Patrick refused, saying he would not pay anything nor accept any assignment of the certificate of sale. As we have said, this is contradicted by Patrick, but the trial court had the witnesses before it, and, although the witnesses were interested, the court was able to judge of their credibility. We are of the opinion that the plaintiffs sustained the burden of proof in this regard, and that such proof shows that Patrick absolutely refused any demand for specific performance, or offer of performance by the respondents. Respondents brought into court and tendered at the trial an executed assignment of the sheriff's certificate of sale, and also a quitclaim deed as a further assurance of their good faith and readiness to perform. It transpired at the trial that the land in question had in the meantime been sold under foreclosure of the first or prior mortgage, and that the appellant was a party of record to such foreclosure action.

The chief questions raised on this appeal are: (1) Was this properly an action in equity? (2) Was a tender of the assignment of the certificate of sale by Lindholm a condition precedent to this action? and (3) whether the loss of the legal title to both respondent and appellant by the subsequent foreclosure of the first mortgage avoided the liability of appellant upon his written contract.

[2] The distinction which this case suggests between a case at law and a case in equity has been very clearly defined by a number of learned courts. In Rindge v. Baker, 57 N. Y. 209, 15 Am. Rep. 475, it is said:

> If the action "be brought for damages for breach of contract, it is a case at law; if it be brought for money, by way of performance of the contract, it is a case in equity. Thus, where a vendor in a contract for the sale of land sues for the price, his action is equitable."

Here there is no claim for damages. The action is plainly one to compel the appellant to perform his contract for the payment of a sum of money; such contract being one of mutuality, allowing to appellant an action for specific conveyance had the conditions of the case been reversed.

> "A vendor of lands seeking the payment of the purchase money may maintain an action against the vendee for the specific performance of the written contract of sale upon the principle of mutuality of remedy." Wat. Spec. Perf. §§ 14–16.

See, also, Pomeroy, Spec. Perf. § 6; 2 Beach, Eq. Jur. § 636; Tiedeman, Eq. Jur. § 493.

Obviously this is not damage in the sense of excluding equitable jurisdiction. The mere fact that a judgment is for money is not determinative of the character of an action as at law or in equity. Though not cited as directly in point, the recent decision in Salt v. Anderson, 180 Pac. 873, and the cases therein cited, is of importance in this aspect of the argument.

We conclude that the court below was properly sitting in equity.

[3] On the question of the necessity of tender as a condition precedent to maintaining this action, what we have above indicated as the proof shown on the trial of the case in regard to the proffer of performance by respondent and his attorney, and its rejection by the appellant Patrick, brings this contention squarely within the well-established rule, repeatedly announced by this court as being supported by universal authority, that it is not necessary to continue a tender when the party for whose benefit the tender or the proffer of performance has been made repudiates the contract, for the reason that the law will not compel any one to do an idle thing.

In the case of Kane v. Borthwick, 50 Wash. 8, 96 Pac. 516, 18 L. R. A. (N. S.) 486, this court, speaking by Judge Rudkin, quotes with approval from 28 Am. & Eng. Encyc. Law (2d Ed.) p. 5, as follows:

> "The maxim that the law does not compel one to do vain or useless things applies to the case of tender of performance of an obligation. Hence a tender is not necessary where it appears that, if made, it would have been fruitless. The general rule may be stated as follows: An actual tender of performance may be excused when there is a willingness and an ability to perform, and actual performance has been prevented or expressly waived by the parties to whom performance is due. It appears, then, that to excuse a failure to make an actual tender, there must be an existing capacity to perform, coupled with a state of facts which establishes the futility of making the tender."

See Livieratos v. Commonwealth Dec. Co., 57 Wash. 376, 106 Pac. 1125; Weinberg v. Naher, 51 Wash. 591, 99 Pac. 736, 22 L. R. A. (N. S.) 956.

[4] The third and last contention is that respondents' inability to convey title avoids appellant's liability. It is the well-settled doctrine of this and other jurisdictions that an action for the specific performance of a contract to convey real property will not lie in favor of one who knows, prior to the commencement of such action, that the defendant is incapable of performing the contract for want of title. Morgan v. Bell, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614; Peters v. Van Horn, 37 Wash. 550, 79 Pac. 1110. The instant case is clearly distinguishable from the foregoing. Title was lost to either of these parties by the foreclosure of the first mortgage; but that was a condition directly the result of appellant's own action in placing such first mortgage upon his land, and was not an act or thing done by respondents. The respondents did not agree to pay off or protect against the first mortgage; they merely reserved the right to do so.

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Neither did the respondents procure the foreclosure of the first mortgage; that occurred by reason of the appellant's failure to discharge an obligation he himself had voluntarily incurred.

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The judgment is affirmed.

CHADWICK, C. J., and FULLERTON, MOUNT, and PARKER, JJ., concur.

(107 Wash. 300)

LESTER v. MILLMAN et ux. (No. 15304.)

(Supreme Court of Washington. May 31, 1919.)

MALICIOUS PROSECUTION ⟸71(2)—PROBABLE CAUSE—QUESTION FOR JURY.

In an action for malicious prosecution, whether defendants had probable cause for instituting prosecution *held* for the jury under their evidence that one of them fairly and fully stated the facts to the prosecuting attorney, and acted on his advice, and plaintiff's testimony in effect going to show that defendant in making his statement to the prosecuting attorney suppressed an essential matter.

Department 1.

Appeal from Superior Court, Pierce County.

Action by Ralph Lester against Alexander Millman and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

W. A. Johnson, of Tacoma, for appellants.

O. S. Galbreath, of Tacoma, for respondent.

MITCHELL, J. This action was brought by Ralph Lester, respondent, against Alex. Millman and Mary Millman, husband and wife, appellants, to recover damages for malicious prosecution. The jury returned a verdict against appellants in the sum of $250, upon which verdict a judgment was rendered, after a motion for a new trial was denied. Appeal has been taken from the judgment.

The only assignment of error is the denial by the trial court of appellants' motion for a directed verdict at the conclusion of all the testimony. The motion was based upon the contention that the evidence showed appellants had acted upon the advice of a deputy prosecuting attorney, after making a full and truthful statement of all known facts relating to probable cause for the prosecution.

The rule stated in Simmons v. Gardner, 46 Wash. 282, syl. 1, 89 Pac. 887, L. R. A. 1915D, 16, followed in the cases of Anderson v. Seattle Lighting Co., 71 Wash. 155, 127 Pac. 1108, Hightower v. Union Savings & Trust Co., 88 Wash. 179, 152 Pac. 1015, Ann. Cas. 1918A, 489, Main v. Healy, 100 Wash. 253, 170 Pac. 570, Borg v. Bringhurst, 178 Pac. 450, and Bruce v. Elmergreen, 180 Pac. 135 (quoting from the syllabus in the first case), is as follows:

"In an action for malicious prosecution, where it appears from the undisputed evidence that the prosecutors acted upon the advice of the prosecuting attorney, after making a full and truthful statement of all known facts relating to probable cause for the prosecution, it becomes the duty of the court to find probable cause as a matter of law, and to direct a verdict for the defendants. * * *"

Considered from another viewpoint, the cases of Finigan v. Sullivan, 65 Wash. 625, 118 Pac. 888, and Baer v. Chambers, 67 Wash. 357, 121 Pac. 843, Ann. Cas. 1913D, 559, and authorities therein cited, in effect declare that, in an action for malicious prosecution, where there is evidence warranting the jury in concluding that the defendant did not fully and truthfully communicate to the prosecuting attorney all the material facts within his knowledge bearing upon plaintiff's guilt of the crime for which he was prosecuted, then the court cannot decide, as a matter of law, that defendant was justified by the advice of the prosecuting attorney, but the question of probable cause is one for the jury.

In the present case the parties were, and for about 10 years had been, neighbors. They lived in the country, some distance from Tacoma. The alleged criminal act consisted of breaking into the cellar at the Millman home and carrying away personal property belonging to them, about 2 o'clock in the morning of June 9, 1918. At that time there were with respondent, at his parents' home, a brother, Dave Lester, Mrs. Dave Lester, and a sister, Miss Lester. On the evening of the 8th of June, respondent visited with the neighborhood merchant and family from 8 o'clock until about 11 o'clock, when he returned home in his automobile. This is corroborated by the merchant. Respondent testified he retired about 11:30, without having been near the Millman place. On that same evening, Miss Lester was taken from her home about 8 o'clock by a friend, on a motorcycle, to a theater in Tacoma. Returning, they left the show about 11 o'clock, and arrived at her home about 11:30 o'clock. Mrs. Millman testified she was certain she retired at one o'clock the night of June 8th, laid awake quite a while, and about 2 o'clock, upon being disturbed, she looked out the window and saw respondent, whom she recognized, and another person, taking the property out of the cellar under an outbuilding about 40 feet away. Mr. Millman worked at a sawmill at night, and on his returning home, about 6:15 a.m. June 9th, his wife told him of the larceny. He testified he immediately went out to the cellar, and noticed footprints

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which he followed out to automobile tracks which led to the Lester home. He went to the barn, where respondent and his brother Dave were, called respondent out, and accused him of the theft. Upon denial by respondent, Millman took out his watch, noticed the time, and said: "I will give you one hour's time to bring that back." His account of what then occurred, as testified to in the present trial, was:

"I went home, changed my clothes, had breakfast, came back about two hours later, saw him again. I said, 'You haven't brought the goods back.' He said, 'No.' He wanted me to search his place. Might as well search for a needle in haystack; good many brushes and buildings around there. He says, 'Come in, I will show you the tracks which way I came in last night.' I didn't want to listen to that, because I already had positive proof; I didn't want any more of it. I said, 'I will miss my car.' He said, 'I will take you to the car with my machine.' I said, 'No, my friendship ceases with a man doing dirty trick like that.'"

He further testified that he then called at the prosecuting attorney's office and related to one of the deputies Mrs. Millman's story, his finding and following the footprints and automobile tracks, and the two interviews with respondent, took the deputy prosecuting attorney's advice, made a criminal complaint, and had respondent arrested for larceny. At the giving of the testimony of Millman, as above set out, the deputy prosecuting attorney was present, and when called into the witness chair he testified that Millman's testimony was substantially the same as he had represented the facts upon which he advised the prosecution of respondent; but on cross and redirect examination he stated the information he received prior to the arrest was Mrs. Millman's having seen and recognized respondent at the time of the theft and Mr. Millman's having seen and followed the footprints and automobile tracks up to respondent's home.

On the contrary, respondent's testimony showed there was nothing unusual about his footprints, nor the tracks of his automobile. Between the two interviews on the morning of June 9th, after talking with his sister, and learning that she and her escort returned home about 11:30 the night before, and having talked with her escort, who lived near by, respondent examined the tracks of his automobile, made as he came in the night before, and observed that they were plainly crossed over by the motorcycle. In this connection, it may be mentioned that several witnesses, including the young man who used the motorcycle, testified that upon an examination, made that morning between 7 and 9 o'clock, it was apparent that the motorcycle, which came in about 11:30 o'clock, was the last vehicle along the road at the Lester home, and, as it ran to the house, crossed all other tracks, including those made by respondent's automobile. So that the conversation which took place between respondent and Millman at the second interview on the 9th of June, as testified to by respondent and corroborated by his brother Dave, was this:

"He said, 'You haven't brought it back?' I said, 'No, sir; I haven't anything to take back; I don't see how I can bring it back.' He said, 'I will have you arrested.' I said, 'All right.' He said, 'You took it; my wife seen you out of the window.' I said, 'That is funny.' I said, 'I was in at 11.' He said it was around 2 o'clock when done. In the meantime I had went up and seen Stone; that was the man out with my sister; he took her to a show. Q. He was not present? A. No, sir. Q. Say what he said and what you said. A. I said, 'I came in at 11 o'clock.' He said, 'None of your lies goes here; you know you done it.' I said, 'Millman, if you come out to the road, I will show you where I came in my machine; my sister said Stone and her got home half past 11.' I said, 'Come out to the road, I will show you where his crossed mine.' He said, 'None of your lies.' He said, 'I haven't time to listen to lies.' He went off. I said I would take him to town in my machine if he missed his car."

Relative to the fairness of Mr. Millman in reporting the matter to the deputy prosecuting attorney, he has no excuse, by way of haste or excitement at the time of detailing the facts, for it was on Saturday he first called, at which time the deputy prosecuting attorney was too busy to talk with him, and fixed the following Monday, when the story was told upon which Millman was advised of probable cause to make the criminal complaint. Giving the testimony of Millman and the deputy prosecuting attorney, as to the statements and report made by Millman of the facts upon which he was advised there was reasonable ground for the prosecution of respondent, the strongest consideration in favor of appellants it is obvious there was ample testimony, which the jury was at liberty to believe, that appellants did not make to the deputy prosecuting attorney a full and truthful statement of all known material facts relating to probable cause for the prosecution, because respondent, corroborated by his brother, testified that, in addition to what Millman said occurred in the second conversation on June 9th, he told Millman that his sister, Miss Lester, had told him that she and her friend had returned home that night at half past 11, and that if he would go out to the road he would show him where they crossed his automobile tracks. It is manifest such declaration and information by respondent were important. Millman, who was depending in large measure upon the contention that automobile tracks were followed to the Lester home from the scene of a theft at 2 o'clock that morning, was told by respondent that his sister had told him she and her friend re-

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turned at 11:30 the same night, and that, if he would go out to the road with him, he would show him where they had crossed his automobile tracks. The materiality of that part of respondent's statements, shown by his proof to have been omitted by Millman, is apparent.

The question of whether that material additional information was, or was not, given to Millman, as testified to by respondent's witnesses, was no concern of the trial judge, who properly determined that under the rule he was stripped of all right or necessity to declare probable cause as a matter of law and to direct a verdict.

Judgment affirmed.

MACKINTOSH, TOLMAN, FULLERTON, and MAIN, JJ., concur.

(107 Wash. 372)

In re MARTIN. (No. 2.)

(Supreme Court of Washington. June 4, 1919.)

ATTORNEY AND CLIENT ⟸44(1)—DISBARMENT —GROUNDS.

That an attorney, contrary to his client's instructions, fraudulently sold a note and mortgage held by him in a fiduciary capacity, and refused to account for the proceeds, that he represented to another client that he was writing a brief on appeal, but did not actually do so, whereby the appeal was dismissed, that he appropriated the proceeds of a recovery to his own use, and that he failed to account for fees to attorneys associated with him in a divorce suit, constituted grounds for disbarment.

En Banc.

Appeal from State Board of Law Examiners.

Proceeding for the disbarment of H. N. Martin for unprofessional conduct constituting moral turpitude. On review of the report of the State Board of Law Examiners. License annulled.

R. M. Burgunder, of Colfax, and W. V. Tanner, of Olympia, for board of examiners.

Cannon & Ferris, of Spokane, for defendant.

MITCHELL, J. This is a proceeding for the disbarment of H. N. Martin, an attorney and counselor at law in this state. He has been charged with unprofessional conduct constituting moral turpitude. A hearing was had, in August, 1918, before the state board of law examiners, whose findings, conclusion, and recommendation, with all the evidence in the case, have been reported for review by this court, in accordance with its rules and the provisions of chapter 115, page 421, Laws of 1917. The defendant filed written objections to the findings, conclusion, and recommendation of the state board of law examiners, and the cause has been argued and submitted to this court.

The findings, conclusion, and recommendation of the board are as follows:

"Findings.

"I. That H. N. Martin is now, and at all times mentioned herein has been, a duly qualified attorney at law admitted to [practice in this state].

"II. That in the month of September, 1916, one M. H. Sorell employed H. N. Martin as his attorney to defend him in a criminal action pending against him in the superior court of Grant county, Wash. That it was agreed between Martin and Sorell and wife that the attorney fee in said case was to be the sum of $1,000 for services in the superior court. That said Sorell did not have the sum of $1,000 in cash with which to pay said attorney fee, and it was necessary for him to place a mortgage upon certain property in order to secure the money, and in connection therewith the said H. N. Martin suggested to and advised said Sorell that an additional mortgage of $10,000 be made on all of Sorell's property not already covered by mortgages, in order to protect Sorell in case a judgment for damages was rendered against him in a civil action then pending in the same court. That pursuant to said advice from said H. N. Martin the said M. A. Sorell and Emma Sorell, his wife, on the 15th day of September, 1916, executed a mortgage in favor of H. N. Martin on certain property owned by them to secure the payment of a note for $10,000, payable one year from date. That prior to and at the time of the execution of said note and mortgage it had been agreed between Martin and Sorell and wife that the mortgage should not be placed of record unless Sorell requested Martin to do so, and in that event Martin agreed to release all or any part of the land included in said mortgage, if Sorell wished to sell or mortgage any of the property, or if such request was made for any other purpose.

"III. That thereafter, and on the 22d day of September, 1916, said Martin indorsed said note and delivered it to the Davenport National Bank, of Davenport, Wash., and thereafter, and on the 20th day of October, 1916, the said H. N. Martin sold and assigned said mortgage to said bank for a recited consideration of $5,000. That at the time of said assignment said H. N. Martin fraudulently represented to said bank that said mortgage for $10,000 had been given to him in payment of an attorney fee and was bona fide. That in fraud of the rights of said Sorell, and without his knowledge or consent, said mortgage was delivered to said bank and recorded by it on the 23d day of October, 1916. That said Martin fraudulently sold said mortgage and appropriated the proceeds of the sale or assignment to his own use, and has refused to account therefor to the said Sorell, or to secure its release and satisfaction in whole or in part, or to reduce the amount of said mortgage by proper credits on the note or otherwise, although repeated requests have been made to said Martin by Sorell.

"IV. That a short time after the execution of

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said $10,000 mortgage, and on or about the 20th day of October, 1916, the said M. H. Sorell mortgaged part of his land for the sum of $1,000, and paid said amount to said H. N. Martin, in full for his services in the criminal action. That the assignment of the note and mortgage by Martin to the bank was accomplished by falsely representing to the bank its consideration, and was done for the purpose of defrauding said Sorell of his property and for the personal gain of said Martin.

"V. That on November 6, 1913, in the case of D. C. Bonthius and wife against the Great Northern Railway Company, in the superior court of Lincoln county, cause No. 6060, a judgment was entered in favor of the plaintiffs after a trial before Judge McCroskey of that county, in which action plaintiffs were represented by Martin & Wilson as their attorneys. That subsequent to the date of the judgment the defendant appealed from the decision of the superior court to the Supreme Court of the state of Washington. That plaintiffs, through their son, C. Bonthius, arranged with H. N. Martin to represent them on said appeal and to write a brief for the Supreme Court in said action, and have the same printed, which Martin agreed to do. That the sum of $25 was paid to Martin to apply on the payment of printing the brief. That Martin failed to write or have printed a brief for the Supreme Court, and no brief was filed in this case for or on behalf of the plaintiffs, although said Martin repeatedly told and wrote his clients that he was writing said brief. That a decision of the Supreme Court on the appeal was rendered on February 2, 1916, in which judgment of the superior court was reversed, and the action of plaintiffs dismissed.

"VI. That on or about November 9, 1915, suit was brought by D. C. Bonthius against the Great Northern Railway Company, wherein H. N. Martin acted as attorney for the plaintiff, in which judgment in the sum of $220 was sought for the killing of a two year old steer July 31, 1915, one three year old steer August 3, 1915, and the injury to one Durham bull calf six months old, and one Durham heifer calf six months old, all the property of plaintiff. That on December 21, 1915, H. N. Martin, as attorney for plaintiff, and the attorneys for the railway company, entered into a written stipulation whereby the case was settled for $140. That subsequently H. N. Martin was paid the sum of $140 by the railway company in accordance with the stipulation. That this money was appropriated by Martin to his own use, and no accounting thereof has ever been made by him with D. C. Bonthius. That at the time of the appropriation of said sum of $140 by said Martin the said D. C. Bonthius was indebted to the firm of Martin & Wilson for services rendered and costs expended by them in previous litigation.

"VII. That in the month of July, 1913, one Amanda W. Nichols employed the firm of Roche & Onstine, attorneys at law at Spokane, Wash., to cancel a deed and bill of sale and obtain a divorce for her, and thereafter one E. D. Reiter, an attorney, was associated with said firm of attorneys in said action which was entitled: 'In the Superior Court of the State of Washington in and for the County of Spokane. Amanda W. Nichols, Plaintiff, v. J. J. Nichols, Defendant.'

"VIII. That thereafter the attorneys above named served and filed a motion in said cause to require the defendant to pay a reasonable sum as alimony, suit money, and attorney's fees, but prior to the hearing on said motion the said H. N. Martin was entered as one of her attorneys. That it was agreed by and between Roche & Onstine, E. D. Reiter, and said Martin that the fees payable to Martin for the services rendered by him in the case should be paid directly to him by the plaintiff, and that he was to receive no part of the fees that were to become due to the other attorneys in the case, but that, in the event that the court made any order in the action allowing attorney fees to the plaintiff therein, the same would be divided equally between the attorneys, to wit: Mr. Martin one-third, Roche & Onstine one-third, and Reiter one-third.

"IX. That thereafter, on the 12th day of January, 1914, an order was made by the court in said case, requiring the defendant to pay to the clerk of the court the sum of $50 suit money and $200 attorney fees. That said sum of $250 was paid to the clerk on the 20th day of January, 1914, and on the same day the said H. N. Martin demanded and received the same from the clerk. That said Martin kept all of said money for his own use and has made no accounting to said Roche & Onstine or E. D. Reiter for their share in said sum of $200, although repeated demands have been made for the payment of said money.

"X. That thereafter the said E. D. Reiter assigned to Roche & Onstine his interest in said fee, and an action was instituted in the superior court of the state of Washington in and for Spokane county by said firm of attorneys against said H. N. Martin and the deputy clerk of Spokane county to recover their share of said $200 attorney fee. That said action was tried on the 9th day of June, 1916, and thereafter and on the 11th day of July, 1916, the court granted judgment in favor of Roche & Onstine and against said H. N. Martin in the sum of $130, having found in said case that said Martin had wrongfully received from the clerk all of said attorney's fees and had unlawfully appropriated the same to his own use, and had refused to pay said E. D. Reiter and said Roche & Onstine their share thereof, although often requested so to do. That since the rendition of said judgment the said H. N. Martin has failed to pay to said Roche & Onstine their share of the attorney fee in said divorce action, as determined by the court, and has continued to unlawfully and wrongfully retain and appropriate said money to his own use.

"Conclusion.

"I. As conclusion of law on the foregoing findings of fact, the board finds that the acts and omissions of said H. N. Martin, as set forth in the first, second, and fourth causes of action, constitute unprofessional conduct as an attorney at law and involve moral turpitude.

"Recommendation.

"I. The board recommends that on the first, second, and fourth causes of action the said H. N. Martin should be disbarred from further practice as an attorney in the state of Washington and that his license to practice therein should be revoked."

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We have examined the evidence, and are satisfied that the findings, conclusion and recommendation of the state board of law examiners are justified, and that defendant has forfeited his right to practice law in this state.

It is therefore ordered that defendant, H. N. Martin, be disbarred, and his license to practice law in this state annulled.

FULLERTON, MAIN, PARKER, and MACKINTOSH, JJ., concur.

(107 Wash. 296)

HARLAN v. McGRAW et al. (No. 15246.)

(Supreme Court of Washington. May 31, 1919.)

1. PLEADING ⇐246(1) — SUIT FOR FORFEITURE OF LEASE—AMENDMENT OF COMPLAINT—DENIAL OF LEAVE.

In suit to forfeit and cancel a lease of coal lands for failure to pay royalties, trial court properly denied plaintiff leave to amend the complaint by adding allegations as to the commission of waste by using coal mined as railroad ballast and by excluding it from the royalty account.

2. MINES AND MINERALS ⇐66 — COAL LANDS—FORFEITURE OF LEASE.

Filing of labor liens on the property of a lessee of coal lands by the terms of the lease first specifically pledged as security for the payment of rentals *held* not such a breach of the lease as would warrant its forfeiture, especially where the rentals had been fully paid before suit for forfeiture by the lessor.

3. MINES AND MINERALS ⇐70(4)—LEASE OF COAL LANDS—FORFEITURES.

In view of length of term created by lease of coal lands, the probable value of the lessee's improvements made as contemplated by the lease, the comparatively small amount of rentals or royalties withheld from the lessor, and the fact that he demanded the amount only one day before bringing suit for forfeiture of the lease, *held*, that a forfeiture could not be enforced, though the portion of the lease providing for the payment of rentals and royalty was construable as the lessor contended; the lessee and his successor not being insolvent, or the lessor's legal remedy inadequate.

Department 1.

Appeal from Superior Court, Lewis County; W. A. Reynolds, Judge.

Suit by Israel G. Harlan against Marcus L. McGraw and others. From judgment of dismissal, plaintiff appeals. Affirmed.

C. D. Cunningham, of Centralia, for appellant.

Ralph A. Coan, of Portland, Or., and Miller & Wilkinson, of Vancouver, for respondents.

TOLMAN, J. Appellant on the 19th day of September, 1916, being then the owner of the real property therein described, made a written lease of certain coal lands to the respondent Marcus L. McGraw, who afterwards assigned his rights thereunder to the Centralia Coal Mining Company, a corporation. The provisions of the lease, so far as they are material to the issues here to be determined, are as follows:

"The party of the second part shall pay, and he does hereby agree to pay, to the party of the first part, as rental for said land and as minimum royalty on coal mined therefrom, one thousand dollars per year to cover the first ten thousand tons mined or less, said one thousand dollars to be paid at the rate of one hundred dollars per month on the 10th day of each and every month, beginning with the 10th day of October, 1916, and continuing on the 10th day of each and every month thereafter during the term of this lease, save and except that during the months of June and July of each year said payment shall be discontinued; and for all coal mined in excess of the first ten thousand tons per year, the party of the second part agrees to pay ten cents per ton of two thousand pounds, mine run coal, taken from said lands, on the 10th day of each and every month, said royalty to be payable at the Field & Lease Bank, Centralia, Lewis county, Washington, in United States gold coin; it being the intention of the parties hereto that there shall be a settlement once every month between the parties for the purpose of determining the amount of coal mined in the previous month, and that if said settlement shall show that more than one thousand tons of coal have been mined in the previous month, then the party of the second part shall pay to the party of the first part the sum of ten cents per ton for all coal mined in excess of one thousand tons, this to continue during every month covered by this lease, save and except the months of June and July of every year, in which months the party of the second part shall only be required to pay ten cents per ton for all coal actually mined during said months. * * *

"It is further stipulated and agreed as part consideration of this lease, that the party of the first part shall have a lien on all machinery, equipments, cars, buildings and other property erected and to be erected on said lands, or in the mine or mines, made by the party of the second part, for any money due the party of the first part, under this lease, which said lien shall be a prior claim to all other liens, including labor liens, and the party of the second part hereby pledges to the first party all such property of whatever kind and description belonging to him or hereinafter acquired by him, his successors or assigns, that may be placed on said land during this lease, or placed in said mine or mines in connection therewith, to secure any money becoming due, and the said party of the second part shall have the right to remove said machinery and equipment and buildings only after such money has been paid. * * *

"It is further stipulated and agreed that in respect to the several provisions herein, referring to the performance of acts within certain

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named period of time, time being of the essence of this contract, and in case of the failure of the party of the second part to pay in full any year's rental under this lease at the time herein specified, or to pay any taxes or assessments before the same become delinquent, or in any way fail to fulfill the terms of the lease, then this lease may be forfeited and terminated at the option of the party of the first part."

Appellant in his complaint alleges that under this lease the lessee became obligated to pay as royalty at least $100 on or before the 10th day of each and every month, except the months of July and August, in each year, and in addition thereto the sum of 10 cents per ton for all coal mined over and above 1,000 tons in any such month, and further alleged that the defendants and each of them had defaulted and breached the covenants of the lease, in that they had failed and refused to pay each of the $100 monthly payments which became due on the 10th day of January, 1918, the 10th day of February, 1918, the 10th day of March, 1918, the 10th day of April, 1918, and the 10th day of May, 1918. The complaint also alleges a further breach, in that the defendants suffered and permitted liens for labor to be filed against the mine and appellant's property and interest therein, of upwards of $4,000, and that, although due demand had been made, they had wholly failed to satisfy and discharge said liens, and the same were and are an incumbrance and lien upon the appellant's property. The prayer of the complaint is for judgment canceling and annuling the lease and excluding the defendants and each of them, and all persons claiming or to claim by, through, or under them, or any of them, from the property, and enjoining them from claiming or asserting any right, title, or interest therein. In due time respondents answered to the complaint, alleging that all sums due for rental provided for in the lease had been fully paid, and no amount whatever was due the plaintiff on account thereof, and further admitting that certain liens had been filed, but alleging that the lien claimants had been fully paid, and that no such liens had been filed on or against the property of the plaintiff. Upon these issues the case was called for trial, and at that time counsel for appellant moved the court for leave to amend the complaint by alleging the following as an additional ground for forfeiture:

"That at all times since the lease in question was executed the defendants have operated a coal mine upon the lands and premises described in the lease and in this complaint. That by the terms of the lease it is provided that payments for royalty upon the coal shall be made at ten cents per ton, mine run. That as a matter of fact at all times since this lease was executed down until the time of the commencement of this action, while the defendant was operating the mine, it committed great waste in this: That of the coal which was extracted from the ground they hauled out and scattered around the mine and used as ballast upon a railroad tract about 7,000 tons, which was never accounted for to the plaintiff by the defendant. That by reason of the fact that this coal has been scattered about it is impossible to ascertain the amount of it or to determine the amount of royalties that are earned under the lease for such coal as has been wasted and dissipated. That although frequent demands have been made for the amount and use of scales and weighing of all coal, the defendants failed and refused to do so, and by reason of their wastes they have forfeited all rights in and to said lands and premises."

Respondents objected to the amendment, first, upon the ground that it came too late, the case being then ready for trial, and that the proposed amendment would raise new issues involving considerable time and labor upon their part to meet such issues, and also objected upon the further ground that accepting the statement of counsel as embodied in the offer to amend as true, the facts stated made no ground for forfeiture of the lease. Counsel for appellant offered to allow additional time to meet the proposed issue, and, respondents still objecting, the trial court refused to allow the amendment, and directed that the trial proceed upon the issues as framed. Thereupon it was stipulated that, prior to the commencement of this action, workmen employed in and about the mine filed liens for labor upon all of the machinery and equipment of the mine, but asserted no lien against the land; that subsequently an action was brought and judgment rendered against the Centralia Coal Mining Company for a sum aggregating approximately $3,000, based upon such labor liens, and that thereafter the defendants paid such judgment in full and satisfied the record. It was further stipulated that the last coal mined under the lease was on January 28, 1918, no coal being mined subsequent to that date; that on February 28, 1918, the defendants paid to the plaintiff the sum of $324.13, which covered the balance of the royalty of 10 cents per ton for all coal actually mined up to that time; and that on the 10th day of May, 1918, defendants paid to the plaintiff the further sum of $54.95, which, together with the royalties theretofore paid for coal actually mined at 10 cents per ton, made up the full sum of $1,000 paid as rental after the 19th day of September, 1917. It was further stipulated that, the day before this action was commenced, plaintiff went to the Field & Lease Bank at Centralia, Lewis county, Washington, and there demanded payment of the sum of $100 per month, minimum royalty for the months of February, March, and April, 1918, and that there was no money there with which to meet said demand, and said minimum royalty was not paid. It was still further stipulated that after the commencement of this action, and on August 10, 1918, and again on September 10, 1918, defendants de-

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posited in the Field & Lease Bank at Centralia the sum of $100 to cover the minimum payments provided in the lease for the months of August and September but that plaintiff had refused to accept the money, so deposited. Neither party offered any other testimony, and the trial court, holding that no ground for forfeiture had been established, entered a judgment of dismissal, from which this appeal is prosecuted.

[1] It will be observed, and must be constantly borne in mind, that appellant is seeking only the forfeiture and cancellation of the lease, and does not in this action seek to enforce any rights which he may have other than the right of forfeiture. This being so, it seems manifest that the trial court did not err in denying leave to amend the complaint. The lease, in addition to the provisions quoted, gave the appellant the right of oversight and inspection of operations, in order to enable him to know at all times the amount of coal being mined, and if he permitted the respondents to mine and use coal for ballast, and to exclude the material so used from the royalty account, he should not be permitted to claim a forfeiture by reason thereof, at any rate until such time as he had made a specific demand and his demand had been refused.

[2] Nor can we hold that the filing of labor liens upon the property of the lessee, which was by the terms of the lease first specifically pledged as security for the payment of the rental, was such a breach as would warrant a forfeiture, especially when, as here, the liens have been fully paid. We find no covenant in the lease that the property of the lessee will be kept clear from subsequent labor liens, nor any agreement that a failure to so do will work a forfeiture.

[3] While that portion of the lease which provides for the payment of rental and royalty must, we think, be construed as appellant contends, and effect be given to the language used providing for monthly settlements and the payment of royalty each month on all coal mined in excess of 1,000 tons in the preceding month, yet as equity abhors a forfeiture, and as this action was brought for no other purpose, it does not follow that, because the parties differ in their construction of the terms of the lease, the mistaken party will be penalized to the extent of enforcing a forfeiture against him. It is suggested in respondents' brief that the parties hereto had, until shortly before the institution of this suit, themselves by their act placed a construction upon the contract in harmony with respondents' contentions. But neither in the pleadings nor the stipulated facts does that appear, except as it may be inferred from the fact that an attempt to forfeit was no sooner made, and by the acceptance of the payment of $54.95 made on the 10th day of May, 1918. Appellant asks for no judgment except that of forfeiture, and in view of the length of the term created by the lease, the probable value of the improvements as contemplated by the terms of the lease, the comparatively small amount which has been withheld from appellant, and the stipulated fact that he demanded that sum but one day before the bringing of this suit, we think the rule laid down by this court in Walker v. McMurchie, 61 Wash. 489, 112 Pac. 500, must be followed. It is there said:

"Equity has ever been jealous of the right of forfeiture, and has never enforced it unless the right thereto has been so clear and insistent as to permit of no denial."

The general rule appears to be well stated by the Supreme Court of Illinois in Tarr v. Stearman, 264 Ill. 110, 105 N. E. 957, where it is said:

"Courts of equity, as well as courts of law, recognize the rights of the parties to a contract to stipulate for penalties and forfeitures; but it is a rule of universal application that courts of equity will never affirmatively enforce either a penalty or a forfeiture. 2 Story's Eq. Jur. (13th Ed.) § 1319; 16 Cyc. 80. It is a well settled and familiar doctrine that a court of equity will not interfere on behalf of the party entitled thereto and enforce a forfeiture, but will leave him to his legal remedies, if any, even though the case might be one in which no equitable relief would be given to the defaulting party against the forfeiture. The few apparent exceptions to this doctrine are not real exceptions. In fact, there are no exceptions. Those which appear to be so all depend upon other rules and principles."

See, also, 16 Cyc. 80, and cases there cited.

There being no suggestion of the insolvency of respondents, or either of them, or allegation that such remedy is inadequate, appellant will be left to pursue his remedy at law until such time as it shall appear that the legal remedy is inadequate.

Judgment affirmed.

CHADWICK, C. J., and MITCHELL, MAIN, and MACKINTOSH, JJ., concur.

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(107 Wash. 310)

LAURIDSEN v. BOWDEN, GAZZAM & ARNOLD. (No. 14809.)

(Supreme Court of Washington. May 31, 1919.)

1. NEW TRIAL ⟸10—WAIVER OF MOTION—EFFECT.

Where appellant, defendant, in writing waived its motion for new trial, but insisted upon its motion for judgment non obstante veredicto, the waiver of the motion for new trial did not carry with it and condone whatever errors might have been properly considered under the motion for new trial.

2. INSURANCE ⟸74—AGENCY—SUFFICIENCY OF LETTER TO CONSTITUTE.

Where defendant, agent of an insurer upon inquiry simply quoted rates and concluded its letters by saying it hoped to receive an order for insurance on the cargoes, such statement was insufficient to constitute the appointment of the inquirers as agents of defendant who was agent of an insurer writing insurance as an unauthorized company under Insurance Code, § 75.

3. INSURANCE ⟸74—AGENCY—AUTHORITY—SUFFICIENCY OF INSTRUCTIONS.

A statement of insurer's agent that if inquirer would advise the name of shipper, amount of shipment, nature of cargo, boat shipped on, and point of sailing and destination, they would protect the shipment by insurance conferred no authority upon the inquirer in the name of such agent to do anything to protect shippers or shipment.

4. INSURANCE ⟸74—MARINE INSURANCE—AGENCY—CONSTRUCTION OF LETTER.

Where defendant insurance agent sued for breach of alleged contract to procure insurance, in a letter to parties attempting to procure marine insurance for other parties, said, "We have another agent up the sound," etc., such does not of itself prove the existence of, nor create an agency in the persons written to, although inferring that the writer proposed to give addressees authority to do a given thing in a special manner.

5. INSURANCE ⟸93—MARINE INSURANCE—AGENCY—APPOINTMENT OF AGENTS.

Since third parties dealing with an agent must at their own risk ascertain both the fact and extent of the agent's authority, and the burden is on them to show that the acts of he agent were within the scope of his authority, and neither the fact of agency nor its scope can be established by declarations of the alleged agents in the absence of the principal, in an action for breach of contract to procure marine insurance the rights of plaintiff are to be considered as if he had read the communications between the parties attempting to procure insurance for him and the defendant insurance agents bearing upon the question of agency.

6. INSURANCE ⟸94—RATIFICATION OF AGENT'S ACTS.

There could be no ratification of the act of the parties attempting to procure insurance as agents of the insurance agency, where there was no proof of any agency on the part of the performers of the act.

Main, Holcomb, and Tolman, JJ., dissenting.

En Banc.

Appeal from Superior Court, Clallam County; Guy C. Alston, Judge.

Action by G. M. Lauridsen against Bowden, Gazzam & Arnold. Verdict and judgment for plaintiff, and defendant appeals. Reversed and remanded, with instructions to dismiss the action.

Bogle, Graves, Merritt & Bogle, of Seattle, for appellant.

T. F. Trumbull and Rose & Lewis, all of Port Angeles, for respondent.

MITCHELL, J. Respondent brought this action to recover damages for an alleged breach of contract to procure marine insurance upon a cargo of canned salmon to be shipped from Clallam county to Seattle in November, 1915. At the close of respondent's proof appellant challenged the sufficiency of the evidence, and moved the court for a judgment of nonsuit. Again at the close of all the evidence appellant moved the court to direct the jury to return a verdict for appellant and against the respondent on the ground that the evidence failed to show any right of recovery on the part of respondent. And again after the verdict and at the proper time appellant made and filed a written motion for judgment non obstante veredicto. Each of the motions was denied and an exception taken. The jury returned a verdict in the sum of $2,500 for respondent, and from a judgment entered thereon this appeal has been taken.

[1] After the verdict had been received in the trial court, and after appellant had filed a motion for a new trial, it then in writing waived its motion for a new trial, but insisted upon its motion for a judgment non obstante veredicto. Respondent now objects to the consideration by this court of appellant's assignments of errors, it being contended that the waiver of the motion for a new trial carried with it and condoned whatever errors, if any, might have been properly considered under the motion for a new trial. Whatever may have been the rule in this respect at common law and according to the early decisions in this state, under the present practice statutes and the later decisions of this court the rule is otherwise. In the case of Dyer v. Middle Kittitas Irrigation District, 40 Wash. 238, 82 Pac. 301, a verdict was rendered for the defendant; plaintiff made a motion for a judgment notwithstanding the verdict and for a new trial. Before the motions were passed upon, the motion for a new trial was withdrawn by the

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plaintiff, and plaintiff's rights were submitted upon the other motion. It was overruled, and judgment was entered on the verdict. This court considered the sufficiency of the evidence to sustain the judgment, and reversed the case, ordering a judgment for the plaintiff. Again, in the case of Forsyth v. Dow, 81 Wash. 137, 139, 142 Pac. 490, 491, this court said:

"A motion for a judgment non obstante veredicto is a creature of the common law. It is now entertained only in so far as it has been defined and assigned a particular function in our Code of Procedure. * * * Nor does the statute make the motion in any way dependent upon or concurrent with a motion for a new trial."

Other cases to the same effect are Birch v. Abercrombie, 74 Wash. 486, 133 Pac. 1020, 50 L. R. A. (N. S.) 59, and Mattson v. Griffin Transfer Co., 90 Wash. 1, 155 Pac. 392.

[2-4] The case was tried upon a second amended complaint. In the original complaint, appellant, the Pacific Marine Insurance Company, a corporation, and Davis & Woods, a copartnership, were all made defendants and served with summons and complaint. The complaint alleged, inter alia, that Davis & Woods acted in the transaction as agents for appellant and the Pacific Marine Insurance Company, and recovery was sought for loss on a policy of insurance that Davis & Woods represented was or would be issued because of the receipt by them of the premium paid for the policy prior to the loss. The amended complaint was served and filed, continuing the case against all three defendants. A separate demurrer of the Pacific Marine Insurance Company to the complaint having been sustained, the case was dismissed upon motion of the plaintiff as to the insurance company and also as to Davis & Woods. In the second amended complaint the plaintiff sued, not on an alleged breach of contract of insurance, but on an alleged breach of contract to procure insurance.

The probative facts in the case are undisputed. Respondent was a resident of and doing business in Clallam county; J. M. Davis and P. J. Woods resided in Port Angeles, Wash., and were engaged in business as copartners in the name of Davis & Woods; and appellant was and is a corporation of this state having its office and place of business in Seattle, and engaged, under its articles of incorporation, in the insurance business only as agent and broker for fire, marine, and liability insurance companies. Appellant, as agent, represented, among other companies, the Pacific Marine Insurance Company, a foreign insurance company which wrote marine insurance in this state as an "unauthorized company" under section 75 of the Insurance Code of the state. Davis & Woods had no license from the state insurance commissioner to solicit insurance for the appellant or the Pacific Marine Insurance Company.

Respondent, intending to send two gas boats with cargoes of canned salmon from his cannery near the mouth of the Quillayute river in Clallam county to Seattle, was solicited on November 20th by Mr. Davis, of the firm of Davis & Woods, to give them the application for the marine insurance on the cargoes. Davis told respondent he was the representative of the Pacific Marine Insurance Company, through Bowden, Gazzam & Arnold, of Seattle, and, not being posted as to rates, he would write and find out what they were. Thinking there was insufficient time to attend to it by mail, Davis agreed to telegraph appellant. That afternoon (Saturday) Davis sent a telegram as follows:

"Port Angeles, Wash., Nov. 20, 1915.

"Bowden, Gazzam & Arnold, N. Y. Blk., Seattle, Wn. Write us best marine rate cargo salmon ex boats Albert and Rhododendron owned by Capt. Albert Johnson, this city, from cannery mouth Quillayute river, Clallam county to Seattle. Davis & Woods."

Appellant's office was closed on Saturday afternoon, and the telegram was not delivered to it until Monday, November 22d, which was the first appellant heard of the transaction. Davis' statement to respondent on November 20th that his firm was agent of appellant was unauthorized. On Monday Mr. Arnold, secretary of appellant, replied to the telegram he had just received as follows:

"Seattle, Wn., 11:59 a. m., Nov. 22.

"Davis & Woods, Port Angeles, Wn. Rate salmon thirty cents gasoline boats ten cents regular steamers see letter today.

"Bowden, Gazzam & Arnold."

On the same day, after sending the telegram, a letter was written and mailed from appellant's office as follows:

"Seattle, Wash., Nov. 22, 1915.

"Messrs. Davis & Woods, Port Angeles, Wash. —Gentlemen: Your wire of the 20th was not received until this morning owing to the fact that we always close the office on Saturdays at 1 p. m., and we therefore wired you this morning as follows: 'Rate salmon thirty cents gasoline boats ten cents regular steamers, see letter to-day.'

"The rate on cargo salmon from cannery at mouth of Quillayute river, Clallam county, to Seattle, if by regular steamers is but 10 cents per $100, while if shipped by gasoline boats the rate is thirty cents per $100, and we trust these rates will enable you to secure the business.

"The above rates quoted are for cargo under deck and are always twice as much when loaded on deck.

"Thanking you for this inquiry, and hoping to receive your order for the insurance, we remain, yours very truly,

"Bowden, Gazzam & Arnold,
"W. W. Turner,
"Manager Marine Insurance Dept."

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On November 22d, upon receipt of the telegram of that date from appellant, Davis informed respondent of the rates. Respondent testified he then told Davis "to write a policy, and he (Davis) explained they did not issue a policy on marine insurance like they do on fire, they would give me what he called a slip or receipt for the money—a memorandum or something of that kind."

On or about November 24th, Davis & Woods wrote to appellant as follows:

"Port Angeles, Wash.

"Bowden, Gazzam & Arnold, Seattle, Wn.—Dear Sirs: Refer your letter 22d inst. Shall we issue applicant a slip and contract such as you mailed us in June last, per inclosed blanks; if so, kindly mail blanks and when we are advised as to cargo we will issue slip to assured and mail copy to you.

"Kindly advise us in this matter that there is no hitch.

"Yours truly, Davis & Woods,
"Per J. M. Davis."

On November 27th, appellant's office in Seattle wrote and mailed to Davis & Woods a letter as follows:

"Seattle, Wash., Nov. 27, 1915.

"Messrs. Davis & Woods, Port Angeles, Wash.—Gentlemen: Replying to your letter of the 24th inst., have to state that if this order is for a single shipment it will not be necessary for you to issue an open policy contract with the assured. If you will advise us the name of the shipper, amount of shipment, nature of cargo, boat that it is shipped on, to and from what port and the date of sailing we will protect the shipment for you and return one of our policies covering on the same.

"In our letter of June 5th, we sent you open policy for your own use, made out in triplicate. These were to have been signed by your firm and all returned to this office for the policy itself to be made out. Kindly do this now, and we will then be able to complete the transaction.

"We have another agent up sound that has taken care of several salmon shipments and we have issued policies from this office, on such information as requested above.

"Awaiting your advices, we remain, yours very truly, Bowden, Gazzam & Arnold,

"W. W. Turner, Manager Marine Ins. Dept.

"Please return the open policy contracts signed, as requested."

In the meantime, about 3 o'clock on Saturday afternoon, November 27th, respondent went to the office of Davis & Woods and gave them certain information relative to the shipments he wished covered by marine insurance. At that time respondent gave to Davis & Woods a check payable to them in the sum of $24.76, premium for insurance, and was informed by Davis & Woods the cargoes would be protected. Davis & Woods still retained the check at the time of the trial of this case. About 5 or 5:30 o'clock in the afternoon on Saturday, November 27th, Davis, by telephone, delivered to the telegraph company, at its office in Port Angeles, to be forwarded to Seattle, a night letter as follows:

"Port Angeles, Wash., Nov. 27, 1915.

"Bowden, Gazzam & Arnold, N. Y. Bldg., Seattle, Wash. Launches Albert and Rhododendron sailed today from cannery Quillayute river for Seattle with cargo salmon, cover with marine policy favor G. M. Lauridsen eighteen hundred ninety cases value seven thousand and fifty-five dollars on Albert, three hundred eighty-eight cases value twelve hundred dollars on Rhododendron number cases each variety furnished if you require them. Acknowledge by wire. Davis & Woods."

This telegram, being a night letter, was not received by appellant until Monday morning, November 29th. It bears a notation by the telegraph company, "9:15 p," but it does not show if that was the time it was received by the company at Port Angeles or at Seattle. About 6 o'clock in the afternoon, Saturday, November 27th, the boat carrying the cargo of salmon went on the beach, causing the loss involved in this suit. The real damage to the cargo occurred, however, in the subsequent exposure of the goods to the weather and in transferring them to a rescue boat on November 29th. Davis & Woods learned Saturday night, November 27th, that the boat had gone on the beach. Davis knew his night letter of Saturday, November 27th, would not reach appellant until Monday morning, November 29th. On Sunday, November 28th—the same day Davis received appellant's letter written the day previous, and after he knew the boat had gone on the beach—he signed and delivered to respondent a writing as follows:

"Mr. G. M. Lauridsen to Davis & Woods, Dr. Dr. to premium marine insurance Rhododendron 1200 Albert 7055–8255 premium 24.76 paid 11—27—15.

"Davis & Woods, per J. M. Davis."

Monday morning, November 29th, appellant wired as follows:

"Seattle, Wn., Nov. 29, 1915.

"Davis & Woods, Port Angeles, Wn. Your night letter wire dated Saturday received this morning newspapers report Albert on rock Friday night cannot protect except subject loss already sustained what are the facts.

"Bowden, Gazzam & Arnold."

Davis & Woods replied by wire as follows:

"Port Angeles, Wn., Nov. 29, 1915.

"Bowden, Gazzam & Arnold, Seattle, Wash. Albert grounded Saturday not Friday another wire states facts. Lauridsen gave us data Saturday afternoon on receiving same from Mr. Morse of the cannery, you advised us under date twenty-second you closed noon Saturday so we requested coverage by night letter consult correspondence re this shipment. Latest advices say no cargo lost and only damage if any is in handling. We advised Lauridsen he was cover-

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ed when data furnished. We have solicited business for you per correspondence. Where are we, answer. Davis & Woods."

And again on the same day Davis & Woods sent the following wire:

"Port Angeles, Wn., Nov. 29, 1915.

"Bowden, Gazzam & Arnold, Seattle, Wn. Re insurance cargo salmon Lauridsen. Albert went aground mouth of river while going to sea, Snohomish could not reach her but Lauridsen has word today from cannery man that cargo has been taken ashore. Have requested this man to preserve best manner possible until representative arrives. Davis & Woods."

On November 30th, appellant wrote to Davis & Woods as follows:

"Seattle, Wn., Nov. 30, 1915.

"Davis & Woods, Port Angeles, Wn.—Gentlemen: Owing to the fact that the writer has not been well and is not feeling able to make the trip to-night to Port Angeles, I am going to write you instead.

"The telegram which was received by the writer Monday morning was a night letter which left Port Angeles at 9:15 p. m. and the same being a night letter, of course was not received at the Seattle office until Sunday morning. In view of your telegram of to-day, in which you state you were advised by Mr. Lauridsen Saturday afternoon of this shipment, beg to state that if you had sent us an immediate day wire 'rush' it would have been telephoned to our homes and proper insurance procured. As it is, this wire came to hand Monday morning, giving us no opportunity to place any lines in excess of what any one company we represent can carry. The greatest amount we are permitted to write in any one company on gasoline boats is $2,500, but had we been advised before the sailing of the vessel we could have placed in this market almost any amount.

"I wish you would advise me immediately whether the entire cargo has been saved or not and what has been done with the same.

"I presume Mr. Lauridsen is saving all cargo in every way possible to protect his interests regardless of the question as to whether he is covered by insurance or not.

"I did hope to see you to-morrow morning in person and go into the matter of the loss carefully and aid you in arriving at what the loss was, if any, but owing to my indisposition I am unable to go up to-night. I wish you would write me fully the details of this loss; what has been done with the salmon, and as near as you can estimate—what the loss is going to be and what the character of the loss will be.

"We intend to do everything in our power to save your client and yourselves from any loss in connection with this matter that is possible for us to do, but as to admitting or denying liability so far as the insurance company is concerned at the present time, I am unable to say just what position we will be obliged to take until we know all of the facts in connection with the loss; how it happened; what was done, and amount of loss or damage, if any.

"The great difficulty in the whole situation is the fact that you did not send us a day wire as soon as you were advised that this cargo was to be shipped.

"Awaiting your advices and assuring you that we shall protect you in every way possible consistent with good underwriting, we beg to remain,

"Yours very truly,

"Bowden, Gazzam & Arnold,

"E. C. Arnold."

Notwithstanding other assignments of error made by appellant, only one need be noticed in our view of the case. That one is a question of agency. The whole theory and effect of the cause of action, as stated and relied on, is the breach of an alleged contract to procure marine insurance. Agency was not admitted, nor was it alleged or attempted to be proven to be a general agency. There were no direct negotiations between respondent and appellant, and the whole matter must be determined by the written and telegraphic correspondence between the firm of Davis & Woods and the appellant. In considering the correspondence it must be kept in mind that appellant had no intimation whatever that Davis & Woods had represented they were appellant's agents. The communications consisting of the two first telegrams, and appellant's letter of November 22d, gave Davis & Woods no authority to act as agents for appellant. There was nothing to show who Davis & Woods represented. Appellant, upon inquiry, simply quoted rates, and concluded its letter by saying it hoped to receive the order of Davis & Woods for the insurance—a statement insufficient to constitute the appointment of an agent. Had the letter gone so far as to express the hope that Davis & Woods would receive the order, it would yet have fallen short of the appointment of them as agents; for even that language would not have been inconsistent with appellant's position, then and now, to the effect that before appellant could be bound it must receive the order.

Concerning the letter of Davis & Woods of November 24th to appellant, it may be noticed, parenthetically, that in June, 1915, Davis & Woods attempted to place marine insurance for a person other than respondent, and for that purpose corresponded with appellant. It appears to have been a case in which insurance was not effected, although negotiations progressed to the extent of showing just what had to be done to bind appellant in that particular instance. In the present trial there was testimony, over appellant's objection, as to that transaction, which testimony was later stricken from the case. It clearly appears from their letter of November 24th that Davis & Woods recognized they had no authority to represent appellant, for they asked for advice as to what to do and how to do it. They asked if they should proceed according to a plan suggested on a former occasion and said: "If so, kindly mail blanks and when we are advised as to cargo we will issue slip to assured and mail copy to you." In other words, if it was their purpose to act for appellant, they not only sought such power, but asked

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for information as to details to be followed in their conduct within the scope of that power. The letter shows that Davis & Woods were aware that appellant could not and would not be obligated until it had been heard from; and, as a fact, notwithstanding the promptness of appellant in answering the letter, Davis & Woods did not receive the answer until after the loss involved had occurred. Appellant answered the letter of Davis & Woods three days after it was written. If it was ever intended by appellant that Davis & Woods should represent it in this transaction, this letter alone expressed that intention. Special and not general authority was conferred. It said:

"If you will advise us the name of the shipper, amount of shipment, nature of cargo, boat that it is shipped on, to and from what port and the date of sailing we will protect the shipment for you and return one of our policies covering on the same."

There was no authority to Davis & Woods in their name to do anything to protect the shipment by insurance. The instructions were, "If you will advise us, * * * we will protect," etc. If it be argued that this letter should be understood as giving authority to Davis & Woods to make the contract after collecting the data suggested and report to appellant, and that upon its receipt appellant would issue a policy that would relate back to the time Davis & Woods had purported to make the contract, that argument is successfully met in three ways. First, the language is not to that effect; second, if inference is to be indulged in, since there was at the date of the letter no information whatever to appellant sufficient to write the insurance, nor the time when the insurance would be required, the natural inference was that appellant had in mind there was sufficient time to get all the information necessary and write the policy before it was needed by the applicant for the insurance; and, third, the whole matter of the construction of the letter is immaterial, because it was not received by Davis & Woods until the next day after the loss or damage to the cargo. Respondent, with some avidity, takes hold of the word "another," used in the letter where appellant said "we have another agent up sound," etc. But writing of a third person as another agent does not of itself prove the existence of, nor create, an agency in the person written to, while on the other hand the use of the word "another" in this instance is in harmony with the whole letter, as it referred to the addressees, to the effect that the writer proposed to give them authority to do a given thing in a special manner.

[5] This court, in the case of O'Daniel v. Streeby, 77 Wash. 414, 137 Pac. 1025, L. R. A. 1915F, 634, called attention to and declared the general rule to be that third parties dealing with an agent must at their own risk ascertain both the fact and extent of the agent's authority, and the burden is on them to show that the acts of the agent were within the scope of his authority. The same rule was again declared in the case of Woodworth v. School District No. 2, 92 Wash. 456, 159 Pac. 757, wherein it was further said:

"Neither the fact of agency, nor the scope of the agent's authority can be established by declarations of the alleged agent in the absence of the principal."

Such being the rule, respondent's rights are to be considered as if he had read each of the communications between Davis & Woods and the appellant at the time and as they took place.

[6] On Monday morning, November 29th, appellant, having learned through newspaper reports that one of the boats was already in trouble, and knowing that by its letter of November 27th it had advised Davis & Woods how to proceed with reference to procuring insurance, and upon receiving the night letter from Davis & Woods of the Saturday previous, promptly telegraphed Davis & Woods that it could not protect the cargo except subject to loss already sustained. The advice was cautionary, and must be taken as intended to advise Davis & Woods that if they purposed to act under the authority given in appellant's letter of November 27th (now about due to reach Port Angeles), they must consider those instructions modified so as to apply to the cargo as it was at the time and subject to any loss of the cargo that had already occurred. This telegram is inexplicable upon any other theory. It was to avoid any complication that might arise from any possible act on the part of Davis & Woods under the letter of November 27th to now attempt to effect insurance which would relate back to a time prior to any damage or loss to the cargo. No responsibility would be assumed except subject to loss already sustained.

The two telegrams from Davis & Woods to appellant on November 29th and appellant's letter to them on November 30th do not alter the situation nor fix any liability on appellant. They amounted simply to a discussion between those parties. The letter contains no admission of agency on the part of Davis & Woods to bind appellant, nor of liability to respondent. There is no question of estoppel involved; for appellant never, directly or indirectly, advised respondent that Davis & Woods were its agents, nor has it received, nor authorized any one else to receive, any money from respondent. There is nothing in appellant's letter of November 30th, or in any other way, which amounted to a ratification of the representations of Davis & Woods to respondent that the cargo was protected by insurance. Indeed, ratification relates to an unauthorized act of an agent, while in this case there is a failure of proof of agency existing at the time of the transaction; and,

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besides, respondent by his pleading alleged an authorized act of an authorized agent.

Appellant, up to and including the happening of that transaction between respondent and Davis & Woods, indispensable to respondent's right to recover from any one, had done nothing that either respondent or Davis & Woods could rely on other than answer an inquiry about insurance rates and express the hope it would receive an order.

We are satisfied the evidence in this case is not sufficient to justify any judgment against the appellant.

The cause is reversed and remanded, with instructions to dismiss the action.

CHADWICK, C. J., and MACKINTOSH, MOUNT, FULLERTON, and PARKER, JJ., concur.

MAIN, HOLCOMB, and TOLMAN, JJ., dissent.

(107 Wash. 437)

STATE v. SHUEY. (No. 15201.)

(Supreme Court of Washington. June 25, 1919.)

1. INDICTMENT AND INFORMATION ⟸110(1)—LANGUAGE OF STATUTE.

Information charging statutory offense must at least employ the statutory language or its equivalent.

2. CRIMINAL LAW ⟸13—CRIMINAL STATUTE.

A criminal statute can reach no further than the limitations prescribed by the words of the statute.

3. BUILDING AND LOAN ASSOCIATIONS ⟸23(8)—CRIMINAL OFFENSE—DECLARING DIVIDENDS WITHOUT EARNINGS.

The gravamen of the offense, under Rem. Code 1915, § 3601—27 of "willfully" violating section 3601—7, prohibiting directors of building and loan associations from declaring dividend for period during which the association has acquired no net earnings, are the elements of scienter and bad purpose.

4. INDICTMENT AND INFORMATION ⟸110(1)—STATUTORY LANGUAGE — DECLARING DIVIDEND WITHOUT EARNINGS—INFORMATION.

Information charging director of building and loan association with declaring dividend for period during which the association had acquired no net earnings, in violation of Rem. Code 1915, §§ 3601—7, 3601—27, *held* fatally defective for failure to contain word or words equivalent to word "willfully," used in the statute prohibiting such dividend.

Department 1.

Appeal from Superior Court, King County; Walter M. French, Judge.

H. O. Shuey was charged with declaring dividend, as director of building and loan association, for period during which the association had not acquired any net earnings. Verdict of guilty, and, from order granting motion in arrest of judgment and vacating verdict, the State appeals. Affirmed.

Alfred H. Lundin and Frank P. Helsell, both of Seattle, for the State.

Clise & Poe, of Seattle, for respondent.

MITCHELL, J. The information in this case charged defendant with a misdemeanor. After alleging place and time, and that he was one of the directors of a building and loan association, it is then charged:

"And while acting as such director of said association, did then and there authorize, direct, vote for, and cause the said Equitable Building, Loan & Investment Association to declare and pay a semiannual dividend of three per cent. (3%), upon all of the stock of said association then issued and outstanding, for the semiannual period between January 1, 1916, and July 1, 1916, when, in truth and in fact, said association, during said period, had not acquired any net earnings whatsoever."

Upon return of a verdict of guilty, judgment was arrested on the motion of defendant, on the ground that the facts stated in the information do not constitute a crime. The state has appealed.

The statutes of this state relating to the organization, management, regulation, and control of building and loan, and savings and loan, associations and societies, are comprehensive, commanding or prohibiting the doing of many things mentioned in detail. The last section pertaining to the subject, 3601—27, Rem. Code, provides:

"Every officer, director, agent or other employé of any savings and loan association, who shall willfully violate or fail to comply with any of the provisions of this act, shall be guilty of a misdemeanor."

[1-3] It is contended by the state that respondent is accused by the information, to the extent of criminal liability, with having violated that portion of section 3601—7, Rem. Code, which provides that "dividends shall be taken from the net earnings of the association, * * *" by having authorized and voted for, and caused the association to declare and pay, a dividend, for a specified period during which it had not acquired any net earnings. The offenses provided for by these statutes are statutory, and, while we have generally held it is sufficient to lay such charges in the language of the statute, it will not do to employ less than the statutory language or its equivalent. A criminal statute can reach no further than the limitations prescribed by the words of the statute. The information charges respondent with doing certain things, as a director of the association, which the statute says he shall not

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do. But the penal section of the act does not declare the doing of these things to be a misdemeanor. On the contrary, that one's conduct may constitute a crime, it exacts, not simply that he violate, but that he willfully violate, the provisions of the act; and, in the process of construing the information, notwithstanding the rule of liberality, it will not do to eliminate the word "willfully" from the statute, for manifestly it is the quality of the act which constitutes the gist of the offense. The distinction between doing an act and willfully doing it rests upon reason and is recognized by the authorities. The elements of scienter and bad purpose are involved and constitute the gravamen of the offense.

Appellant cites the case of Commonwealth v. Bradford, 50 Mass. (9 Metc.) 268. That was a case in which one was indicted for willfully giving in a vote at an election, knowing himself not to be a qualified voter. The defendant admitted he gave in his vote, and one of the questions was the correctness of the decision of the trial court that the admission was sufficient to support the averment that he voted willfully, concerning which the court said:

"Considering the manner in which the word 'willfully' is used in the statute, the court are of opinion that this was right. It may sometimes mean corruptly or unlawfully; but in this section, where the gist of the offense consists in the other clause, 'knowing himself not to be a legal voter,' the term, 'willfully' means designedly, purposely, with an intent to claim and exercise the right of suffrage, on that occasion, in common with the legal voters of the city."

But that case is not in point here, because there the statute required, and the indictment charged, a willful voting. The point decided was a matter of proof.

Viewed from another angle, appellant cites the case of State v. Smith, 31 Wash. 245, 71 Pac. 767. It was a case of grand larceny, wherein the question presented was that the information did not state a crime because the word "feloniously" was not used in the information. After setting out the information and quoting the statutes defining "grand larceny" and "petit larceny," this court said:

"It will be noticed that the only difference between the crime of grand larceny and that of petit larceny, as defined by these statutes, is in the value of the property taken. The words 'feloniously steal' appear in each."

And then, answering the question presented, the court said:

"Under these statutes it is not necessary that the word 'feloniously' should be used to define the crime of grand larceny, if other words conveying the same meaning are used instead. The word 'feloniously' means 'with intent to commit a crime.' Webster. The word 'steal' means 'to take and carry away feloniously—without right or leave.' Webster. It implies a felonious taking. As the words are used in this statute, the word 'feloniously' refers to the intention with which the stealing is done. When it is alleged that the defendant 'unlawfully stole' $785, 'with intent to defraud the owner thereof,' the felony defined was sufficiently alleged to sustain a judgment after verdict."

[4] That case is not in point, for, as already seen, the information in the present case contains no word or words equivalent to the word "willfully," used in the statute. We do not find occasion to review all the authorities furnished by appellant. The rule applicable here is found in the case of Spurr v. United States, 174 U. S. 734, 19 Sup. Ct. 815, 43 L. Ed. 1152, quoted from Potter v. United States, 155 U. S. 438, 445, 15 Sup. Ct. 144, 39 L. Ed. 214, viz.:

"The charge is of a willful violation. That is the language of the statute. Section 5208 of the Revised Statutes [U. S. Comp. St. § 9770] makes it unlawful for any officer of a national bank to certify a cheque unless the drawer has on deposit at the time an equal amount of money. But this section carries with it no penalty against the wrongdoing officer. Section 13 of the act of 1882 imposes the penalty, and imposes it upon one 'who shall willfully violate,' etc., as well as upon one 'who shall resort to any device,' etc., 'to evade the provisions of the act'; 'or who shall certify cheques before the amount thereof shall have been regularly entered to the credit of the dealer upon the books of the banking association.' The word 'willful' is omitted from the description of offenses in the latter part of this section. Its presence in the first cannot be regarded as mere surplusage; it means something. It implies on the part of the officer knowledge and a purpose to do wrong. Something more is required than an act of certification made in excess of the actual deposit, but in ignorance of that fact or without any purpose to evade or disobey the mandates of the law. The significance of the word 'willful' in criminal statutes has been considered by this court. In Felton v. United States, 96 U. S. 699, 702 [24 L. Ed. 875], it was said: 'Doing or omitting to do a thing knowingly and willfully, implies not only a knowledge of the thing, but a determination with a bad intent to do it or omit doing it. The word "willfully," says Chief Justice Shaw, "in the ordinary sense in which it is used in statutes, means not merely 'voluntarily,' but with a bad purpose." [Commonwealth v. Kneeland] 20 Pick. (Mass.) 220.' "

See, also, United States v. Edwards (C. C.) 43 Fed. 67; State v. Preston, 34 Wis. 675; Williams v. People, 26 Colo. 272, 57 Pac. 701; 14 R. C. L. p. 177.

The order granting the motion in arrest of judgment, and vacating the verdict, was proper, and is affirmed.

MAIN and TOLMAN, JJ., concur.

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(107 Wash. 155)

BEHRENS v. COMMERCIAL WATERWAY DIST. NO. 1, OF KING COUNTY.

(No. 15376.)

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(Supreme Court of Washington. May 24, 1919.)

1. EMINENT DOMAIN ⟸2(11) — TAXATION — ASSESSMENT OF PROPERTY NOT BENEFITED.

Under Const. art. 7, § 9, there can be no special assessment to pay for a thing which has conferred no special benefit upon the property assessed, for to assess property to pay for a thing which did not benefit it would be pro tanto the taking of private property for a public use without compensation, and hence unconstitutional, being in violation of Bill of Rights, § 16.

2. TAXATION ⟸528—INTEREST.

Where no authority is given by statute, interest on an assessment cannot be collected.

3. EMINENT DOMAIN ⟸2(11) — SPECIAL ASSESSMENTS—CHARGE UPON PROPERTY BENEFITED.

The expense and cost of all public works may be charged to property benefited, but no greater charge can be made than a sum equal to the benefits received, for a charge in excess thereof would be taking property without just compensation, in violation of Bill of Rights, § 16.

4. STATUTES ⟸181(1)—CONSTRUCTION.

Court, in construing a statute, will gather the true intent and meaning of Legislature; its first resort being the context and subject-matter of the statute.

5. TAXATION ⟸1—CONSTRUCTION OF STATUTE —CONTRACT BETWEEN STATE AND PROPERTY OWNER.

Statute placing involuntary charge upon private property for the public good should be treated as a covenant between the state and the property owner.

6. NAVIGABLE WATERS ⟸12—WATERWAYS—ASSESSMENT — INTEREST — CONSTRUCTION OF STATUTE.

Rem. Code 1915, § 8192a, providing for assessment of land benefited by waterway improvement, for maximum amount of benefits, and providing that no more than 25 per cent. of benefits shall be charged against property in any one year, does not, in view of section 8199a, and Laws 1917, p. 616, authorize a charge against the property for interest over and above the maximum benefits.

Department 1.

Appeal from Superior Court, King County; Calvin S. Hall, Judge.

Action by Adolph Behrens against the Commercial Waterway District No. 1 of King County. Judgment of dismissal, and plaintiff appeals. Reversed.

Donworth, Todd & Higgins, of Seattle, for appellant.

Shorett, McLaren & Shorett, of Seattle, for respondent.

CHADWICK, C. J. The purpose of this proceeding is to test the validity of certain bonds which the respondent waterway district intends to issue.

The bonds are a general issue to be used in part for the refunding of an outstanding issue of approximately $500,000 and to meet the future needs of the respondent as occasion may require. The total present bonded indebtedness of the district is $1,121,500.

The present plan is pursued in virtue of the authority vested in waterway districts and, if accomplished, will result in the issue of bonds in such amount that the total principal of all bonds then to be outstanding, while less in total amount than the total amount of maximum benefits, will, if account be taken of the interest now accrued and to accrue on the outstanding bonds, greatly exceed the amount of total maximum benefits.

It is confessed that the property cannot be charged in a principal sum greater than the total amount of the maximum benefits, but it is contended that the interest accrued and to accrue, which is depended upon by the respondent to swell the total indebtedness to an amount in excess of the maximum benefits, is no part of the cost and expense of the improvement; that the collection of interest, while incidental to the financial plan of the district, is not a thing to be considered as an item to be balanced as cost or expense against the total of maximum benefits.

The question submitted by counsel requires a construction of section 8192a, Rem. Code.

[1] Since the authority of respondent rests in the statute, and that alone, we are not called upon to go beyond it or search for authority to sustain general principles, except to say:

"It is the basic principle and the very life of the doctrine of special assessments that there can be no special assessment to pay for a thing which has conferred no special benefit upon the property assessed. To assess property for a thing which did not benefit it would be pro tanto the taking of private property for a public use without compensation, hence unconstitutional. Though the right to levy special assessments for local improvements is referable solely to the sovereign power of taxation, our state Constitution, art. 7, § 9, expressly limits its exercise to assessments of property benefited." In re Shilshole Avenue, 85 Wash. 522, 537, 148 Pac. 781, 787.

[2] And:

"Where no authority is given by statute, interest on the assessment cannot be collected. The taxing power must be strictly exercised and the particular sum only assessed." Hamilton, Law of Special Assessments, § 721.

Under a like statute, the Supreme Court of New Jersey held:

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"The commissioners are to determine what proportion of the costs and expenses of the improvement shall be paid by the county, and the statute directs that amount to be raised by taxation. In the exercise of the taxing power, the board of freeholders is limited, by the terms of the statute, to the imposition of the sum assessed. No authority is given to increase the burden by adding interest. The taxing power must be strictly exercised." Paterson Ave., etc., v. Board of Freeholders, etc., 44 N. J. Law, 570.

[3] Keeping in mind, then, that the expense and cost of all public works may be charged to property benefited, it is fundamental that no greater charge can be made than a sum equal to the benefits received; for, if a charge be made over and above the benefit to the property, it is a taking of property without just compensation and violates article 1, section 16, of the Bill of Rights.

[4, 5] One of the first considerations of a court, when called upon to construe a statute, is to gather the true intent and meaning of the legislative body, and the first resort in such cases is the context and subject-matter of the statute. Taking the act by its four corners, it, as all acts of the legislative body which assume to put an involuntary charge upon private property for the public good, should be treated as a covenant between the state and the property owner. With this view we are convinced that the waterway commission has no power to make a charge for interest unless it be within the limit of maximum benefits.

[6] Referring now to the original authority of the waterway commission and the constitutional right of the property owner, and which may be said to be emphasized in the act, it seems plain that it was not the intention of the Legislature to charge the property benefited beyond the maximum benefits to be obtained.

It is provided that—

After the entry of a judgment of the court fixing the amount of the benefits, "* * * all the lands included in the list of lands benefited by such improvement shall stand charged with the entire cost and expense of said improvement and the other costs, expenses and charges provided for by this act, not exceeding with respect to any lot or tract of land (so far as concerns the original cost) the maximum amount stated or declared in such judgment to be the maximum amount of benefits to be derived by such lot or tract of land or the owners thereof, and all such lands shall thereafter be subject to the assessments to be levied by the board of commissioners for said purposes, which assessments shall be levied pro rata in proportion to the maximum amount of benefits as to each lot or tract of land as stated or declared in such judgment."

We find no provision for the payment of interest. There is a charge put upon the property to the extent, and to the extent only, of the maximum benefits to pay the costs and expenses of construction. There is nothing to suggest that the Legislature intended that the property of an individual owner might be subjected to a lien upon his property equal in amount to the maximum benefits and be thereafter called upon to pay anything in addition thereto, whether it be in the nature of an interest charge or otherwise. This conclusion is sustained, as we believe, by the further provisions of the section that—

"All assessments shall be levied from time to time by the board of commissioners by written notice to be addressed to and served on the county assessor of the county. * * *"

The act then provides for the collection of the assessment, and it is further provided:

"The amount of the assessment levied by the commissioners during any one year shall not exceed twenty-five per cent. of the amount estimated by the board of commissioners to be necessary to pay the costs of the proceedings and the establishment of said district and waterway system, and the cost of construction of said work. * * *"

It will be observed that the commissioners are denied the power to levy an assessment for more than 25 per cent. of the cost and expense of construction, in any one year, although they are not required to levy such assessments; the Legislature evidently having it in mind that, when work such as the act contemplates had been undertaken, it would extend over a period of time, and that a charge of 25 per cent. of the amount of the benefits in any one year until the whole sum was collected would provide ample funds for the prosecution of the work. Or, to state our conclusion in a different way, it is apparent that the Legislature fixed the extreme boundary of a charge upon property benefited as the maximum amount of benefits; that the charge in the mind of the Legislature was the cost and expense of construction; and that the property owner should have four years to pay, or rather could not be compelled to discharge the entire lien in less than four years. If the amount of his benefits is, say, $100, he could be assessed that sum or any sum within it, and one-fourth payment in each year for four years would entirely discharge the lien. If it were held otherwise, the lien might sustain a perpetual interest charge; the commissioners might levy an assessment from time to time for one-fourth of the amount of the lien and exhaust the entire sum in the payment of interest and charges, costs of maintenance and operation, and other charges incidental to the bonded debt of the district, that were not within the mind of the Legislature at the time the act was passed. For it must be regarded as true that the Legislature was providing a plan for the construction of waterways intending that a payment from

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time to time by the property owner would be sufficient to meet the cost of construction (there are other provisions providing for maintenance and operation), and that it did not have in mind primarily a scheme for the issuance of bonds for the profit of those who are engaged in buying and selling them.

For the purposes of this argument, we must assume that the property said to be benefited is now charged with the full amount of the maximum benefits. Let us assume that the lien is $100 upon a given tract. It is the law that the property owner shall never be called upon to pay any sum in excess of $100. The commissioners may levy an assessment from time to time, and let us assume that the assessment is $25; the property owner pays it, and at a certain time, which time may be determined in the judgment and discretion of the commissioners, another assessment is levied, and so on, until, say in ten years, four $25 assessments are paid, or that $7, being a sum equal to the interest on $100, is collected for 14 years. The property owner has paid on account of the improvements the full amount of the benefits. He sells his property. The purchaser buys it in the belief that, $100 having been paid, it is free of all liens. It is then determined that the amount collected has gone to the payment of interest on outstanding bonds and that no part of the amount collected has been applied upon the lien. The lien is a perpetual lien. If an owner cannot discharge his property by the payment of a sum equal to the amount of the benefits, under whatever pretense it may be collected, he might be called upon to pay several times its value, and still suffer the burden of the lien, for the commissioners are under no duty to retire his bonds. On the contrary, they have sought and obtained authority to refund outstanding indebtedness from time to time. Chapter 152, Laws 1917.

Our conclusion is further strengthened by reference to section 8199a. It is there provided that bonds may be issued, and—

"In case such bonds are issued there is hereby appropriated and pledged for the payment thereof a sufficient amount of all the maximum benefits stated or declared, or to be stated or declared, by the judgment of the court against all the lands benefited and to be benefited by the improvement within such district and there is hereby appropriated and pledged for such payment a sufficient amount of all sums charged against such lands and the assessments therefor as will be sufficient to pay all such bonds as the same or any part thereof become due; and while any such bonds shall be outstanding the board of commissioners shall at no time levy any assessments for any purpose, other than their payment, which shall so far impair the fund to be realized from the collection of all the assessments as to jeopardize the payment of such bonds or to reduce such fund below the point where there will be ample amounts still leviable to provide for the payment thereof."

There being no exception in the statute, the holding is compelled that an appropriation and pledge for the "payment" of the bonds out of the maximum benefits "stated or declared" can mean only that "payment" is the discharge of the principal and interest of the bond, and that in the payment of principal and interest the commissioners shall not impair the fund to be realized from the collection of assessments so as to jeopardize the payments of the bonds or reduce such fund below the point where there will be ample amounts "still leviable" to provide for the payment thereof. The Legislature would not have used the words "to jeopardize the payment of such bonds," and provided that the fund should not be reduced below a point where ample funds would not be "still leviable" to provide for the payment thereof, if it had had in mind that the commissioners would have a right to collect interest over and above the amount of maximum benefits, otherwise it must have provided that a property owner would have a right to discharge the lien immediately and take a full acquittance of his debt.

If this be not the true meaning of the act, the words "amounts still leviable" have no meaning and no place in the law. "Still," in its present setting, means something remaining out of an entire thing. "Amounts still leviable" mean, and can only mean, the difference or amount after the levy of one or more assessments and the amount of the maximum benefits. For if interest be a lien on the property, it must fall within the limit of the maximum benefits, for that, by the terms of the law, is the limit of the lien. If the position of respondent be sustained and interest can be charged over and above the amount of maximum benefits, the charge cannot by any possibility be a lien and would not therefore be collectible. It is not contended that the property owner is under any personal obligation to pay either the principal or interest.

The case of Mall v. City of Portland, 35 Or. 89, 56 Pac. 646, is somewhat analogous. There the law provided that, as soon as a lien docket had been made up, it was the duty of the city to issue and sell on the best terms available its 10-year 6 per cent. bonds in all equal to the amount of assessments against the property affected by the improvement. The property owner had under the terms of the law an option to pay the assessment at the time it was made. The city thereafter levied a special tax equal to 10 per cent. of the amount docketed against the property charged, which, with the accrued interest at the rate of 6 per cent. as provided in the statute, the owner tendered and demanded a receipt in full. The city refused the tender, claiming that the property owner and his property were liable for 6 per cent. interest on the entire assessment from

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the time it was docketed in addition to the special tax or tax for partial payment and interest thereon. The court held that the docketing of the assessment against the property in the lien docket did not render it due and payable, and, to the contention that the provision requiring a special tax to be equal to 10 per cent. of the amount of bonds issued for the improvement necessarily implies that it would be such per cent. of the bonds and accrued interest on the whole assessment, the court said:

"The amount docketed as a lien against the property is necessarily the amount of the assessment, and a special tax of 10 per cent. thereof would clearly not include any interest thereon."

The court went so far as to hold that, although there was a privilege of discharging the whole amount of the lien, the terms of the act providing for an assessment equal to 10 per cent. of the indebtedness in each year did not imply that interest upon the whole assessment should be charged upon property of an owner who had not availed himself of the privilege of payment, saying:

"This language is, in terms, confined to the payment of the assessment and accrued interest thereon, and, as we have already seen, there can be no interest on an assessment of this character until after it becomes due and payable."

Under the terms of our waterway act, the amount of an assessment is not due and payable at the time the decree of the court is entered, nor is there any privilege of payment; the law being that the property shall be subject to assessments to be levied by the board of commissioners and that all assessments shall be levied "from time to time," and that such assessments "shall be levied against and apportioned to the lands in such district benefited by said improvement in proportion to the maximum benefits originally determined by the judgment of the court and such assessments shall fall due during the then ensuing calendar year at the time of the falling due of general taxes."

It would seem to require no argument to sustain our view that, if the charge is not due, interest cannot be added to the amount of the lien until it is due and may be discharged.

A suggestion is made that an indefinite extension of the time of payment is a favor to the property owner. We are not holding that the act may not have provided for the payment of interest, but, wherever an interest charge on special assessments has been sustained, the statute has given the property owner an opportunity to discharge his debt. The property owner has no such privilege in this case.

Interest is not allowed on assessments as for the use of money under a contract for its use, but as an involuntary charge to be collected as a penalty if the assessment is not paid at a time to be fixed when the property owner can pay his assessment and discharge the lien.

The Legislature would have no constitutional right to put a charge of $100 or any other sum, upon the property of the citizen, and say to him, "This is a charge equal to the maximum benefits to be derived from your property, but you cannot pay it unless you pay that sum and interest to accumulate for four years, or for forty years, thereafter," for this would contrive a scheme, not for the benefit of the property owner, but for the benefit of strangers to the enterprise and for no consideration; for it cannot be held to be a good or valid consideration to extend the time of payment of a debt, either public or private, to a man who does not desire to postpone it or has no need of it.

We hold, therefore, that it is the meaning of the act that the waterway commission may function within the limit of its powers; that it may collect assessments to the extent of the maximum benefits; that it may issue bonds and refund an outstanding issue, but that it may not charge the property beyond the amount of maximum benefits, whether it be under the pretext of collecting interest or for any other charge, except as provided in the act. It is the duty of the respondent to see that the primary fund, which, theoretically, is the amount of maximum benefits, shall not be jeopardized or be allowed to go below a point, by overissue or otherwise, where there will not be amounts "still leviable" within the limit of maximum benefits to provide for the payment thereof.

MITCHELL, TOLMAN, and MACKINTOSH, JJ., concur.

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(107 Wash. 442)

BEELER et al. v. STANDARD INV. CO. et al. (No. 15189.)

(Supreme Court of Washington. June 30, 1919.)

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1. CORPORATIONS ⟸553(5) — RECEIVERS — GROUNDS—DISAGREEMENT AS TO POLICIES.

Where a corporation had made greater profits than ever before while under the present management, and was wholly solvent, its stock, the par value of which was originally $10, being worth about $150, *held*, that receiver should not be appointed and dissolution ordered at suit of the minority shareholders because they did not agree with some of the policies of the trustee and thought the general manager too young.

2. CORPORATIONS ⟸553(5)—RECEIVERS—APPOINTMENT—GROUNDS—DISSATISFACTION.

The policy of a corporation, if honestly controlled, must be controlled by the majority of the stockholders, and under Rem. Code 1915, § 741, authorizing the court to appoint receivers whenever in its discretion it may be necessary to secure ample justice to the parties, a receiver of a solvent corporation which was making large profits cannot be appointed because minority stockholders are dissatisfied with the policy or the personnel of the management; those questions being for the majority stockholders.

3. CORPORATIONS ⟸553(5)—RECEIVERS—APPOINTMENT—GROUNDS.

Where the general manager of a dairy farm owned by a corporation kept all accounts necessary for successful management, and such accounts were open to inspection of minority stockholders, *held*, that a receiver should not be appointed under Rem. Code 1915, § 741, because the accounts were not kept as the minority shareholders desired, nor because the secretary failed to send out monthly statements, it appeared that he served without compensation, and such statements would vastly increase his work.

Department 2.

Appeal from Superior Court, King County; Everett Smith, Judge.

Action by F. A. Beeler and others against the Standard Investment Company and others. From a judgment appointing a receiver and ordering dissolution of the corporation, defendants appeal. Reversed, and cause ordered dismissed.

James B. Murphy and W. H. Beatty, both of Seattle, for appellants.

George B. Cole and John Wesley Dolby, both of Seattle, for respondents.

MOUNT, J. This action was brought by a minority of the stockholders of the Standard Investment Company, a corporation, for the appointment of a receiver, for an accounting by the trustees, and to wind up the affairs of the corporation and distribute the property among the stockholders.

Generally and briefly stated, the complaint charged that the board of trustees was dominated by James Campbell, the president of the corporation; that Lee Oien, the manager of the business of the corporation, was inefficient, extravagant, and incompetent; that the property was not properly managed, and was permitted to deteriorate; that the manager had not accounted for all the proceeds of sales, had made unreasonably poor sales of property, and had refused to give the minority stockholders a statement of the affairs of the corporation, and alleged that, unless a receiver was appointed, the property would be wasted and irreparable injury done to the plaintiffs. The answer denied generally all the allegations of the complaint. The case was tried to the court without a jury, and resulted in a judgment appointing a receiver to take charge of the property of the corporation and to sell the same and divide the proceeds among the stockholders according to their respective interests. The defendants have appealed from that judgment.

The appellants make three contentions in this court: First, that the court erred in appointing a receiver, because all the stockholders were not made parties to the action; second, that the court arbitrarily refused to receive certain evidence offered by the appellants; and third, that there was no cause for the appointment of a receiver. There is merit in all three of these contentions, but, in view of our conclusion that there was no real cause for the appointment of a receiver, the first two points will not be considered.

[1] It appears that, several years prior to the time of the institution of this suit, the Standard Investment Company was organized as a corporation, with a capital stock of $10,000, divided into 1,000 shares of $10 each. The principal property owned by the corporation is a dairy farm located near Thomas, in King county. This farm consists of about 500 acres of land. It is stocked with a herd of dairy cattle and other farm stock, tools, and equipment. At the time of the trial the farm was worth more than $200,000. It was subject to a mortgage indebtedness of $50,000 and some other minor indebtedness. At the trial of the case the principal points contended for by the respondents to show that a receiver should be appointed were that Lee Oien, the business manager of the corporation, in charge of the dairy farm, was incompetent; that he had failed to keep a proper system of accounts, sold property of the farm without accounting therefor, mismanaged the farm by letting it grow to weeds, and neglected to keep up the fences and make proper drainage; that the trustees had refused to furnish a monthly statement to each of the stockholders; had refused to

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discharge the manager when requested to do so; and that by reason of extravagant management the trustees had declared no dividends.

At the conclusion of the trial the court made no findings of fact, but filed a written opinion, in which he found that the manager in charge of the farm, on account of his youth, was not qualified to manage the farm, and that he had not kept proper accounts, that the minority stockholders had not been treated fairly, and that a division of the farm and the property belonging thereto was necessary to secure ample justice to all the parties, and apparently for that reason appointed a receiver. The evidence is very voluminous. The abstract of the record alone comprises more than 400 pages. The writer of this opinion has carefully examined the abstract of the evidence, and the court is satisfied therefrom that whatever evidence the respondents offered in support of their general allegations was entirely overcome by the testimony on behalf of the appellants. The manager of the farm selected by the majority stockholders was a young man 20 years of age. That fact seemed to control the lower court. The evidence shows conclusively that, while Mr. Lee Oien, the manager, was a young man, he had lived on this particular farm from his early life, when his father was manager thereof, and that he was thoroughly qualified to take care of the farm and had conducted it in a businesslike manner. The evidence is conclusive that, under his management, the profits of the farm for the year prior to the trial amounted to $19,000, or $9,000 more than for any previous year. The evidence also conclusively shows that his system of accounts was amply sufficient; that the farm was kept up on an average as good as or better than the majority of the farms in that neighborhood. The effort to show that he had not been honest in his accounts was entirely overcome. There was an endeavor on the part of the respondents to show that the milk and the cows were kept in a filthy condition, but that evidence was entirely overcome by the evidence on the part of the defense. We find no justification in the record for any finding that the management of the farm by Lee Oien was detrimental to any of the stockholders. It is true upon several occasions he had furnished milk and some vegetables of no special importance to one or two of the stockholders. One of these stockholders was the secretary and treasurer of the corporation, who had served for years without pay; and when he had driven from Seattle down to the farm he had upon several occasions obtained some of the produce of the farm which was not accounted for. But this clearly could not be regarded as mismanagement or incompetency on the part of the manager. It was contended by the respondents that the trustees were dominated by the president of the corporation. If this is so, there was no evidence of a wrongful domination. He and the other trustees were elected by a vote of a majority of the stock, and were thereby authorized to control the affairs of the corporation according to their best judgment; and when they do this they do their full duty, notwithstanding the fact that the minority stockholders do not agree to their policy. There was no evidence of fraud or unfair treatment of the minority stockholders. Much evidence was introduced upon the trial to the effect that the fences were not properly kept up, and that a drainage system should be installed; but we think, when the appellants' testimony was considered, it is plain that no criticism should be made against the trustees or the manager on account of the fences. It was shown that a drainage system upon this farm would be expensive. Some of the witnesses testified that it would cost about $30 per acre, and the evidence on the part of the appellants shows that an effort had been made to establish a drainage district in that section of the country so as to include other farms beside this, and, this being so, it was a question of policy with the trustees whether they should put in an independent expensive drainage system or not. The evidence shows that it was the desire of the governing trustees, who were all stockholders, that the debt should be paid rather than that dividends be declared or extensive improvements made upon the farm. This was a question of policy which was within the discretion of the governing trustees, and we are satisfied no serious criticism could be offered because an expensive drainage system was not installed. There was some evidence on the part of the respondents to the effect that the ditches and drains on the place were allowed to become stopped up and clogged. The evidence on the part of the appellants shows that these ditches and drains were cared for each year properly; and we are satisfied that no criticism should be made by the minority stockholders upon this account.

[2, 3] The respondents argue that under section 741, Rem. Code, relating to the appointment of receivers, the court is authorized to appoint a receiver "when, in the discretion of the court, it may be necessary to secure ample justice to the parties. * * *" This section gives to the court wide discretion in matters of that kind, but it was clearly never intended that, where a corporation is a solvent, going concern, a minority of the stockholders may have the corporation dissolved and its affairs wound up simply because they are not satisfied with the way the majority is conducting the corporation, especially when the majority is acting in good faith and exercising

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their best judgment. No contention is made in this case that the corporation is insolvent. It is plain from the evidence that, when the corporation was formed, the value of the property was $10,000, the par value of the stock. It is now worth, at least according to the testimony, $200,000, incumbered by a mortgage of $50,000. So it is apparent that the stock which a few years ago was worth but $10 a share is now—if the figures given upon the trial are correct—worth $100 or $150 a share. The net profits of the corporation for the last year were more than $19,000; so there can be no reasonable claim that the corporation is insolvent, or liable to become so. We said, in Secord v. Wheeler Gold Mining Co., 53 Wash. 620, at page 625, 102 Pac. 654, at page 656:

"The policy of the corporation, if honestly conducted, must be controlled by the majority of the stockholders. Mistakes, inadvertence, or bad policy, if honestly pursued, will not warrant the appointment of a receiver."

That must rule this case. The respondents rely upon the case of Boothe v. Summit Coal Min. Co., 55 Wash. 167, 104 Pac. 207, 19 Ann. Cas. 1255. That was a case where the stock in a corporation was held equally by two persons who could neither agree nor elect officers. One set of officers by reason of a failure of election claimed to hold over. These officers were not honestly conducting the corporation, because of extravagant management and increased salaries paid to one of the stockholders. In that case we said, at page 177 of 55 Wash., at page 211 of 104 Pac. (19 Ann. Cas. 1255):

"After a most diligent research we have been unable to find any case similar to this. It is sui generis."

Upon the facts in that case we concluded that it was within the discretion of the court whether a receiver should be appointed, and that a receiver was necessary to secure ample justice to the parties; but that case is far different from this. In this case two-thirds of the stockholders are satisfied with the management of the farm. So far as the record shows, they are conducting the farm at a profit. They are exercising their honest judgment in the management of the affairs of the corporation; and it is apparent, therefore, that no receiver should be appointed. The respondents insisted in the trial below that a monthly statement should be furnished to each of the stockholders, and that this had been refused by the trustees. It was shown that this monthly statement would entail upon the manager of the farm and upon the secretary of the corporation much labor, that the secretary of the corporation was acting, as were the other trustees except the manager, without salary, and that they had devoted their time to the affairs of the company without remuneration. The evidence on the part of the appellants showed also that the books of the corporation were open at all times to the minority stockholders; that they were at liberty, not only to inquire of the secretary and treasurer what the books showed, but they were at liberty to inquire of the manager at any time the condition of the accounts or the business of the farm; that for the year prior to the trial the manager of the farm had kept a diary of everything upon the farm; that the pay rolls and everything of that nature were open to inspection of the minority stockholders.

From every angle of the case we are satisfied that the trial court was not authorized under the facts to appoint a receiver or to wind up the affairs of this solvent, going company.

The judgment appealed from is therefore reversed, and the cause ordered dismissed.

HOLCOMB, C. J., and FULLERTON and PARKER, JJ., concur.

(107 Wash. 378)

HAM, YEARSLEY & RYRIE v. NORTHERN PAC. RY. CO. et al. (No. 14942.)

(Supreme Court of Washington. June 4, 1919.)

1. EMINENT DOMAIN ⟸222(4)—VALUE OF PROPERTY—INSTRUCTION.

In proceeding for condemnation of land for the construction and maintenance of a dam site, an instruction that the defendants were to be allowed its fair and reasonable market value at the time of trial, based on the evidence, the jury's view and the instructions, was correct.

2. EMINENT DOMAIN ⟸131 — DAMAGES — VALUE OF PROPERTY—"MARKET VALUE."

The market value of property condemned is the price which land would bring when offered for sale by one desiring, but not obliged, to sell it, and bought by one under no necessity of having it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Market Value.]

3. EMINENT DOMAIN ⟸131—DAMAGES.

In estimating the value of real estate jury should consider all of its capabilities and all the uses to which it is applied and for which it is adapted, but not the owner's unwillingness to sell.

4. EMINENT DOMAIN ⟸124—MARKET VALUE —TIME OF VALUATION.

The market value at the time of the trial is the basis of compensation in a condemnation proceeding.

5. EMINENT DOMAIN ⟸134—COMPENSATION —VALUE FOR USE AND CAPACITY.

In proceeding for condemnation of land for construction and maintenance of a dam site, it

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is proper under the rule fixing the market value at time of taking and in determining that value, to show condition of land and its surroundings, the uses to which it has been applied and its capacity for other uses, including that to which it is sought to be applied, but not its value for the special use for which it is to be taken.

6. EMINENT DOMAIN ⟸134—CONDEMNATION —VALUE OF LAND—SPECIAL USE.

The market value of land to be estimated with reference to the use and purpose for which it is adapted and any special features which may enhance its marketability may properly be considered, but not the fact that land is needed for the particular purpose for which it is sought to be taken.

7. EMINENT DOMAIN ⟸84—DAMAGES—MARKET VALUE.

In proceeding to condemn land on a lake for a dam site, the owners, having no title or interest in waters of lake as riparian owners or as owners of upland, or any right by appropriation superior to that of petitioner, which was entitled to appropriate waters and to condemn land, could not recover cost of their subsequently completed storage and diversion works erected at their peril or value of water stored as compensation or damages, but were limited to market value of site appropriated.

8. COSTS ⟸184(8)—WITNESSES—FEES.

On retaxation of costs in a condemnation proceeding wherein the owners appealed from the assessment of damages, they could not claim witness fees for an appellant, as he was not entitled thereto.

9. COSTS ⟸184(3)—WITNESS FEES.

In condemnation proceeding, wherein appealing owners on matter of retaxing costs averred that certain witnesses were qualified to and called to testify to market value of premises, which respondent by affidavit denied, the disallowance of fees to such witnesses was an abuse of trial court's discretion, although they did not in fact testify.

Mount, Main, and Fullerton, JJ., dissenting.

En Banc.

Appeal from Superior Court, Grant County; Sam Hill, Judge.

Condemnation proceedings by Ham, Yearsley & Ryrie, against the Northern Pacific Railway Company and others. From the assessment of damages, and from the denial of a motion for a new trial and the entry of a verdict on the judgment, defendants appeal. Reversed and remanded, with instructions.

Cannon & Ferris, of Spokane, and Williamson & Luhman, of North Yakima, for appellants.

Merritt, Lantry & Merritt and Voorhies & Canfield, all of Spokane, for respondent.

HOLCOMB, C. J. The chief question in this case is the proper measure of compensation and damages in a condemnation proceeding.

On September 9, 1913, judgment was entered in the superior court for Grant County whereby $16^2/_{10}$ acres of land on Moses Lake, in that county, were decreed subject to appropriation for a public use by the respondent, subject to the right of the respondent to acquire the same by condemnation, for the construction and maintenance of a dam site. That judgment was entered by direction of this court, culminating protracted litigation. See State ex rel. Ham, Yearsley & Ryrie v. Superior Court, 70 Wash. 442, 126 Pac. 945; State ex rel. Grant Realty Co. v. Superior Court, 76 Wash. 376, 136 Pac. 144; State ex rel. Ham, Yearsley & Ryrie v. Superior Court, 81 Wash. 690, 143 Pac. 310; and Grant Realty Co. v. Ham, Yearsley & Ryrie, 96 Wash. 616, 165 Pac. 495. Four years later, after the termination of the above-mentioned litigation, a trial of the condemnation proceeding before the court, sitting with a jury, resulted in the assessment of damages in the sum of $85. Motion for a new trial upon the ground that the verdict was inadequate and for error of law at the trial and for other reasons set forth in the motion was denied, and verdict entered upon the judgment.

The principal errors assigned by the appellants are:

(1) The court erred in rejecting appellants' offer of testimony that "the land described in the petition and sought to be condemned by the petitioner for a dam site is, by reason of its surroundings and natural advantages, peculiarly adapted for a dam site."

(2) The court erred in rejecting appellants' offer of testimony that the "fair market value of the land sought to be condemned, taking into consideration all of the uses to which the land is adaptable, including that of a dam site, is from $40,000 to $60,000."

(3) The court erred in rejecting appellants' offer of testimony that a fair market value of the land sought to be condemned with improvements located thereupon is approximately the sum of $45,000.

(4) The court erred in rejecting appellants' offer of testimony as follows: That the defendant companies subsequent to the date of the filing of notice of appropriation of the waters in Moses Lake by the petitioner, filed upon Moses Lake in conformity with the Laws of the State of Washington relative thereto, notice of appropriation of the waters of said lake for use both by storage and by diversion; that pursuant to said notice of appropriation and in due compliance with the law relative thereto the defendants diligently and continuously prosecuted to completion the necessary works for the impounding and diversion of 48,000 acre feet of the waters of said lake by the construction of a dam upon the property sought to be condemned; that by virtue of said dam, which was

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constructed and is now upon the land sought to be condemned, the defendants have stored, are now storing, and in possession of, approximately 48,000 acre feet of the waters which would otherwise have gone to waste; that they are the owners of 38,000 acres of irrigable land adjacent to and irrigable from the said Moses Lake with the waters so impounded in said lake; that works have been constructed and completed for the irrigation of approximately 3,200 acres of said body of land of which there is already reclaimed and being irrigated a considerable portion; that the petitioner proposes to immediately destroy the dam heretofore referred to as now existing on the property sought to be condemned, thereby taking of said dam site, and injuriously affecting other property of the defendants, to wit, the said 48,000 feet of water now stored and impounded in said reservoir, and that a reasonable value of the property thus deprived of the defendants is the sum of $114,000.

(5) The court erred in rejecting appellants' offer of testimony that "the dam upon said property sought to be condemned cost the sum of $17,500, is in good condition and is serviceable."

(6) The court erred in rejecting appellants' offer of testimony "that the dam is in good condition, has not depreciated in value, and cannot be reproduced for a considerably larger sum."

Assignments numbered 7 to 11, inclusive, are that the court erred in giving instructions numbered 2, 3, 6, 7, 8.

Assignment 12 is that the court erred in refusing appellants' motion for a new trial.

Assignment 13 is that the court erred in granting respondent's motion to retax costs.

Appellants state their proposition contended for on this appeal succinctly in their reply brief as follows:

(1) In a condemnation proceeding, can the owner show the value of his land for all purposes for which it is naturally adapted?

(2) In a condemnation proceeding, can an owner show market value of the land with the improvements existing at the time of trial?

(3) In a condemnation proceeding, can an owner show damages to other property injuriously affected by the taking of the specific property condemned?

(4) In a condemnation proceeding, is an owner entitled to witness fees for witnesses produced by him to testify to the market value of his premises?

Appellants insist that this court must answer each of these questions in the affirmative, but that the lower court answered each of them positively in the negative.

All of these questions must be answered abstractly in the affirmative, and it remains only to be seen, concretely, whether or to what extent they were answered in the negative by the court below.

The respondent stated in its brief that the site contended for is the only practicable dam site for impounding the waters of the lake. Respondents contend, however, that appellants only offer, in connection with their offers to prove the value of the land and damages, to prove the value of the land in connection with the waters of Moses Lake. The offer as shown in assignment of error No. 2 and by the statement of facts is not such an offer; that offer was a clear and unequivocal offer to show that the fair market value of the land sought to be condemned, taking into consideration all the uses to which the land is adapted, including a dam site, is from $40,000 to $60,000, and the offer shown in assignment No. 3 was that "the fair market value of the land sought to be condemned, with the improvements located thereon, is approximately the sum of $45,000."

[1-3] The court instructed the jury (instruction No. 4) that they were to "assess and allow to defendants for said land its fair and reasonable market value at the time of this trial, based on the evidence given in the case and upon your view thereof, and in conformity with all the instructions given you by the court." In instruction No. 5 the jury were instructed that the "market value as given in the instructions is the price which said real estate will bring when it is offered for sale by one who desires, but is not obliged, to sell it, and is brought by one who is under no necessity of having it." Instruction No. 6 was that—

"In estimating the value of the real estate you may consider all of its capabilities and all of the uses to which it is applied, and for which it is adapted, but you shall not consider the fact, if you find such fact to be, of the unwillingness of the owner to sell or dispose of said property."

These instructions were all correct and in accord with our decisions and the almost universal decisions upon this question; but the court further instructed the jury (instruction 7) that in ascertaining the value of damage they "must not take into consideration any special value which said property may have to the petitioner by reason of its necessity, but the market value as hereinbefore defined to you"; "nor should you take into consideration the value of defendants' property as a dam site." The court further instructed the jury that—

"The waters of Moses Lake, in front of the defendants' lands which are sought to be condemned in this proceeding, are navigable waters within the law, and the right to impound, store, and use them is owned by the petitioner, and the defendants, by reason of the ownership of said lands abutting on said lake, would have no proprietary rights in any dam site upon which to construct a dam for the purpose of impounding and storing the waters of said Moses Lake, and would not be entitled to have the value of such dam site considered in esti-

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mating the value of the lands, as they have no interest in and to the waters of Moses Lake or any right to impound and store the same."

In instruction No. 7 the respondent insists that the trial court adhered to the rule which held to the market value for all purposes, and clearly, specially, and unmistakably told the jury that in their determination of the value of the land they could consider its adaptability for a dam site. This is certainly not correct, when we find in the instruction that the court told the jury they were not to take into consideration the value of the land for a dam site.

[4] This court has always adhered to the rule that the market value at the time of trial is the basis of compensation in condemnation proceedings. Seattle & Mont. Ry. Co. v. Murphine, 4 Wash. 448, 30 Pac. 720; Seattle & Mont. Ry. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864; In re Westlake Ave., 40 Wash. 144, 82 Pac. 279; Grays Harbor & P. S. Ry. Co. v. Kauppinen, 53 Wash. 238, 101 Pac. 835; Columbia Rafting Co. v. Hutchinson, 56 Wash. 323, 105 Pac. 636; Distler v. Grays Harbor & P. S. Ry., 76 Wash. 391, 136 Pac. 364; Tacoma v. Nisqually Power Co., 57 Wash. 420, 107 Pac. 199; Seattle & Port Angeles, etc., Co. v. Land, 81 Wash. 206, 142 Pac. 680; King County v. Seattle Cedar Lum. Mfg. Co., 94 Wash. 84, 162 Pac. 27, L. R. A. 1917C, 1184. Lewis on Eminent Domain (2d Ed.) section 479, lays down the rule as follows:

"*Value for Particular Uses.*—The market value of property includes its value for any use to which it may be put. If, by reason of its surroundings, or its natural advantages, or its artificial improvements, or its intrinsic character, it is peculiarly adapted to some particular use, all the circumstances which make up this adaptability may be shown, and the fact of such adaptation may be taken into consideration in estimating the compensation. Some of the cases hold that its value for a particular use may be proved, but the proper inquiry is, What is its market value in view of any use to which it may be applied and of all the uses in view to which it is adapted?"

In Boom Company v. Patterson, 98 U. S. 403, 25 L. Ed. 206, the United States' Supreme Court say:

"In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be, What is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can readily be estimated."

"So many and varied are the circumstances to be taken into account in determining the value of the property condemned for public purposes that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community or such as may be reasonably expected in the immediate future.

"The position of the three islands in the Mississippi fitting them to form, in connection with the west bank of the river, a boom of immense dimensions, capable of holding in safety over 20,000,000 of feet of logs, added largely to the value of the lands. The boom company would greatly prefer them to more valuable agricultural lands, or to lands situated elsewhere on the river; as, by utilizing them in the manner proposed, they would save heavy expenditures of money in constructing a boom of equal capacity. Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands."

Lewis on Eminent Domain (3d Ed.) § 707, says:

"So it is proper to show that property possesses a peculiar value for railroad purposes, for dock purposes, for a mill site, for a ferry, for market gardening, for raising cranberries, for warehouse purposes, or for a bridge site."

In 10 R. C. L. § 114, p. 131, the rule is stated as follows:

"*Value for Special Use.*—While market value is always the ultimate test, it occasionally happens that the property taken is of a class not commonly bought and sold, as a church, or a college, or a cemetery, or the fee of a public street, or some other piece of property which may have an actual value to the owner, but which under ordinary conditions he would be unable to sell for an amount even approximating its real value. As market value presupposes a willing buyer, the usual test breaks down in such a case, and hence it is sometimes said that such property has no market value. In one sense this is true; but it is certain that for that reason it cannot be taken for nothing. From the necessity of the case the value must be arrived at from the opinions of well-informed persons, based upon the purposes for which the property is suitable. This is not taking the 'value in use' to the owner as contradistinguished from the market value. What is done is merely to take into consideration the purposes for which the property is suitable as a means of ascertaining what reasonable purchasers would in all probability be willing to give for it, which in a general sense may be said to be the market value.

"*Value from Expected Public Use.*—The value of the land taken to the party taking it is not the test of what should be paid, nor should the fact that the land is desired or needed for a particular public use be considered when it is

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taken for that use. If, however, entirely apart from the fact that the property was taken for a particular use, it appears that it was exceptionally adapted and available for such a use, as, for example, for a municipal water supply, or for a railroad, or for a bridge, and the necessity for such use was so imminent as to add something to the present value in the minds of possible buyers, that element may be considered in determining the fair market value."

In Southern Railway Co. v. Memphis, 126 Tenn. 294, 148 S. W. 669, 41 L. R. A. (N. S.) 838, Ann. Cas. 1913E, 161, it is said:

"It [value] includes every element of usefulness and advantage in the property. If it be useful for agricultural or for residence purposes, if it has adaptability for a reservoir site or for the operation of machinery, if it contains a quarry of stone or a mine of precious metals, if it possesses advantage of location or availability for any useful purpose whatever, all these belong to the owner, and are to be considered in estimating its value. It matters not that the owner uses the property for the least valuable of all the ends to which it is adapted, or that he puts it to no profitable use at all. All its capabilities are his, and must be taken into the estimate.

"This does not mean that all the capabilities are to be priced separately, and the aggregate put down as the true value, for they do not exist independently of each other, and cannot all be realized at the same time; nor will it do to restrict the estimate to any one of them, because in one view that would exclude the other elements altogether, and in another view it would tend to make the degree of benefit to the party appropriating and condemning for a particular purpose the real measure of value, which is never allowable."

Lewis on Eminent Domain (2d Ed.), at page 1056, says:

"The conclusion from the authorities and reason of the matter seems to be that witnesses should not be allowed to give their opinions as to the value of the property for a particular purpose, but should state its market value in view of any purpose to which it is adapted. The condition of the property and all its surroundings may be shown, and its availability for any particular use. If it has a peculiar adaptation for certain uses, this may be shown, and if such peculiar adaptation adds to its value the owner is entitled to the benefit of it. But, when all the facts and circumstances have been shown, the question at last is, What is it worth in the market?"

See, also, Currie v. Waverly & N. Y. B. R. Co., 52 N. J. Law, 381, 20 Atl. 56, 19 Am. St. Rep. 452.

His honor, the trial judge, adopted the theory of the respondent that the rule announced in Grays Harbor Boom Co. v. Lownsdale, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267, applies to this case, and framed his instruction in conformity with the instruction given in that case. We later pointed out, however, in Columbia River Rafting Co. v. Hutchinson, 56 Wash. 323, 105 Pac. 636, that in the Lownsdale Case the claimant against whom the condemnation was instituted was not the owner of the shore land with the accompanying littoral and riparian rights, and there was not sought to be appropriated any part of the upland further than for a right of way, with possible consequent erosion caused by the use of the shore land and upland, and that in a case where, as in the Hutchinson Case, the respondents were the owners of the shore land as well as the upland and the appurtenant littoral and riparian rights that attach to such lands in this state, and where for the successful operation of the boom it was necessary to use a part of the upland, the availability of the land as a boom site should be taken into consideration, and in that case such availability was taken into consideration and approved by this court. In a note by the editor to the case of McGovern v. City of New York, 46 L. R. A. (N. S.) 391, at page 393, it is pointed out that the Grays Harbor Boom Co. v. Lownsdale Case, supra, does not depart from the general rule heretofore stated. The case was analyzed, and it was pointed out that the owner of the land there involved, which abutted on the river and shore, had no proprietary right in any boom site, and hence was not entitled to have its value for a boom site considered in estimating the value of the land; that the court does not intend, by its decision, to hold that the owner of land which was available for the purpose for which it was sought to be condemned was not entitled to have its value for that purpose considered as an element to establish the market value is made clear by a later decision, wherein an instruction to the jury was sustained to the effect that the jury, in making up their verdict, should take into consideration the value of the land as a boom site, although it was being condemned to be used for that purpose, citing Columbia & C. R. Boom, etc., Co. v. Hutchinson, 56 Wash. 323, 105 Pac. 636. The distinction between the cases as here made was pointed out by the editor in the foregoing note. It is true that the owner is not permitted to take advantage of the necessities of the condemning party, but neither can the condemnor obtain something of value for nothing.

[5] Under the rule fixing the market value at the time of taking obtaining in this state, and in determining that value, it is proper to show the condition of the property, its surroundings, the uses to which it has been applied, and its capacity for other uses, including that to which it is sought to be applied in estimating its value, but no showing may be made of its value for any special use; the value of the use for which it is sought may be more or less than its market value. Black River, etc., v. Barnard, 9 Hun, 104; O. R. & N. Co. v. Taffe, 67 Or. 102, 134 Pac. 1024, 135 Pac. 332, 515.

[6] A proper theory for the trial court to

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proceed upon and admit and reject evidence and instruct the jury is the rule as stated in Brack v. Mayor of Baltimore, 125 Md. 378, 93 Atl. 994, Ann. Cas. 1916E, 880, as follows:

"The rule is that the market value of the land is to be estimated with reference to the uses and purposes for which it is adapted, and that any special features which may enhance its marketability may properly be considered. But the fact that the land is needed for the particular object sought by the condemnation is not to be regarded as an element of the value to be ascertained. The question is, not what the property is worth to the condemning party, but what could probably be realized from its sale to any purchaser who might desire it for any or all of the purposes for which it is available." 15 Cyc. 757; Sargent v. Merrimac, 196 Mass. 171, 81 N. E. 970, 11 L. R. A. (N. S.) 996, 124 Am. St. Rep. 528; Board of Trade Tel. Co. v. Darst, 85 Am. St. Rep. 291, note.

We are therefore of the opinion that the trial court was in error in rejecting appellants' offers under assignments 1, 2, and 3, and in instructing the jury as in instruction No. 7.

[7] We are, of the opinion, however, that the court properly rejected the offers stated in assignments Nos. 4, 5, and 6. These appellants and additional claimants who are parties to the proceeding were held in the original case (State ex rel. Ham, Yearsley & Ryrie v. Superior Court, 70 Wash. 442, 126 Pac. 945) to have no right, title, or interest in the waters of Moses Lake, as riparian owners, or as owners of the shore land and upland, and they were subsequently held to have no right by appropriation superior to that of the petitioner in this case; and we held in the subsequent case of Grant Realty Co. v. Ham, Yearsley & Ryrie, 96 Wash. 616, 165 Pac. 495, that the petitioner had proceeded in good faith and was entitled to the appropriation of the waters and to condemn land and property for the storage and diversion thereof. We there held that so long as their proceedings were in good faith and diligently prosecuted, their rights related back to the time of their appropriation, and thereby they acquired prior, superior, and exclusive rights as against these parties. In the face of what we have adjudged to be the prior and superior rights of the petitioner, these claimants have proceeded to erect storage and diversion works which we must hold they did at their own peril. While it is true that they are secondary appropriators or users, their works may be of no value whatever to prior appropriators, and may not fit into their project at all, and it would be unfair to compel the respondent to pay the cost price of improvements or the value of water alleged to be stored in the face of respondent's rights, as compensation or damages, in order to acquire the dam site for petitioner's own storage and diversion works. Appellants must be limited to the market value of the dam site which is appropriated by the petitioner, that market value to include the availability of the site by reason of its surroundings and natural advantages and whatever improvements may add to its fair market value for any and all purposes at the time of trial, and not as erected for the benefit of the appellants for their irrigation works.

[8, 9] On the matter of retaxing the costs, appellants claim witness fees for A. L. Pettigrew, who is one of the appellants, and certainly is not entitled to witness fees. They also claim witness fees for R. K. Tiffany and mileage from Yakima; T. A. Noble and mileage from Yakima; W. R. Hill and mileage from Seattle, and John D. Anderson and mileage from East Farms. On the motion to retax costs the respondent filed an affidavit to the effect that none of the above-named persons had any qualification to testify as to the market value of real estate sought to be condemned in this action, or of other real estate in the vicinity of Moses Lake, nor were said parties or either of them present at the place of trial at the time thereof for the purpose of testifying as to such values, but each and all of them were called for the purpose of testifying as to the value of the real estate as a dam site in connection with the waters of Moses Lake, and as to the value of the dam then standing thereon to the claimants, and as to the value of the dam site and dam in connection with the waters of Moses Lake and the rights of the petitioner therein and its project thereon. All of these matters were denied by the appellants in their counter affidavit, and it was averred that these witnesses were qualified to, and called for the purpose of testifying, as witnesses, to the market value of the premises, taking into consideration all the purposes for which they were adaptable, and which would go to make up such value in the open market. Such being the state of the record, the trial court abused its discretion in disallowing witness fees in regard to the above-mentioned witnesses, in view of our decision herein, even though, because of the manner in which the case was tried, they did not testify. Low v. McDonald, 90 Wash. 122, 155 Pac. 748.

The judgment is reversed and the cause remanded, with instructions to the trial court to proceed in conformity with this decision.

MITCHELL, TOLMAN, PARKER, and MACKINTOSH, JJ., concur.

MOUNT, J. In my opinion there was no error in the trial. The judgment should be affirmed. I therefore dissent.

MAIN and FULLERTON, JJ., concur.

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(107 Wash. 454)

BURKE v. WILSON et al. (No. 15350.)

(Supreme Court of Washington. June 30, 1919.)

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1. ASSIGNMENTS ⟸78—CHOSES IN ACTION—RIGHTS OF ASSIGNEE.

In the absence of any provision to the contrary, the unqualified assignment of a chose in action vests in the assignee an equitable title to all such securities and rights as are incidental to the subject-matter of the assignment.

2. ASSIGNMENTS ⟸121—RIGHT OF ASSIGNEE TO SUE.

Where an assignment was made by one partner to a third person of a right of action against another partner after dissolution to recover possession of property given as security under a chattel mortgage, the assignee could maintain the action notwithstanding the assignment was made for the sole purpose of enabling the assignee to enforce by appropriate action the rights possessed and assigned by the assignor, notwithstanding Rem. Code 1915, § 179, in view of section 191.

3. CHATTEL MORTGAGES ⟸172(1)—RIGHT TO REPLEVIN—POSSESSION.

The rule that the mortgagee is not entitled to possession of the mortgaged property and cannot therefore recover it in a replevin action applies only to the mortgagee whose rights are secured by a conventional chattel mortgage, and not to a mortgage which contemplates the actual transfer of possession from the mortgagor to the mortgagee, and where transfer of possession has actually been made to be held as security.

4. APPEAL AND ERROR ⟸910—REVIEW—PRESUMPTIONS—DEMAND.

On appeal in an action to recover possession of property held as security, it will be presumed, in support of a judgment for plaintiff in the absence of a statement of facts, that such a defense was made as would make a demand by plaintiff or his assignor wholly unnecessary under the rule that where defendant claims title and right of possession no demand is necessary.

Department 2.

Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by M. Burke against E. H. Wilson and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Frank E. Hammond, of Seattle, for appellants.

Philip Tworoger, of Seattle, for respondent.

PARKER, J. The plaintiff, Burke, as assignee of William Bojezk, commenced this action in the superior court for King county, seeking recovery of possession of a team of horses, a spring wagon, and a set of double harness, which he claims to be entitled to the possession of as against the defendants, the Wilsons and Chopek, who he claims wrongfully acquired possession thereof from Bojezk, and which possession is wrongfully withheld by them; also seeking in the alternative a money judgment against the defendants for the value of the property. Trial upon the merits in the superior court sitting without a jury resulted in findings and judgment in favor of the plaintiff and against the defendants, from which they have appealed to this court.

There is no statement of facts or bill of exceptions in the record before us. The facts may be summarized from the trial court's findings as follows: On and prior to July 11, 1918, Bojezk and Chopek were partners in business, and as such were the owners of the property in question. On that day they mutually dissolved their partnership, and in the settlement of their partnership affairs made an agreement touching the disposition of this property, as evidenced by two written instruments then executed and to which both were parties. One of the instruments was a plain bill of sale executed by Chopek, purporting upon its face to be an absolute conveyance of this property to Bojezk. The other instrument, executed at the same time and as a part of the same transaction, in so far as we need notice its terms, reads as follows:

"This agreement made this 11th day of July, 1918, by and between William Bojezk and William Chopek, witnesseth: Said William Chopek has this day executed and delivered to said William Bojezk a bill of sale on the following described property, to wit: [description]. It is hereby agreed by and between the parties hereto that the said William Bojezk will at his convenience sell the property and out of the proceeds of the said sale of property after deducting the sum of $273 and any charges or expenses that he may be put to by reason of said sale, pay to William Chopek any sum that he may realize over the sum of $273 and such additional charges and expenses that he may be put to by reason of having custody of the said property."

Immediately after the execution of these instruments, they went to the stable where the property was being kept, when it was there delivered into the possession of Bojezk, who then paid the charges existing against it for feed and care. On the following day, July 12, 1918, Chopek, without the knowledge or consent of Bojezk, removed the property from where it had been kept and was left by Bojezk, taking it to and placing it in a stable kept by Wilson. Soon thereafter Bojezk, through his attorney, made a demand upon Wilson for the possession of the property, which demand Wilson refused to comply with. At that time the property "was in the actual possession of the said Wilson, and in the constructive possession of the said Chopek." Thereafter, on July 16, 1918, Bojezk executed and de-

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livered to Burke an instrument in writing as follows:

"In consideration of one dollar and other valuable considerations, I hereby assign to M. Burke, all my right, title and interest, in and to right of action I have against E. H. Wilson and Jane Doe Wilson, his wife, and Wm. Chopek, growing out of their conversion of certain personal property belonging to me, to wit: [description]. And I hereby authorize the said M. Burke to bring action to recover either the said property, or the value thereof."

This assignment was executed merely for the purpose of permitting Burke to bring this action: Bojezk retaining title to the rights assigned, as between him and Burke. The court found the value of the property to be $350. No demand was ever made in behalf of Bojezk or Burke upon either Wilson or Chopek for possession of the property, other than the demand made by Bojezk upon Wilson above noticed. The property remained in the possession of Wilson and Chopek, Burke not having sought to acquire possession thereof by writ of replevin pending the action. The judgment is in favor of Burke for the possession of the property, or upon failure of the Wilsons and Chopek to deliver the same to Burke, for a money judgment against them in favor of Burke for the sum of $273, that being, as the trial court found, the value of Burke's interest in the property, as assignee of Bojezk.

The principal contention here made in behalf of appellants, the Wilsons and Chopek, seems to be that an action of this nature, that is, an action to recover the property, or in the alternative, its value, cannot be maintained by Burke upon this assignment, since it was made solely for the purpose of enabling Burke to maintain the action, and not, as between Bojezk and Burke, to divest Bojezk of his interest in the property and the proceeds of its sale when made in pursuance of his contract with Chopek. Counsel invokes section 179, Rem. Code, providing that:

"Every action shall be prosecuted in the name of the real party in interest, except as is otherwise provided by law"

—and argue that section 191, Rem. Code, does not provide otherwise with reference to an action of this nature by an assignee who has become such for the sole purpose of suing upon the chose in action assigned. That section, so far as we need here notice its terms, reads as follows:

"Any assignee or assignees of any judgment bond, specialty, book account, or other chose in action, for the payment of money, by assignment in writing, signed by the person authorized to make the same, may, by virtue of such assignment, sue and maintain an action or actions in his or her name, against the obligor or obligors, debtor or debtors, therein named, notwithstanding the assignor may have an interest in the thing assigned. * * *"

[1] The trial court concluded and proceeded upon the theory that the bill of sale and agreement made at the same time and as a part of the same transaction on July 11, 1918, to which Bojezk and Chopek were parties, became in effect a chattel mortgage, with the right of possession of the property in Bojezk to secure to him the payment of the $273 agreed by the parties as due him upon the settlement of their partnership affairs. Counsel upon both sides of this case proceed upon the same theory, as we understand them. And we may therefore safely do likewise, so far as our present inquiry is concerned. It seems to us that what was assigned by Bojezk to Burke was primarily the right of action which Bojezk possessed as against the Wilsons and Chopek for the recovery of the $273, to secure which the property was mortgaged to him, accompanied by his actual possession thereof at the time it was taken from him and retained by Wilson and Chopek. This was a "chose in action for the payment of money." That Burke could, under section 191 above quoted, maintain an action to recover this sum from Wilson and Chopek, by virtue of the assignment from Bojezk, seems to be conceded; but it is argued that Burke could not maintain, under the assignment, a recovery of the property, because a right thereto such as is here involved is not a chose in action for the recovery of money. We may concede for argument's sake that this contention would have some reasonable basis to rest upon if Burke as Bojezk's assignee were seeking recovery of the property under a claim of absolute ownership instead of as security for the payment of the $273 for which the mortgage and possession of the property was given as security. But it has become well-settled law that—

"In the absence of any provision to the contrary, the unqualified assignment of a chose in action vests in the assignee an equitable title to all such securities and rights as are incidental to the subject-matter of the assignment." 2 R. C. L. p. 633; National Bank of Commerce v. Lock, 17 Wash. 528, 50 Pac. 478, 61 Am. St. Rep. 923; Munson v. Exchange National Bank, 19 Wash. 125, 52 Pac. 1011; Lewis v. Third St., etc., R. Co., 26 Wash. 28, 66 Pac. 150.

[2] We think it follows that Burke can maintain an action for the recovery of the property from Wilson and Chopek, seeking an alternative money judgment in the same action, notwithstanding the assignment was made for the sole purpose of enabling Burke to enforce by appropriate action the rights possessed and assigned by Bojezk. Our recent decisions in Olsen v. Hagen, 102 Wash. 321, 172 Pac. 1173, and Dyer v. Title Guaran-

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ty & Surety Co., 179 Pac. 834, are in harmony with this conclusion.

[3] Contention is made that Burke's only remedy is by an action for damages against Wilson and Chopek, or by an action seeking the foreclosure of the mortgage, and that only by the latter can Wilson and Chopek be deprived of the possession of the property. Counsel for appellants invoke the general rule as announced in Silsby v. Aldridge, 1 Wash. 117, 23 Pac. 836, and Kerron v. North Pacific, etc., Co., 1 Wash. 241, 24 Pac. 445, which is, in substance, that a mortgagee is not entitled to the possession of the mortgaged property, and therefore cannot recover it in a replevin action. This rule applies only to a mortgagee whose rights are secured by a conventional chattel mortgage, which leaves the possession of the property with its owner the mortgagor. It has no application to a mortgage which contemplates the actual transfer of the possession of the property from the mortgagor to the mortgagee and transfer of possession has actually been made, to be held as security Here we have such a mortgage, accompanied by the actual transfer of the possession of the mortgaged property by the mortgagor to the mortgagee. Under such circumstances, the mortgagee may maintain the action of replevin to recover possession of the property when it is wrongfully taken and withheld from him. It was so held in Marsh v. Wade, 1 Wash. 538, 20 Pac. 578.

[4] Contention is made that Burke should not be permitted to recover in this action because there was no sufficient demand made by Bojezk or Burke for the possession of the property prior to the bringing of the action. It may be that the trial court's findings show such a state of facts touching the question of a demand of possession prior to the bringing of the action as would, under some circumstances, defeat Burke's right of recovery. But as already noticed, we have no statement of facts advising us as to what occurred during the course of the trial, and we find nothing in the record showing but what Wilson and Chopek defended upon the theory that they were the owners of the property, and as such could not be required under any circumstances to surrender its possession to either Bojezk or Burke. Hence we must presume in support of the judgment that such defense was made as would make a demand by Bojezk or Burke wholly unnecessary to the maintenance of the action, under the rule that—

"Where in replevin defendant claims title to the property and the right of possession incident thereto, no demand by plaintiff is necessary." 34 Cyc. 1409.

Some other contentions are made in behalf of appellants; but we are convinced that they do not call for a reversal of the trial court's judgment, or for further discussion, especially in the absence of a statement of facts in the record.

The judgment is affirmed.

HOLCOMB, C. J., and FULLERTON and MOUNT, JJ., concur.

(107 Wash. 253)

LOGAN v. NEW YORK LIFE INS. CO.
(No. 15008.)

(Supreme Court of Washington. May 31, 1919.)

1. INSURANCE ⟸136(4)—LIFE INSURANCE—VALIDITY OF POLICY—DELIVERY WHILE INSURED IN GOOD HEALTH.

Where insured was not in good health at the time the policy was delivered to him, and the contract provided that the policy should be void unless delivered to insured in his lifetime and while in good health, the policy did not take effect.

2. INSURANCE ⟸136(4)—LIFE POLICY—CONDITION REQUIRING GOOD HEALTH AT DELIVERY—"WARRANTY" OR "STATEMENT."

The condition that a life insurance policy shall not take effect unless delivered to and received by insured in his lifetime and while in good health is not a warranty or statement within the meaning of Rem. Code 1915, §§ 6059—34, 6059—184, relating to representations or warranties in negotiating a policy.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Statement; Warranty.]

3. INSURANCE ⟸646(1)—ACTION ON LIFE INSURANCE POLICY—REQUIREMENT OF GOOD HEALTH UPON DELIVERY — BURDEN OF PROOF.

When a life insurance policy has been delivered and the first premium paid, the burden of proof is upon the defendant insurance company to show that the policy was delivered while the insured was not in good health, and for that reason the contract did not become effective.

Parker, Holcomb, Fullerton, and Tolman, JJ., dissenting.

En Banc.

Appeal from Superior Court, Grays Harbor County; Ben Sheeks, Judge.

Action by Nellie M. (known as Daisy) Logan against the New York Life Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed, and cause ordered dismissed.

John C. Hogan and A. Emerson Cross, both of Aberdeen, for appellant.

Lee & Kimball, of Spokane, and Bridges & Bruener, of Aberdeen, for respondent.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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MOUNT, J. This action was brought upon a policy of life insurance issued by the defendant upon the life of Allen Mitchel Logan. The plaintiff was named as the beneficiary therein. The complaint alleged, in substance, that the policy was delivered to the insured on July 28, 1916; that the first premium was paid; that the insured died on August 6, 1916; that proofs of death were furnished in accordance with the terms of the policy; and that the defendant refused to pay. The answer of the defendant admitted the issuance and delivery of the policy, and that the premium was paid; that the insured died as alleged, but denied any liability by reason of the alleged fact that the insured was not in good health at the time the policy was delivered, and that the policy was obtained upon false and fraudulent representations. Upon these issues the case was tried to the court and a jury. A verdict was returned in favor of the plaintiff for the full amount of the policy. At the close of the evidence the defendant moved for a directed verdict, which motion was denied. After verdict the defendant moved for judgment notwithstanding the verdict, which motion was also denied, and judgment was entered in favor of the plaintiff for $5,000, the amount of the policy. The defendant has appealed from that judgment.

[1] Upon the trial of the case it appeared, without dispute, that the insured, during his lifetime, on the 27th day of June, 1916, made an application for the policy sued upon. This application contained the following clause:

"I agree as follows: 1. That the insurance hereby applied for shall not take effect unless the first premium is paid and the policy is delivered to and received by me during my lifetime and good health, and that unless otherwise agreed in writing, the policy shall then relate back to and take effect as of the date of this application. * * *"

It was stated in the application that the insured desired the policy to date from July 25, 1916. Thereafter the insured was examined by a physician, the report of the physician was sent to the insurance company, and the policy was issued. It was delivered to the insured on the 28th day of July, 1916, and the first premium was paid at that time. The insured died suddenly, from a tumor of the brain, on Augnst 6, 1916, nine days after the delivery of the policy. It is shown, without dispute, that after the application was made for the policy, but before the policy was delivered, the insured had several spells of illness, one on June 22d, another on July 3d, and another on July 17th; that upon these occasions he suffered from severe headache, nausea, chills, and poor heart action; and that nine days after the policy was delivered he had another of these spells, from which he died. Upon a post mortem examination it was found that he died from a tumor of the hypophysis. Upon the trial of the case four doctors qualified as experts and testified, in substance, that this disease was of slow growth, running over months or years, and that symptoms of the disease were such as the insured had manifested prior to the delivery of the policy in question. There was no evidence in the record that this disease which resulted in the death of the insured could have originated within the period between the date the policy was delivered and the date of the insured's death. All the evidence is to the effect that the disease could not have originated within that time.

Upon this state of facts we are satisfied that it was the duty of the court to have directed a judgment of dismissal at the close of the evidence. The rule is stated in 14 R. C. L. p. 900, at section 78, as follows:

"Where a completed contract of life insurance exists it is immaterial that the insured was not in good health at the time of the delivery of the policy evidencing the contract. However, applications for policies of life insurance, as well as policies, frequently provide that the policy shall not take effect unless it is delivered to the insured and the first premium paid while he is in good health, and such a provision is valid and enforceable, and it is immaterial that the condition of the insured has not changed since his application was made, or that the insured was ignorant of his condition."

The text is well supported by footnotes.

Murphy v. Metropolitan Life Ins. Co., 106 Minn. 112, 118 N. W. 355, was a case where a policy was issued on May 7, 1906. On April 23d a physician had examined the insured and found a swelling of the knee. He treated the insured up to June 7th, when the knee was placed in a cast. In August the knee was operated upon for malignant tumor, from which the insured died. The policy contained a clause like the one in question. The court there said:

"It is clear from the language of the policy that the defendant's promise of insurance was not absolute, but conditional, and that the existence of life and sound health in the insured on the date of the policy is the condition upon which the promise is made. It is the fact of the sound health of the insured which determines the liability of the defendant, not his apparent health, or his or any one's opinion or belief that he was in sound health. Therefore, if the insured was not in fact in sound health on the date of the policy, the defendant is not liable unless it has waived the defense. * * * The term 'sound health,' as it is used in this policy, does not mean perfect health, but an absence of any disease that has a direct tendency to shorten life."

In Paine v. Pacific Mut. Life Ins. Co., 51 Fed. 689, 2 C. C. A. 459, the court said:

"Conceding that the application was accepted on June 7, 1890, by the defendant, it expressly provided that the contract of insurance

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should take effect and be in force only upon compliance with three conditions precedent, viz. that a policy should be delivered, that it should be delivered during the life and good health of the applicant, and that the premium should be paid when the policy was delivered. These conditions were never complied with. The vital, indispensable condition was that the policy should be delivered and take effect during the life and good health of the applicant; but that life had ended, that applicant was no more, and that condition could never be complied with, and therefore the contract could never take effect."

In Metropolitan Life Ins. Co. v. Howle, 62 Ohio St. 204, 56 N. E. 908, the court said:

"The condition in the policy is that there shall be no obligation assumed by the company, unless upon the date of the policy the insured, the wife, shall be alive and in sound health. The matter of life and sound health is not made to depend upon her knowledge thereof, but upon the fact itself. She might be dead and not be conscious of it, and she might be in unsound health and not know it, but either would alike defeat a recovery."

In Gallant v. Metropolitan Life Ins. Co., 167 Mass. 79, 44 N. E. 1073, the court said:

"The company made its own contract, a part of which was that no obligation was assumed by the company unless, at the time when the policy was issued, the insured 'was alive and in sound health.' If, in fact, the insured at that time was not in sound health, the defendant is not liable on the policy, and this fact can be shown by any competent evidence."

In Metropolitan Life Ins. Co. v. Willis, 37 Ind. App. 48, 76 N. E. 560, the court said:

"The policy recites that it is issued upon the written application of the insured, and that no obligation is assumed, unless, on the date the policy is delivered, 'the insured is alive and in sound health.' The evidence shows conclusively that he was not in 'sound health' when the policy was delivered. It is unnecessary to cite authorities in support of the proposition that an insurance company has the right to make such conditions a part of its contract of insurance. These undisputed facts establish such a breach of the contract as to relieve appellant of liability."

In Yount v. Prudential Life Ins. Co. (Mo. App.) 179 S. W. 749, the court said:

"No contract could come into existence until his proposal had been accepted upon the terms required, and notice of such acceptance conveyed to him. * * *. Clearly a delivery of the policy to the applicant during his lifetime and while he was in good health was required before the things done by the parties could ripen into a contract. It was a condition precedent to a completion of the contract."

And in Gallop v. Royal Neighbors of America, 167 Mo. App. 85, 150 S. W. 1118, the court said:

"Parties to a contract of insurance have the undoubted right to agree on the terms of their contract and to declare when and under what conditions the contract shall go into effect. * * * And where the parties agree in the application that the contract of indemnity shall not take effect until the delivery of the policy at a certain time and under certain specified conditions, such agreement will be enforced if it is one the parties lawfully could make. * * * The physical state the contract was intended to have existent at the time it became effective as a contract of indemnity was in the nature of a condition precedent. * * * And since that condition had failed before the delivery of the certificate, it must follow that the contract at no time came into being."

Numerous other cases to the same effect might be cited. The parties to this contract agreed that it should not take effect unless the first premium was paid and the policy delivered to and received by the insured in his lifetime and good health. It is proven conclusively that at the time the policy was delivered the insured was not in good health. He died nine days afterwards from a disease which the evidence shows had existed for months, or probably years, before the delivery of the policy. It is true the applicant was unconscious of the fact that he was ailing from that disease; and for that reason, no doubt, he agreed that the policy should not take effect until it was delivered to him in his lifetime and good health. The jury in this case, upon special interrogatory submitted to them, answered that the insured was in good health at the time the policy was delivered. But there is no evidence in the record to support this finding. In fact, the entire evidence is to the effect that the insured was ailing before the policy was delivered; that the symptoms which he had before the policy was delivered were the symptoms of tumor of the brain. While the physicians who attended him upon these different occasions were unable to diagnose the case as tumor of the brain, it was discovered upon his death that this was the cause of his death. There was no evidence, and none can reasonably be anticipated, that the disease from which the insured died was one which was, or might have been, contracted after the delivery of the policy. Since there was no evidence at all to support the finding of the jury, it follows that the finding is of no force. This was the vital question in the case, and when the evidence altogether showed that the insured was not in good health at the time the policy was delivered to him, the policy did not take effect according to the contract and according to the great weight of authority, a part of which we have hereinbefore cited.

[2, 3] The respondent contends that this policy is governed by the provisions of the following sections of Rem. Code:

Section 6059—34. "No oral or written misrepresentation or warranty made in the negotiation of a contract or policy of insurance, by the as-

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sured or in his behalf, shall be deemed material or defeat or avoid the policy or prevent it attaching, unless such misrepresentation or warranty is made with the intent to deceive. If any breach of a warranty or condition in any contract or policy of insurance shall occur prior to a loss under such policy, such breach shall not avoid the policy nor avail the insurer to avoid liability, unless such breach shall exist at the time of such loss under such contract or policy."

Section 6059—184. "No life insurance policy * * * shall be issued or delivered * * * unless it contains: * * *

"(3) A provision that the policy and the application therefor shall constitute the entire contract between the parties and that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties."

These provisions of the Code apply to representations by the insured as inducements or upon his qualifications in his examination for the insurance, and we have so held in a number of cases. See Hoeland v. Western Union Life Ins. Co., 58 Wash. 100, 107 Pac. 866; Woods v. Insurance Co. of Pennsylvania, 82 Wash. 563, 144 Pac. 650; Quinn v. Mutual Life Ins. Co., 91 Wash. 543, 158 Pac. 82; Brigham v. Mutual Life Ins. Co., 95 Wash. 196, 163 Pac. 380; Goertz v. Continental Life Ins. & Inv. Co., 95 Wash. 358, 163 Pac. 938; Ramat v. California Ins. Co., 95 Wash. 571, 164 Pac. 219; Askey v. New York Life Ins. Co., 102 Wash. 27, 172 Pac. 887, L. R. A. 1918F, 267.

In all these cases we had under consideration representations and statements made in order to obtain the insurance. The condition that the policy shall not take effect unless it is delivered and received by the insured in his lifetime and good health is not a warranty or statement within the meaning of the statute. Respondent apparently concedes that if the insurance company, before delivery of the policy, had discovered the fact that the insured was in bad health the company might then have refused to deliver the policy. Respondent also apparently concedes that if the insured had refused to pay the premium upon the policy when it was offered for delivery, then the company might have refused to deliver the policy and the contract would not take effect. There were three conditions here which were made precedent to the contract becoming effective: First, the payment of the premium; second, the delivery of the policy; and, third, the delivery during the lifetime and good health of the insured. All these conditions must concur before the contract of insurance became effective. If the payment of the premium is a condition precedent, the delivery of the policy during good health is likewise a condition precedent. It is idle to say that where two or three conditions are named in the same clause, in exactly the same way, one of them is a condition precedent and the others not. While there are authorities to the effect that the burden is upon the respondent to prove that the policy was delivered while the insured was in good health, we think the better rule is that when the policy has been delivered and the first premium paid the burden of proof is upon the insurance company to show that the policy was delivered while the insured was not in good health, and for that reason the contract did not become effective. In this case the appellant maintained that burden, because it was clearly shown, without any dispute, that the insured died nine days after the policy was delivered; that the insured was suffering from symptoms which indicated a tumor of the brain prior to the delivery of the policy; and that a disease of this kind does not appear except through months or years of growth. So there can be no escape from the conclusion that the evidence shows beyond doubt that the insured was suffering from a tumor of the brain at the time the policy was delivered to him, and that he died therefrom. There is no escape from the conclusion that the policy never took effect by reason of the agreement between the insured and the insurance company that it should not take effect unless delivered to the insured in his lifetime and good health.

We conclude, therefore, that the contract for life insurance was not completed, and the policy never became effective.

It is unnecessary to consider other questions presented.

The judgment appealed from is therefore reversed, and the cause ordered dismissed.

CHADWICK, C. J., and MACKINTOSH, MAIN, and MITCHELL, JJ., concur.

PARKER, J. (dissenting). I cannot see my way clear to concur in the reversal of the judgment of the trial court. I see nothing involved in this case other than the question of fact as to whether the deceased was in good health at the time of the delivery of the policy, as to which question the burden of proof, as conceded in the majority opinion, rested upon the insurance company. The deciding of this case upon the merits by the court in favor of the insurance company is not deciding that there was no evidence to support the finding of the jury that the deceased was in good health at the time the policy was delivered; but it is deciding as a matter of law that it has been affirmatively conclusively proven that he was not then in good health. To my mind the two or three sick spells of the deceased occurring a short time before the delivery of the policy, and the uncontroverted testimony of the expert witnesses that in their opinion the deceased was not in good health at the time of the delivery of the policy, is not conclusive upon that question of fact, in the sense that the

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court is, upon such a showing, authorized to decide it in favor of the insurance company as a matter of law, contrary to the jury's finding. The jury may have believed that the deceased was in good health at the time of the delivery of the policy, notwithstanding a short time prior thereto he had two or three sick spells. The jury may have also believed that the testimony of the expert opinion witnesses was not such as to compel a finding that the deceased was not in good health at the time of the delivery of the policy. It is to be remembered that this was the testimony of human witnesses, the weight and credibility of which the jury were the judges. The mere fact that there were no expert witnesses testifying that in their opinion the deceased was in good health when the policy was delivered does not take away from the jury the right and duty of weighing the testimony, and being the judges of the credibility, of these expert opinion witnesses. It may be that the trial court should have awarded the insurance company a new trial upon the ground that the verdict was against the weight of the evidence, and possibly the record would warrant this court in deciding that the trial court abused its discretion in denying the motion for new trial made upon that ground. But that is quite a different matter from finally deciding the case upon the merits by this court. I think the judgment of the trial court should be affirmed, or in any event no disposition of the cause should be made by this court more favorable to the insurance company than to grant it a new trial.

HOLCOMB, FULLERTON, and TOLMAN, JJ., concur.

(107 Wash. 424)

In re CORBIN'S ESTATE.

STATE v. CORBIN et al.

(No. 15358.)

(Supreme Court of Washington. June 18, 1919.)

1. TAXATION ⟸856—INHERITANCE TAXES—CONSTRUCTION OF STATUTES—LEGISLATIVE INTENT.

The Legislature intended by Rem. Code 1915, § 9182, and section 9183, as amended by Laws 1917, p. 196, relating to the computation of inheritance taxes, to impose a tax upon the right to receive, rather than upon the property itself or upon the right to transmit it.

2. TAXATION ⟸886½ — INHERITANCE TAXES—COMPUTATION.

The graduated inheritance tax imposed by Rem. Code 1915, § 9182, and section 9183, as amended by Laws 1917, p. 196, is to be computed upon the legacy of each legatee, and not upon the estate as a whole.

Department 1.

Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Proceeding by the State against Austin Corbin and others, executors and trustees under the will of Daniel C. Corbin, deceased, to determine inheritance taxes. From a judgment imposing the tax, the State appeals. Affirmed.

C. R. Jackson and George G. Hannan, both of Olympia, for the State.

Allen, Winston & Allen, of Spokane, for respondents.

TOLMAN, J. Daniel C. Corbin, a resident of Spokane county, there died on June 29, 1918, leaving an estate which, after deducting debts and expenses properly allowable under the inheritance tax law, amounted in value to $743,425.52. Deceased by his will devised this estate to his widow, a son, and a daughter in unequal proportions. The executors and the tax commissioner were unable to agree upon the method of computing the inheritance tax and applying the graduated rates provided by section 9183, Rem. Code, as amended by the Laws of 1917, c. 43, p. 196. The tax commissioner contended that all of the legatees and devisees were within the first class, as defined by the statute, and that, after deducting the exemption, the graduated rates should be applied to the estate passing to them as a whole; while the executors contended that the graduated rates should be applied to each bequest or legacy as a separate entity. By the first-mentioned method of computation the inheritance tax would, by reason of the graduated rates, amount to considerably more than by the second. The matter was submitted to the trial court upon an agreed statement of facts, and that court adopted the method of computing the tax contended for by the executors, and entered judgment accordingly, from which judgment the state has appealed.

The act which we are called upon to consider is entitled "An act relating to the taxation of inheritances and providing for the disposition of the same." In the first section (Rem. Code, § 9182), it is provided that—

"All property within the jurisdiction of this state, and any interest therein, * * * which shall pass by will or by the statutes of inheritance * * * to any person in trust or otherwise, shall, for the use of the state, be subject to a tax as provided for in section 9183, * * * and all administrators, executors and trustees, and any such grantee under a conveyance, and any such donee under a gift, * * * shall be respectively liable for all such taxes to be paid by them. * * * The inheritance tax shall be and remain a lien on such estate from the death of the decedent until paid."

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In the second section as now amended, chapter 43, p. 196, Session Laws of 1917, it is provided:

"The inheritance tax shall be imposed on all estates subject to the operation of this act at the following rate:

"If passing to or for the use of a father, mother, husband, wife, lineal descendant, adopted child or lineal descendant of an adopted child, the tax shall be one per centum of any value not exceeding fifty thousand dollars; two per centum of any value in excess of fifty thousand dollars and not exceeding one hundred thousand dollars; three per centum of any value in excess of one hundred thousand dollars and not exceeding two hundred fifty thousand dollars; five per centum of any value in excess of two hundred fifty thousand dollars. * * *"

Following are other classifications based upon relationship or want of it, each taking a different rate.

[1] Bearing upon the question to be here determined, we must inquire whether this act imposes a tax upon the right to receive property by inheritance as distinguished from a tax upon the property itself thus passing, or a tax upon the right to transmit property by will or under statutes of succession. A reading of the statute at once suggests that in assessing the tax the relationship or classification of each legatee or devisee must be considered in order to determine the rate of taxation; and the language of the act and its title, fairly construed, seem to point toward the conclusion that the legislative intent was to impose a tax upon the right to receive, rather than a tax upon the property itself or upon the right to transmit it. This court has been called upon in a number of cases to consider this legislation, though in none of them was the question now in issue raised; yet some light may be shed upon the present subject by a study of what has been heretofore said.

In State v. Clark, 30 Wash. 439, 71 Pac. 20, the constitutionality of the law was attacked, and the opinion deals mainly with constitutional questions. Among other expressions which might be quoted, it is there said:

"The rule of equality in taxation is invoked against this exemption. It may be observed that the rule invoked does not forbid a liberal classification for purposes of taxation. The classification made here is manifestly reasonable. There is no inequality among the members of the same class. This objection is discussed in many of the authorities heretofore cited. It is so completely met and disposed of in the case of Magoun v. Illinois Trust & Savings Bank, supra [170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037], that it must be convincing here."

The writer of that opinion quoted from and repeatedly referred to the Magoun Case, and so clearly followed and adopted its reasoning as to make it binding upon us, practically to the same extent as though it were a decision by this court. It is said in the Magoun Case:

"The tax is not on money; it is on the right to inherit; and hence a condition of inheritance, and it may be graded according to the value of that inheritance."

This court again considered the act in the case of In re Clark's Estate, 37 Wash. 671, 80 Pac. 267. It was there said:

"We do not think that the claim of the state treasurer can be upheld. The inheritance tax is payable out of the legacies, and is chargeable to the individual legatees. The court cannot compel one legatee to pay the inheritance tax due from another, and yet such is the effect of the order appealed from."

In Re White's Estate, 42 Wash. 360, 84 Pac. 831, there was involved the question of whether the title of the act was sufficiently broad to cover a tax on the right of succession by will as well as by operation of law, and it was there held that the act imposes a tax on the right of succession, whether the property passed by will, by operation of law, or by grant or gift, to take effect upon the death of the grantor or donor.

In Re Stixrud's Estate, 58 Wash. 339, 109 Pac. 343, 33 L. R. A. (N. S.) 632, Ann. Cas. 1912A, 850, it was squarely held that this act imposes a tax, not upon property, but upon the right or privilege of receiving it.

In Re Lotzgesell's Estate, 62 Wash. 352, 113 Pac. 1105, it was held that the inheritance tax was not a debt of the testator, but was properly chargeable to the legatees.

[2] If, then, as we have already held, the tax is one upon the right to receive, to be paid, in the last analysis, by the legatee, and if one legatee cannot be held to pay the tax of another, does it not likewise follow that the amount of the tax to be paid by any one legatee must be determined from the amount of the legacy received by him, and not either in whole or in part from the amount which may be received by others? We are convinced that a fair reading of the statute itself leads to that conclusion, and every expression of this court during the eighteen years that it has been the law lends support to that position. Not only so, but the reasoning of other courts in construing similar laws, while not wholly harmonious, abundantly support our conclusions. Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969; In re Macky's Estate, 46 Colo. 79, 102 Pac. 1075, 23 L. R. A. (N. S.) 1207; In re McKennan's Estate, 25 S. D. 369, 126 N. W. 611, 33 L. R. A. (N. S.) 606; Id., 27 S. D. 136, 130 N. W. 33, 33 L. R. A. (N. S.) 620; In re Fox's Estate, 154 Mich. 5, 117 N. W. 558; McGannon v. State ex rel. Trapp, 33 Okl. 145, 124 Pac. 1063, Ann. Cas. 1914B, 620.

We conclude therefore that the legislative intent was that each legacy should be

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considered as a separate entity and taxed as such at the statutory rate, and therefore the judgment appealed from was right and is affirmed.

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HOLCOMB, C. J., and MITCHELL, MAIN, and MACKINTOSH, JJ., concur.

(107 Wash. 400)

FOSTER v. INDUSTRIAL INSURANCE COMMISSION. (No. 15218.)

(Supreme Court of Washington. June 12, 1919.)

1. MASTER AND SERVANT ⟸417(7) — WORKMEN'S COMPENSATION—AMOUNT OF COMPENSATION—REVIEW.

Award of $150 for permanent partial disability from the loss of a finger amputated at the distal joint, an injury not specified in Laws 1917, p. 81, § 1, subd. f, made according to schedule adopted by Industrial Accident Commission fixing compensation in proportion to compensation for the injuries specified in the statute, *held* not a capricious and arbitrary award reviewable on appeal under Rem. Code 1915, § 6604–20, notwithstanding circumstances.

2. MASTER AND SERVANT ⟸416—WORKMEN'S COMPENSATION—VALIDITY OF AWARD.

That award was made by only one of the industrial accident commissioners, instead of three, does not affect its validity, where it was made from schedule regularly adopted by the commission as a whole.

Department 2.

Appeal from Superior Court, King County; A. W. Frater, Judge.

Proceedings for compensation under the Industrial Insurance Act by Mrs. Ethel Foster. From judgment of superior court setting aside award of Industrial Insurance Commission, the commission appeals. Reversed, and decision of commission affirmed.

W. V. Tanner and D. E. Twitchell, both of Olympia, for appellant.

Walter S. Fulton, of Seattle, for respondent.

HOLCOMB, C. J. On the 26th day of April, 1918, respondent filed with the Industrial Insurance Commission her claim for compensation, alleging that on the 22d day of April, 1918, while engaged in an extra hazardous occupation in the city of Seattle, King county, Wash., she sustained an injury which resulted in the amputation of the middle finger of the left hand at the distal joint (that being the joint nearest the finger nail) and a laceration about an inch long over the dorsal surface of her ring finger of the left hand. Her injury was classified by the commission as a "permanent partial disability" of the affected area, who awarded her the sum of $48.45 for time lost and the further sum of $150 for the permanent partial disability. Dissatisfied with the amount of the award, respondent thereupon appealed from the ruling of the commission to the superior court for King county; her appeal being heard on September 18, 1918. At the close of respondent's testimony, the appellant moved to dismiss the appeal, which motion was denied, and, after hearing respondent's evidence, judgment was entered reversing the action of the commission, setting aside the award of the commission, and remanding the claim to the commission with directions to pay the claimant the sum of $400, together with her costs, and allowing an attorney's fee of $25. From the lower court's action the commission brings this appeal.

The question of fact as to the injury being undisputed, the cause presents several questions of law for our determination. The theory of the appeal, basically, is that the award of the commission is inadequate as compensation for the injury sustained. We can readily understand and sympathize with the vigorous protest of his honor the trial judge, for we also regard the award as pitifully inadequate; but, as we shall see, the correction of such insufficiency is neither with the courts nor with the commission, but must be remedied by the legislative function of the state alone. The Industrial Insurance Act is not one designed to award full compensation to each individual for all such damages as such individual would be entitled to in his peculiar circumstances, but is only a system of limited insurance whereby all industrial employés within the statute are paid definite but limited amounts for injuries without regard, as we have said, to the particular individual circumstances or needs of the injured employé. The injury alone is the subject which can be considered by the commission under the statute, and applies to and covers all classes of injuries alike.

To consider, now, the first proposition presented for our determination: Section 6604—20, Rem. Code 1915, is very definite as to the matter of appeal from the award of the commission to the superior court:

"Any * * * workman * * * or person feeling aggrieved at any decision of the department * * * may have the same reviewed by * * * an appeal, * * * in so far as such decision rests upon questions of fact, * * * it being the intent that matters resting in the discretion of the department shall not be subject to review. * * * In all court proceedings under or pursuant to this act the decision of the department shall be prima facie correct, and the burden of proof shall be upon the party attacking the same."

To the limitation of appeal made in this statute, this court has suggested the qualifi-

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cation that an award might be reviewed by the courts were the commission charged with "capricious or arbitrary action in fixing the amount of their award." Sinnes v. Daggett, 80 Wash. 677, 142 Pac. 5. The respondent, feeling aggrieved at the inadequacy of the award, based her appeal therefrom upon the alleged "capricious and arbitrary action" of the commission manifested in two ways: First, in the method it has adopted of scheduling the amount of compensation to be awarded any given injury; and, second, upon the fact that in this particular instance the award was made by a single member of the commission instead of by all three members.

Has the superior court authority to declare that the system of awards as practiced by the commission is capricious and arbitrary? For this is practically what the superior court in this case has done by substituting its award for that of the commission.

The question may be answered by a reference to the statute. Subdivision "f" of section 1 of chapter 28, Laws 1917, provides, in part:

"* * * For the permanent partial disabilities here specifically described, the injured workman shall receive compensation as follows:

"Loss of one leg amputated so near the hip that an artificial limb cannot be worn, $2,000.00

"Loss of one leg at or above the knee so that an artificial limb can be worn, $1,900.00.

"Loss of one leg below the knee, $1,300.00.

"Loss of the major arm at or above the elbow, $1,900.00.

"Loss of the major hand at wrist, $1,600.00.

* * * * * *

"Compensation for any other permanent partial disability shall be in the proportion which the extent of such other disability shall bear to that permanent partial disability above specified which most closely resembles and approximates in degree of disability such other disability, but not in any case to exceed the sum of two thousand dollars ($2,000.00)."

[1] Under this statute, the claimant receives compensation for his injury irrespective of his earning ability and irrespective of any other thing except the loss which he has sustained. Appellant introduced in evidence a schedule it has adopted by means of which any given loss, for instance that of the finger, receives a certain definite award, determined by a system of "degree" classifications; injuries not specified by the statute being therein proportionately related to injuries specified by the statute. The respondent was awarded compensation according to this schedule.

It will be seen from the statute that the commission is limited to merely arranging a schedule within limitations carefully laid down. Not only is a total sum prescribed for a specified loss, but, where an injury is not one of those so specified in the statute, the commission is ordered to make an award proportionate to the award specified "which most closely resembles and approximates in degree of disability such other disability" (that is, a specified disability). Of course, under this statute the courts have authority to determine whether or not a schedule adopted by the commission for unspecified injuries is properly proportionate to the most closely related specified injury. That question is not raised in this action.

Obviously, a superior court cannot say that an award made from a schedule so defined and limited by law as is this and of so universal and uniform application is a capricious and arbitrary one; an inadequate one, as in this instance it is, but inadequacy is not synonymous with capriciousness.

The extent and nature of an injury is a matter, of course, for competent medical knowledge to determine. But, as we have indicated, there is no question as to the injury itself; the physician of respondent does not take issue with the physician of appellant who classified the injury.

[2] The question then remains: Was the fact that the award was made by one commissioner instead of three an irregularity sufficient to justify reversing the award? We, of course, agree with respondent's contention that, respecting plural boards and commissions, generally speaking, "the law contemplates that all will meet together so that the public will have the benefit of their combined judgment and discussion." Mechem on Public Officers, § 577. But it is almost to reduce that principle to an absurdity to claim that it applies to ministerial acts merely following an agreed and prescribed course of procedure. The commission by adopting the schedule of awards had, as to an injury determined by competent medical knowledge to be within a given degree of the schedule, precluded any necessity for "the combined judgment and discussion" of the whole commission on each or any individual award. The fixing of the degree fixed the amount of the award. The one member of the commission in this case merely declared the amount of award allowed by the schedule for an injury such as was certified to the commission by the commission's physician, nor could the commission collectively have done more or less.

The respondent says:

"Had the Legislature intended that a fixed and arbitrary schedule should be applied in the awarding of compensation, it would have embodied it in the compensation act."

As we read the statute, this is precisely what the Legislature did design, namely, to insure that the commission would fix a definite and uniform schedule. We have seen how under subdivision f, § 1, c. 28, Laws 1917, the more common injuries resulting in permanent partial disabilities are specifically set forth and compensated for in exact sums; and for those not therein set forth a very definite principle of compensation is

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provided, as we have seen, on the proportionate rating of the unspecified injury to the specified injury which "most closely resembles and approximates it." In view of the myriad possibilities of human injuries, this is as definite and comprehensive as a statute could well be.

The judgment of the lower court is reversed, and the decision of the commission affirmed.

MOUNT and PARKER, JJ., concur.
FULLERTON, J., concurs in the result.

(107 Wash. 356)

SKOOKUM LUMBER CO. v. SACAJAWEA LUMBER & SHINGLE CO. (No. 15266.)

(Supreme Court of Washington. May 31, 1919.)

1. CHATTEL MORTGAGES ⟸251 — FORECLOSURE UNDER SECURITY CLAUSE.

To entitle a mortgagee to foreclose under the security clause of the mortgage when he deems the proceeding necessary, he must act in a reasonable manner, and the sending away from the mortgagor mill of a few small items of property of no particular value, being an ordinary transaction carried on openly and in good faith, was not cause for foreclosure under the security clause; the security having been greatly increased from the time of giving the mortgage.

2. CHATTEL MORTGAGES ⟸252 — FORECLOSURE — SECURITY CLAUSE — WARRANTY AGAINST INCUMBRANCES.

The mortgagee of a lumber and shingle plant, the mortgage containing a security clause giving right to foreclose when the mortgagee might deem the proceeding necessary, *held* not entitled to foreclose on the ground that there was a breach of the warranty of the mortgage in that some of the property covered was not free and clear from all incumbrance; the mortgagee under the circumstances not being entitled to complain of the existence of two conditional sale obligations which the mortgagor had arranged to extinguish, but which had not been done because the mortgagee refused to deliver timber to the mortgagor without which the latter could not operate.

3. LOGS AND LOGGING ⟸21—CONTRACT TO FURNISH TIMBER.

Contract between mortgagor and mortgagee of lumber and shingle plant *held* not to obligate the mortgagee to furnish cedar logs or shingle bolts to the mortgagor in order that the latter could conduct its operations.

Mitchell, J., dissenting.

Department 1.

Appeal from Superior Court, Thurston County; D. F. Wright, Judge.

Action by the Skookum Lumber Company against the Sacajawea Lumber & Shingle Company. From judgment for plaintiff, defendant appeals. Reversed.

Fremont Campbell and Harry H. Johnston, both of Tacoma, for appellant.

Thomas M. Vance, of Olympia, for respondent.

MACKINTOSH, J. Upon the respondent's allegation that its security had been rendered insecure, it brought this action, before the maturity of the debt, to foreclose a $4.000 mortgage held by it upon the mill property of appellant. The appellant's defense to the action consisted of its allegation that no justification existed for the premature foreclosure and that the financial difficulties which were troubling it were occasioned by the failure of respondent to comply with the terms of its contract with appellant to furnish timber from which the appellant was to manufacture shingles.

The respondent leased to one Tucker the property upon which the mill in question was constructed and contracted with Tucker for the operation of the mill. Tucker assigned the contract to the appellant, which procured from the respondent the sum of $4,000 upon two notes, executed on May 15 and June 1, 1917. Afterwards, a request being made by the respondent for a mortgage on June 11, 1917, the mortgage securing the notes was executed. Improvements of the property in the sum of approximately $13.000 were subsequently made by appellant, and at the time of the commencement of this foreclosure the mill and premises were worth in the neighborhood of $25,000. The notes had been renewed, and at the time of the institution of this action one would have been due in January, 1918, and the other in February, 1918; this mortgage foreclosure was begun in November, 1917. The debt not being then due, the action was begun under the clause of the mortgage which provided that—

"All of which property is now in the possession of said party of the first part in Thurston county, Washington, and is free from all liens and incumbrances. * * * But if default be made in the payment of said sum of money or the interest thereon, or any part thereof, at the time the same shall become due, or any attempt shall be made to remove any of said property from said county, or to dispose of the same without the written consent of the said second party or its successors or assigns, or if said party shall fail or neglect to take proper care of any of said property, or if at any time said second party shall deem itself insecure, then and thereafter the entire debt secured by this mortgage shall be due and payable."

[1] To entitle a mortgagee to foreclose under the insecurity clause of a mortgage when he "deems" that proceeding necessary, he must act in a reasonable manner. To be allowed to avail himself of the privilege there

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must exist proper cause to apprehend some loss to his security; he cannot act in a purely arbitrary manner. Respondent, in order to exercise the rights which it claimed, alleged that the appellant was removing certain of the machinery and equipment embraced within the mortgage, and was disposing of it with the intention of defrauding the respondent and other creditors. The proof upon this point shows that a few small items of no particular value had been sent away from the mill. Their absence in no way could have been intended to, nor did it, impair the respondent's security. It was an ordinary transaction carried on openly and in good faith. As we have already shown, the mortgage security had been greatly increased from the time of the giving of the mortgage until the foreclosure rather than having been impaired.

[2] Respondent next contends that there was a breach of the warranty contained in the mortgage, in that some of the property mortgaged was not free and clear from all incumbrance; there being, in fact, two conditional sale contracts on part of the mill equipment. The record shows that the respondent must have known of the debts which were represented by the conditional bills of sale before it made the loan to the appellant. Further than this, it is established that one of the appellant's stockholders and officers had, before this action was commenced, made arrangements for a loan, and had actually secured the money thereon which he was ready to use in the full extinguishment of the two debts referred to, but that, finding that the respondent was refusing to deliver timber to the appellant without which the mill could not operate, he returned the money to the bank from which he had borrowed it.

Under these facts, the respondent is not entitled to complain as to the existence of these conditional sale obligations.

The appellant further claims that the debts against the mill were in such amounts that his security was rendered doubtful. It is true that the appellant had several outstanding obligations; but it is also true that the mill had just been completed, and that when operated would show a first-rate net daily profit, and that it was compelled to cease operations because of a lack of material to work upon. The mill had been built upon the property of the respondent, and the only cedar timber available for its use was that belonging to respondent. Under the contract between the parties, the respondent contended that it was not obliged to furnish the cedar timber, while the appellant claims that the contract never would have been entered into and the mill constructed without the understanding that the respondent was to provide the timber. While the contract is not explicit upon this point in view of the entire situation and giving the language contained in the contract its reasonable interpretation, it would seem that the appellant's contention is correct, and that the difficulties which the respondent now asserts gave it the right to early foreclosure were circumstances occasioned by the respondent's breach of its contract with the appellant. This contract, among other things, provides:

"First party shall at no time be required to furnish logs or bolts to second party when second party has on hand 200,000 feet of logs or 200 cords of bolts. In such event first party may sell excess cedar timber and bolts to third parties. First party shall deliver all cedar logs and bolts on cars on the track of the second party, and first party shall unload all thereunder, or where said logs or bolts are carried by the Skookumchuck river same shall be delivered by first party to boom of second party.

"IV. Second party shall not be required at any time to accept the delivery of cedar timber or logs hereunder when the amount of his boom, together with the amount of his mill, shall, in the case of cedar logs exceed 200,000 feet, or in case of shingle bolts, exceed 200 cords. Second party shall be liable for loss of cedar timber or bolts after the same are delivered to the boom of second party, or if shipment is made by rail, at shingle mill of second party.

"V. Second party shall use or put at its shingle mill no timber furnished by third parties, excepting where first party is unable to furnish sufficient timber or logs to keep second party's shingle mill in operation. In the event second party is required to cut timber or bolts of third parties second party shall notify first party at least one day in advance of his proposal so to do, and also notify first party at least one day in advance of his resumption of cutting first party's timber or bolts. Should second party receive timber or bolts from third parties the same shall be kept separate from logs or bolts furnished by first party.

"VI. Second party shall furnish each day to first party a statement of all shingles cut during the preceding day.

* * * * * * * *

"VIII. If timber furnished by first party is sufficient and first party so requires, second party shall operate its mill double.

"IX. Second party shall pay to first party one-half of all moneys received from sale of shingles made from timber furnished by first party, including one-half of all underweights, such payment to be made to first party as soon as received by second party. Second party shall prepare invoices for all shingles manufactured from timber and bolts furnished by first party and sold by second party, and first party shall mail such invoices to purchasers. Second party shall sell to no persons, firms or corporations whose financial standing is unsatisfactory to first party, and only upon terms of payment satisfactory to first party."

There seems to be no other view to take of this contract than that it was one contemplating and calling for the furnishing of cedar by the respondent in order that appellant

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could conduct its operations. Accepting this view of the contract, and under the testimony, the respondent was not entitled to institute this action at the time at which it was begun, and the judgment of the lower court is therefore reversed.

CHADWICK, C. J., concurs.

MAIN, J. [3] I am unable to find, in the contract between the parties to this action, any provision which imposes upon the respondent the duty or obligation of furnishing logs or shingle bolts to the appellant. It seems to me that the contract is carefully drawn to avoid the imposition of such a duty.

The fact that the respondent failed to furnish logs or shingle bolts sufficient to keep the mill in operation may be taken into consideration as bearing upon the good faith of the respondent in attempting to foreclose upon its mortgage.

I therefore concur in the result.

TOLMAN, J., concurs with Judge MAIN.

MITCHELL, J. (dissenting). I am inclined to the opinion of Judge MAIN that the contract imposes no duty upon the respondent to furnish logs or shingle bolts. But, independent of that consideration, there was a breach of the warranty contained in the mortgage, at the time it was given, because a large and substantial part of the mill machinery, necessary to the operation of the mill, did not belong to the appellant. In addition, at the time respondent refused to proceed further with the contract, and for some time prior thereto, appellant was sorely pressed and threatened with immediate litigation at the instance of creditors whose claims were overdue and beyond the ability of the appellant to pay. Its condition was one of insolvency. As was said in Nixon v. Hendy Machine Works, 51 Wash. 419, 99 Pac. 11, followed in McKnight v. Shadbolt, 98 Wash. 665, 168 Pac. 473:

"The evidence plainly shows that it was insolvent in that it was not able to pay its debts in due course of business, and this is the test of insolvency established by this court where the rights of creditors are involved."

In such circumstances, respondent was within its rights, in the protection of its property, to decline to furnish cedar timber, without such conduct constituting any cause for complaint against it.

While possibly not important, it may be noticed that, by the provisions of the first portion of paragraph 5 of the contract, appellant is protected in its right to purchase timber from third parties if necessity arises.

The judgment of the trial court should be affirmed.

(107 Wash. 393)

ALLEN v. SCHULTZ et al. (No. 15202.)

(Supreme Court of Washington. June 12, 1919.)

1. NEGLIGENCE ⟸12—ACTS IN EMERGENCIES—LIABILITY.

One confronted with a sudden peril not arising from his fault, may, to avoid injury to himself, act in the way the emergency seems to require without being guilty of negligence, though he injures another who in no way contributed to the condition creating the peril.

2. MUNICIPAL CORPORATIONS ⟸706(5)—AUTOMOBILE ACCIDENTS—ACTS IN EMERGENCY—EVIDENCE.

In an action for being struck by automobile turning into the left side of a street, while passing a street car from which plaintiff was alighting, evidence *held* not to show that the act of the driver was in an emergency so as to excuse negligence; he having abundant time to stop before reaching the place of peril had he not been mistaken in assuming that the street car was not going to stop.

3. MUNICIPAL CORPORATIONS ⟸705(1)—AUTOMOBILE ACCIDENTS—EMERGENCY STOPS—DEFECTIVE BRAKES.

One who operates on a city street such a dangerous instrumentality as an automobile must take notice that he may be called upon to make emergency stops, and it is negligence for him not to keep the brakes of the automobile in such condition that such stops are possible.

4. APPEAL AND ERROR ⟸854(4)—REVIEW—CORRECT RESULTS ON ERRONEOUS THEORY.

In an action for injuries due to being struck by an automobile where the testimony of both parties showed negligence on defendant's part, it was not error for the trial court to assume there was no conflict in the evidence as to negligence, and to charge accordingly, even though influenced so to do by an inapplicable principle of law.

5. APPEAL AND ERROR ⟸1004(1)—REVIEW—AMOUNT OF DAMAGES.

In a personal injury case, the verdict will not be held excessive where to reach such conclusion the reviewing court must disregard plaintiff's evidence and adopt that of appellants.

6. APPEAL AND ERROR ⟸194(3)—RESERVATION OF OBJECTIONS—DENIAL OF DEFENSES.

Where a personal injury case was tried on the merits as to contributory negligence as if an issue had been formally joined thereon, failure to deny the plea of contributory negligence will on appeal be deemed waived by want of timely objection.

En Banc.

Appeal from Superior Court, Spokane County; David W. Hurn, Judge.

Action by Cora Allen, by J. R. Allen, guardian ad litem, against Christ Schultz and another. Judgment for plaintiff, and defendants appeal. Affirmed.

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S. L. Americus, of Hillyard, and F. C. Highsmith, of Spokane, for appellants.

Losey & Newton, of Spokane, for respondent.

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FULLERTON, J. The respondent, Cora Allen, while alighting from a street car on one of the streets of the city of Spokane, was struck and injured by an automobile owned by the appellant Christ Schultz and driven by the appellant Jake Schultz. She brought this action to recover for the injuries received, averring in her complaint that the accident was the result of negligence on the part of the driver of the automobile. Negligence was denied in the answer of the appellants, and a trial had on the issues thus framed, which resulted in a verdict and judgment in favor of the respondent. On their appeal the appellants assign that the court erred in its instructions to the jury, erred in refusing to grant their motion for a new trial, and erred in entering judgment against the appellant Christ Schultz.

There are certain facts surrounding the transaction which are undisputed. The accident causing the injury occurred at the intersection of Howard street and Augusta avenue in the city named. Howard street at this place extends north and south, is 60 feet in width, and has upon it a double street car track upon which is operated the street cars of the Washington Water Power Company. Augusta avenue is 30 feet wide and crosses Howard street at a right angle. On the square adjoining Howard street on the east and Augusta avenue on the north is a high school building in which the respondent was a student. The street intersection is a usual stopping place for the cars of the street car company named and is the usual alighting place for students of the high school who use the cars as a means of transportation to the school. On the morning of the accident, the respondent, with other students of the high school, came in on a car from the north. The car stopped at the intersection of the streets, and one of the high school students got off. The respondent followed, getting off the car backwards, and was struck by the fender of the appellant's automobile just as she had reached the ground and while she was still holding to a stanchion on the side of the car steps. She was knocked down by the car which passed on to her left, colliding before stopping with an automobile truck which stood some distance back of the end of the street car.

The automobile approached the street car from the west coming along Augusta avenue, which has a downgrade at that place. It was traveling near the center or to the right of the center of the avenue, and, instead of turning to the right toward the front of the street car, turned to the left in an effort to pass the car at its rear end. The principal dispute in the evidence is over the speed of the automobile when it approached and attempted to go behind the street car and the necessity for its turning in that direction.

The respondent's witnesses testified that the automobile approached the street car at a rather high rate of speed and was traveling at from 15 to 20 miles per hour when it struck the girl. They also testified that the street car on stopping at the street intersection protruded into Augusta avenue about one-fourth of the distance across it, and that there was nothing to prevent the automobile from passing the street car at the front or from turning to the right and passing down the street on the right-hand side of the street.

The driver of the automobile testified, and in this he is corroborated by the two persons riding in the car with him, that the automobile approached the car at a slow rate of speed and was going no faster than four miles an hour when it turned to the left to pass the car. He further testified that the street car extended, when it stopped, almost if not quite across Augusta avenue, and that he was prevented from turning to the right because of an automobile which stood in Howard street near the front end of the street car at the south side of Augusta avenue. He further testified that the street car approached the street intersection rapidly, so rapidly in fact that he thought it was going through without stopping, and that he thought because of that fact that he could slack up and go behind it, and that he was within about eight feet of it when it actually stopped. In explanation of the fact that he did not stop the automobile before striking the respondent, he testified that the brakes were not in good condition, being too loose to furnish sufficient pressure on the brake drums to stop the automobile. He also testified that, after the street car stopped, a passenger, a high school girl, got off the car ahead of the respondent, and that the respondent got off the car backwards. It was shown without dispute that the respondent had been a cripple for many years, compelled to wear a metal ankle brace—a fact which possibly explains her manner of alighting from the car.

The court instructed the jury that by the undisputed evidence the driver of the automobile was, at the time of the accident, driving the automobile on the left-hand side of the street, contrary to the ordinances of the city of Spokane, and that such an act constitutes negligence on the part of the driver, and that such negligence is imputed as a matter of law to the owner of the automobile; further instructing the jury that the only question for them to determine was the amount of damage, if any, the respondent sustained by being struck by the automobile.

It is upon these instructions that the appellants assign error. It is not contended

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that the driver of the automobile was not driving upon the left-hand side of the street when the accident occurred, nor is it contended that to so drive is not contrary to the city ordinance; but it is contended that negligence does not necessarily follow from these conditions, that a driver of an automobile may, under some circumstances, drive upon the left-hand side of the street without being guilty of negligence, and whether it is negligence so to do in any particular case must depend upon the facts of such case. It is contended further that in the present case the facts show an excuse for the driver's action; it is said that when the street car did not pass on as he anticipated, but stopped in such a position that he could neither go forward nor turn to the right, he was confronted with an emergency, and whether he acted with due prudence in his effort to escape therefrom was a question of fact for the jury, not one of law for the court.

[1-3] It is probably the general rule that one confronted with a sudden peril, not arising from any fault of his own, may, to avoid bodily harm to himself, act in the way the emergency seems to require without being guilty of negligence, even though in so acting he injures another who in no way contributed to the condition creating the peril. This seems to be the holding in the case of Donahue v. Kelly, 181 Pa. 93, 37 Atl. 186, 59 Am. St. Rep. 632, and is perhaps the corollary of the rule illustrated by the two shipwrecked mariners on the plank. The act, however, is not one which the law commends, and, before it will be given application, it must be clear that an emergency existed, that it was brought about by no negligent act of the person in the perilous situation, and that the resultant injury to the second person could not be prevented after the peril had passed. Here it is clear by the testimony of the driver of the automobile that he does not come within the rule. He had abundant time, according to his own testimony, to have stopped the automobile before he reached the place of peril, had he not been mistaken in assuming the street car was not going to stop. But this was a usual stopping place for street cars, and it was negligence for him to assume that it was not going to stop in this instance. Again, after he had turned and avoided the peril, he had abundant time at the speed he was traveling to have stopped the automobile before striking the respondent had the brakes on the automobile been in proper condition. One who operates on the streets of a city such a dangerous instrumentality as an automobile is bound to take notice that he may be called upon to make emergency stops, and it is negligence on his part not to keep the automobile in such condition that such stops are possible.

[4] We have then a condition of the record in which the testimony of both the respondent and the appellants show negligence. It was not therefore error on the part of the court to assume that there was no conflict in the evidence on the question of negligence and to charge the jury accordingly, even though the court may have been influenced to so act from an inapplicable principle of law.

The case of Sheffield v. Union Oil Co., 82 Wash. 386, 144 Pac. 529, relied upon by the appellants, is not contrary to the principle we here announce. It does not present the question now involved. The question there was one of contributory negligence. The injured party was placed in a position of peril by the negligence of another, and the evidence was conflicting on the question whether he acted negligently or with due prudence in his endeavor to escape from the peril, and hence presented a question for the determination of the jury. The case before us presents a different state of facts, and the evidence is also without conflict. Here the appellant, to avoid injury to himself, ran down and injured another. The cause of his being placed in the perilous situation and his acts in extricating himself therefrom are disclosed by his own testimony. Since the testimony shows conclusively that he was guilty of negligence, there was no question for the jury.

[5] The claim of error under the second assignment is that the verdict is excessive. The jury allowed a recovery of $1,500, and it is contended that the injuries shown were only nominal, while the verdict is substantial. But to reach this conclusion we must disregard the evidence of the respondent and adopt that of the appellants. This was the province of the jury, not ours.

[6] A final contention is that the plea of contributory negligence in the answer of the appellant Christ Schultz stands undenied, and must be taken as true, and, so taking it, no recovery can be had as against him. But the answer appearing in the record transmitted to this court was filed subsequent to the trial of the case before the jury, and, were the question open to the appellant, it may be doubtful if the record is sufficient to invoke the rule. The case, however, was tried on its merits as if an issue had been formally joined, without contention on the part of either side that any traversible allegation of the pleadings had been admitted. The failure to deny was therefore waived by want of timely objection. Kelly v. Lum, 75 Wash. 135, 134 Pac. 819, 49 L. R. A. (N. S.) 1151; Yeisley v. Smith, 82 Wash. 693, 144 Pac. 918.

The judgment is affirmed.

HOLCOMB, C. J., and MOUNT, MITCHELL, PARKER, TOLMAN, MACKINTOSH, and MAIN, JJ., concur.

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(107 Wash. 449)

HOPGOOD v. MILLER. (No. 15214.)

(Supreme Court of Washington. June 30, 1919.)

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1. USURY ⟸103 — RECOVERY OF PAYMENTS — ESTOPPEL.

In an action to recover usurious interest paid, that plaintiff had deeded to defendant outright property mortgaged to secure the loan did not estop him from recovering the usurious payments; the transaction being unlawful.

2. TRIAL ⟸388(4) — BY COURT — NECESSITY OF FINDINGS—MATTERS ADMITTED.

In an action to recover usurious interest paid, where plaintiff had deeded to defendant property mortgaged to secure the loan, the objection that there was no finding that the market value of the property exceeded the principal sum loaned with lawful interest and taxes was untenable, where defendant's answer admitted that the real estate was of a greater value.

Department 2.

Appeal from Superior Court, King County; King Dykeman, Judge.

Action by Thomas S. Hopgood against J. C. Miller. Judgment for plaintiff, and defendant appeals. Affirmed.

Hayden, Langhorne & Metzger, of Tacoma, for appellant.

A. A. Hull and A. R. Rutherford, both of Chehalis, for respondent.

MOUNT, J. This action was brought to recover usurious payments made upon a promissory note. Upon issues joined the case was tried to the court without a jury and resulted in a judgment in favor of the plaintiff for $1,000. The defendant has appealed from that judgment.

The facts are not disputed and may be briefly stated as follows: On February 19, 1914, the appellant loaned to the respondent $3,200. At that time the respondent delivered to the appellant a promissory note for $4,284; $1,084 of this amount being represented by a commission charged by the appellant for loaning the money. The note for $4,284 bore interest at the rate of 8 per cent. per annum until maturity, and after maturity at the rate of 12 per cent. per annum. Thereafter, on August 26, 1914, the respondent paid $85.78 as interest on the note. At the time the note was made the respondent, to secure its payment, executed and delivered to the appellant a mortgage upon certain real estate in Lewis county. When the note became due the respondent was unable to pay, and was threatened with foreclosure of the mortgage. The respondent thereupon conveyed the mortgaged lands to the appellant on December 18, 1916, and received back from the appellant an option to repurchase the lands at any time before August 1, 1917, for the amount of $5,211.60, together with interest after December 18, 1916, at the rate of 8 per cent. per annum, together with costs and expenses which appellant might in the meantime have been put to in preserving the property clear of liens. The sum of $5,211.60 represented, on December 18, 1916, the sum of $4,284 named as the principal in the original note, together with interest thereon from December 18, 1915, at the rate of 8 per cent. per annum, after allowing credit for the payment of interest made by the respondent. Thereafter the respondent, being unable to raise sufficient money on or before August 1, 1917, with which to repurchase the property under his option, lost his right to repurchase. The trial court found that the appellant charged a bonus of $1,084 knowingly with the intent thereby of obtaining a greater profit on his loan of $3,200 than 12 per cent. per annum, and that the appellant received the conveyance of the property in satisfaction of the note with the intention thereby of securing a greater profit on his loan of $3,200 than 12 per cent, per annum, and that he accepted that conveyance in payment and satisfaction of his note for $4,284, together with principal and interest.

Upon these facts the trial court concluded that the $1,084 was usurious under the statute, and gave judgment in favor of the respondent for $1,000.

The appellant makes two contentions upon this appeal.

It is first argued that the respondent, if he had a claim against appellant on account of usury, waived his right when he deeded the mortgaged premises in satisfaction of the debt; and it is argued that the respondent is estopped to now recover back the property or the usurious interest paid upon the note. A number of cases are cited to that effect. There can be no doubt that there is much conflict in the authorities upon the question here presented. Some states hold that, where a usurious debt is paid, the debtor waives the right to claim a recovery back for usurious interest. Other states hold to the contrary. These authorities are collected and reviewed in the note to Zeigler v. Scott, reported in 54 Am. Dec. pp. 395 to 402, inclusive, and also in an exhaustive note to Lee v. Hillman, from this court, reported in L. R. A. 1918B, pp. 581 to 595, inclusive. Many of the authorities cited in the appellant's brief are noticed in the notes above referred to. Whatever may be the rule in other states, it is settled, so far as this state is concerned in Lee v. Hillman, 74 Wash. 408, 133 Pac. 583, L. R. A. 1918B, 581, Ann. Cas. 1915A, 759. That was a case where the plaintiff sought a recovery of the value of certain property which he claimed to have surrendered in payment of usurious interest upon loans made to him;

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and we hold that a complaint seeking the recovery of the value of the property surrendered in payment of usurious interest stated a cause of action. In that case, discussing this question after many authorities had been cited and reviewed, we said:

"We think, however, that it does not follow that the debtor who has been thus unlawfully deprived of money or property may not recover such money or property by a common-law remedy, and that, of course, under our system means by the ordinary civil action which we have substituted for the common-law remedy. While the right here involved rests primarily upon our usury statute and would not exist in the absence of such statute, we think an ordinary civil action, that being our substitute for the common-law remedy, furnishes a remedy available to the debtor to recover the money or property unlawfully taken from him in payment of usurious interest. * * *

"We are of the opinion that, at least in so far as money or property is exacted in payment of interest above the highest rate permitted by our usury statute, the same may be recovered by the payer thereof in a civil action prosecuted by him as plaintiff."

[1] It follows, therefore, that the respondent has a right in this state, under the rule there announced, to recover back the usurious interest or payments exacted from him upon a usurious transaction. This is upon the theory that the transaction is unlawful, and that the money or property is exacted in violation of law, and can therefore be recovered back. Counsel for appellant endeavors to distinguish this case from Lee v. Hillman by saying that there this court was not dealing with a case where the party claiming the contract to be usurious had voluntarily settled and discharged the principal obligation; but a reading of the case itself discloses that it was a case where the party claiming the contract to be usurious had voluntarily settled and discharged the principal obligation by paying or delivering property in payment of the obligation, practically the same as in the case now before us.

[2] Appellant makes another point, to the effect that there is no finding of the court to the effect that the market value of the property at the time of the conveyance exceeded the principal sum loaned, namely, $3,200, with lawful interest and taxes paid. The complaint alleged that the property delivered to the appellant by the respondent was of the value of $75,000. In answer to this allegation of the complaint the appellant denied "that the lands and premises described in said deed were of the reasonable value of $75,000 or of any sum in excess of $5,000. * * *" This, of course, was an admission that the real estate at the time was of the value of $5,000. Furthermore, the appellant took the property in payment of the $3,200 and the $1,084 bonus and other expenses aggregating the total amount of $5,211.60; and, in the absence of any showing to the contrary, this amount must be assumed to be the value of the property at that time.

We are satisfied, therefore, that the appellant has no complaint to make upon a judgment for $1,000.

The judgment appealed from is therefore affirmed.

HOLCOMB, C. J., and PARKER and FULLERTON, JJ., concur.

(107 Wash. 167)

STATE ex rel. MULLEN v. HOWELL, Secretary of State. (No. 15313.)

(Supreme Court of Washington. May 24, 1919.)

1. STATUTES ⟸35½ — REFERENDUM—CONSTRUCTION OF CONSTITUTIONAL AMENDMENT.

Const. Amend. 7, art. 2, § 1, providing for a referendum in all cases "except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions," by specifying the things not reserved, is an expression of a reservation to pass upon all things not so specified.

2. STATES ⟸4—POLICE POWERS OF STATES—FEDERAL INTERFERENCE.

The federal government has no power to control the police power of the states except as such power may have been expressly granted or as it may be necessary to maintain the acknowledged powers of the federal government.

3. CONSTITUTIONAL LAW ⟸40—VALIDITY OF STATUTES.

A law will not be held unconstitutional if it is within the spirit of the policy enunciated by the constitutional provision under consideration.

4. CONSTITUTIONAL LAW ⟸10—AMENDMENT TO UNITED STATES CONSTITUTION—RESOLUTION OF LEGISLATURE — REFERENDUM — "LAW."

Under Const. Amend. 7, art. 2, § 1, providing for referendum of "acts, bills, or laws," joint resolution of state Legislature ratifying constitutional amendment for national prohibition proposed by Res. Dec. 19, 1917, 40 Stat. 1050, is subject to referendum, the amendment to the United States Constitution being a law within the seventh amendment of the state Constitution.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Law.]

5. CONSTITUTIONAL LAW ⟸10 — UNITED STATES CONSTITUTION—AMENDMENT—METHOD OF RATIFICATION.

The authority to act in the matter of a proposed amendment to the Constitution of the United States does not arise in or out of the Constitution of the state, but arises out of the federal Constitution, and any act, whether by

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resolution or bill, on the part of the state Legislature, is a sufficient expression of the legislative will, unless Congress itself challenges the method or manner of its adoption.

6. CONSTITUTIONAL LAW ⟸70(1) — UNITED STATES CONSTITUTION—AMENDMENT—LEGISLATIVE AND JUDICIAL POWERS.

In mandamus to compel submission of joint resolution ratifying amendment to United States Constitution, the contention that the Legislature has no power to act by resolution is nonjusticiable, the power to question the manner of adoption being in Congress, and not the courts.

7. CONSTITUTIONAL LAW ⟸10 — UNITED STATES CONSTITUTION—AMENDMENT—RATIFICATION.

Congress has no concern of the manner in which the people of the several states pass upon proposed amendments to the United States Constitution.

8. CONSTITUTIONAL LAW ⟸10—AMENDMENT TO UNITED STATES CONSTITUTION—REFERENDUM—"LEGISLATURE."

Const. U. S. art. 5, providing that proposed amendment shall be valid "when ratified by the Legislatures of three-fourths of the several states, or by conventions in three-fourths thereof," does not preclude submission of joint resolution of state Legislature ratifying proposed amendment to a referendum, the words "legislatures" and "conventions" not having present-day meanings, the former referring to legislative authority, including all its branches, and not merely the legislative assembly.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Legislature.]

9. STATES ⟸4 — FEDERAL CONSTITUTION—RESERVATION OF POWERS—TO STATES.

Const. U. S. Amend. 10, providing that "the powers not delegated to the United States * * * are reserved to the states respectively, or to the people," is a declaration that the people of the several states may function their legislative power in their own way, especially in view of the ninth amendment.

Parker, Mitchell, Tolman, and Fullerton, JJ., dissenting.

En Banc.

Mandamus by the State of Washington, on the relation of Frank P. Mullen, against I. M. Howell, Secretary of State of the State of Washington. Writ ordered to issue.

P. C. Sullivan, of Tacoma, John F. Murphy, of Seattle, Turner, Nuzum & Nuzum, of Spokane, and Theodore A. Bell, of San Francisco, for appellant.

L. L. Thompson and Glenn J. Fairbrook, both of Olympia, for respondent.

CHADWICK, C. J. At the general election held in 1912 the people of the state of Washington adopted as a principle of government the power to initiate laws, and to review at the bar of popular opinion all acts, bills, or laws passed by the Legislature of the state of Washington.

[1] The right so to do is emphasized as a power reserved, and the terms of the amendment imply in the strongest possible way that the intention of the people was to reserve a right to review every act of the Legislature which might affect the people in their civil rights, or limit or extend their political liberties; for they wrote an exception, saying that a referendum may be ordered in all cases "except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions." Amendment 7, art. 2, § 1. The writing of an exception specifying the things not reserved is an expression, within sound rules of construction, of a reservation to pass upon all things not so specified.

The court in passing directly upon the amendment, and in other cases arising under city charters, has held firmly to the principle of the referendum, and has consistently refused to limit it by construction.

In December, 1917, Congress proposed an amendment (Res. Dec. 19, 1917, 40 Stat. 1050) to the federal Constitution, providing that:

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

"Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of the several states, as provided in the Constitution, within seven years from the date of the submission hereof to the states by the Congress."

[2] It will be noted that the amendment does not pertain to matters within the original concept of the Constitution, to the definition or distribution of powers of public officers, but by its terms assumes to cover matters that are purely legislative, and which have hitherto been a subject of legislation by the several states under the police power. We understand that the federal government has no power to control the police power of the states except as such power may have been expressly granted, or as it may be necessary to maintain the acknowledged powers of the federal government.

This amendment was submitted to, and ratified by, the Legislature of the state of Washington by joint resolution passed January 13, 1919. On March 20, 1919, relator tendered a petition for a referendum to the respondent Secretary of State; he asked that it be filed and a ballot title be supplied.

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Respondent refused to receive it upon the grounds (a) that, the amendment having been adopted by a joint resolution, and not by an act, bill, or law, it was not within the terms of the Seventh Amendment; and (b) that it was not a subject for referendum under article 5 of the Constitution of the United States.

Addressing ourselves to the first contention of the respondent, Is the resolution an act, bill, or law within the meaning of those terms as employed in our Constitution—whether the people intended an act, bill, or law to be statutes enacted by the Legislature, or whether they meant action by the Legislature which affected them as law?

[3] No cases have been cited, and we may confidently say that there is none, holding to a rule of strict construction where the power of the whole people is in question. It is a rule, become axiomatic by long-continued reiteration, that no court will hold a law to be unconstitutional unless such holding is compelled; that a law will not be held to be unconstitutional by construction; that is to say, the power of the legislative body, or the people if exercising that function, will not be abridged by the courts, or suffered to be abridged by others, if the thing sought to be done is within the spirit of the policy enunciated in the provision under consideration. To this end the courts of the country have so addressed themselves that, without resort to the tedium of limitless authority, we may well adopt the language of Judge Cooley, who was an acknowledged master in the field of constitutional law, that constitutional provisions must be interpreted with reference to—

"the times and circumstances under which the state Constitution was formed—the general spirit of the times and the prevailing sentiments among the people. Every constitution has a history of its own which is likely to be more or less peculiar, and, unless interpreted in the light of this history, is liable to be made to express purposes which were never within the minds of the people in agreeing to it." People v. Harding, 53 Mich. 48, 19 N. W. 155, 51 Am. Rep. 95.

"The safe way is to read its [the Constitution's] language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expressions, in a way, so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted." Maxwell v. Dow, 176 U. S. 581, 602, 20 Sup. Ct. 448, 456 (44 L. Ed. 597).

"The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look to the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority." Mugler v. Kansas, 123 U. S. 623, 661, 8 Sup. Ct. 273, 297 (31 L. Ed. 205).

The people, too, have directly charged us with a duty to be mindful of their sovereign rights.

"A frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government." Const. State of Washington, art. 1, § 32.

Wherefore the purpose of the people in adopting the Seventh Amendment is a proper subject to be considered. Did they intend to grant any exceptions other than those enumerated in the Seventh Amendment? If this were an ordinary case of statutory construction, we have no doubt that we could all agree that we would look first to the old law, the mischief, and the remedy. It is more important in considering a question involving, the first of all, the sovereign rights of the citizen—the right to speak ultimately and finally in matters of political concern—that we should measure the power reserved by the former condition.

It is well known that the power of the referendum was asserted not because the people had a willful or perverse desire to exercise the legislative function directly, but because they had become impressed with a profound conviction that the Legislature had ceased to be responsive to the popular will. They endeavored to, and did—unless we attach ourselves to words, and words alone, reject the idea upon which the referendum is founded, and blind ourselves to the great political movement that culminated in the Seventh Amendment—make reservation of the power to refer every act of the Legislature, with only certain enumerated exceptions.

Guided by these considerations, we are satisfied that the people used the words "act, bill or law" in no restricted sense, but in a sense commensurate with the political evil they sought to cure.

[4] And why should not the amendment be a law within the meaning of the Seventh Amendment? No reason is assigned other than that "law" as there used is synonymous with "bill" or "act." We may well argue, and be within sound rules, that if the people had so intended they would not have used the word "law" at all, as was done in the state of Oregon. We can conceive of no more sweeping law than the proposed amendment. Certainly no amendment has ever been proposed that goes deeper into the vitals of the American idea of government. It surrenders pro tanto the sovereignty of the state, gives to the federal government a right to enact laws and to enforce them through the federal courts, and it will deny the citizen the protection of some of those guaranties that we have written out of the travail of time into our own Bill of Rights. Upon construction we hold that the amendment to the Constitution of the United States is a

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law, within the meaning of the Seventh Amendment, and is subject to referendum.

But it is contended that, whereas the Legislature ratified the amendment by joint resolution instead of by act or bill, as it might have done, the resolution, being not eo nomine an act, bill, or law, is not subject to a referendum. This argument defeats itself, for if we are to be literal and exact in terminology, and so insistent upon "scholastic interpretation" as to admit this premise, we must hold that the Legislature had no power to ratify the amendment except by act or bill; for we find no power granted in the Constitution to that body to act in matters legislative other than by act or bill.

This reasoning would lead to two consequences, equally absurd: Either the amendment being ratified by resolution, the act of ratification is void as a thing done in a manner not provided; or, if sustained, would permit the Legislature to defeat the power of referendum by acting, in matters purely legislative, by resolution instead of by bill. The latter is the consequence in the instant case if the argument of the learned Attorney General is to be sustained. But we are not put to the extremity of holding that the Legislature may not in matters of ratification act by resolution, for there is a high road of reason leading down to a true result.

The contention that a resolution, although it may have the force and consequence of a formal legislative enactment, and affect the people in their civil and political rights, cannot be referred, arises from a misconception of the term. This case sounds in fundamentals, not in definitions. It is not the resolution, but the act of the Legislature in adopting it, that is to be referred. A resolution, like all acts of the Legislature, is to be measured by the end accomplished. It is true that we have no provision in our Constitution providing for the passage of resolutions even in the formal matters in which the Legislature has throughout the entire history of our territory and state, been wont to act, but it is just as evident that there is no limitation upon the power of the Legislature to act by resolution.

The Constitutions of some of the states and the Constitution of the United States (section 7, art. 1) permit or recognize the practice of acting by resolution, and some of them limit its uses. It has been held if the Constitution is silent, as ours is, that legislation cannot be effected by that method. Boyers v. Crane, 1 W. Va. 176; State ex rel. Attorney General v. Kinney, 56 Ohio St. 721, 47 N. E. 569; Barry v. Viall, 12 R. I. 18.

[5] And were we considering a matter involving private right, arising in or out of the laws of this state, we could not question the authorities just cited; but they are not applicable for the reason that the authority to act in the matter of a proposed amendment to the Constitution of the United States does not arise in or out of the Constitution of the state, but arises out of the federal Constitution, and any act, whether it be by resolution or by bill, on the part of the state Legislature must be held to be a sufficient expression of the legislative will, unless Congress itself challenges the method or manner of its adoption. It is upon this principle that the Supreme Court of the United States has held that the question whether the referendum does violence to the Constitution of the United States is nonjusticiable, holding that the question whether it deprives the government of a state of its representative character, thus violating the guaranty of a republican form of government, is a question for Congress, and not for the courts.

[6] The power to question the manner of adoption being in Congress, and not in the courts, the contention that the Legislature had no power to act by resolution is nonjusticiable, but this holding does not foreclose an inquiry as to the legislative character of the thing done.

It may be that my argument is not entirely clear. If so, we may profitably resort to an illustration. The people of the state of Washington have, by expression of their reserved right to legislate upon all proper subjects of legislation, declared the policy of this state to be against the barter and sale of intoxicating liquor within the state, and by subsequent laws that we, as citizens of a sovereign state, are opposed to the use of intoxicating liquor by any of our citizens. The original law, by its accretions, has become what is popularly called, in the nomenclature of the Anti Saloon League, "bone dry." This the people did of their own free will and accord and by the assertion of an hitherto unused power. Let the question occur, Can their act be undone by any plan, power, or authority less or other than the power that established the present state of the law? Keeping in mind our present "bone-dry" condition, or plight, if that term be preferred, suppose the Congress of the United States should propose an amendment to the federal Constitution providing that it shall hereafter be lawful to ship into and sell in all of the states of the Union wines and beers containing not to exceed a certain minimum of alcohol—that it has the power so to do will not be denied; then suppose that the state Legislature did by resolution, as in the present instance, ratify the amendment, and that it was ratified by a sufficient number of states only, including our own, to meet the demands of the federal Constitution: We would then have a law that was not a law before; that would wipe out pro tanto the present law; that would work such an exception to it that, so far as the policy of our citizens had been expressed by their direct vote, would defeat its purposes. In such event—and it is a reasonable postulate

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—would it be urged for one moment that the people of this state could be denied a right of referendum to determine for themselves, under their reserved powers, whether they desired their own law to be thus overcome? Would they have to stand by helplessly, while the fruits of their victory were swept away, and their sovereignty surrendered in degree, by resolution of the Legislature?

I opine that we would find some way to declare that the right to refer the matter to the people, who had theretofore exercised their reserved power upon the very subject of the proposed legislation, could not be thus defeated. It is no argument to say that a referendum in that event would operate to promote a good cause, while this demand comes from those who would defeat all liquor legislation. We are here to declare the law, not to maintain or defend policies; and it is enough to say that the relator is within the law as declared by the whole people, and as such his right should not in conscience be denied. We cannot fit a rule to meet a particular case; it must apply to all alike, whatever the cause and whatever the character of those who invoke it.

The final, and, as we believe, the principal, ground of opposition is that the amendment, being submitted under article 5 of the Constitution of the United States, is a federal question in the sense that state laws and state constitutions have no bearing upon, or relation to, the issues.

It is argued that inasmuch as article 5 of the Constitution of the United States provides that a proposed amendment "shall be valid, to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several states, or by conventions in three-fourths thereof," etc., the people have hitherto fixed the manner and form of ratification, against which the reserved power of the people of a sovereign state may not prevail. If we are to stand upon the word "Legislatures"; if that word, and that alone, is the Alpha and Omega of our inquiry—it follows that the controversy is at an end; but we are cited to no instances where a great question involving the political rights of a people has been met by such technical recourse; where any court has so exalted the letter or so debased the spirit of the law.

In Noble State Bank v. Haskell, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487, Justice Holmes frowned upon a like invitation, saying:

"We must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights. * * * Judges should be slow to read into the latter [the Constitution of the United States] a nolumus mutare as against the lawmaking power."

[7] It may be set down as a truism that the Congress of the United States has no concern of the manner in which the people of the several states pass upon the proposed amendments. It is the act of ratification or rejection by the legislative power in a state, and not the manner of doing, that makes for the result to be accomplished.

It may be true that it might have been provided that amendments could be made directly by Congress, and the submission of amendments for ratification or rejection by the Legislatures of the several states at all was a matter of grace upon the part of the whole people when the Constitution was adopted; but we would incline to the opinion that the right to pass upon proposed amendments should be treated as a reservation in the several states of the right to express their legislative will in the manner in which they had then provided, or might thereafter provide, and, when so regarded, as a compact between the states and the federal government.

It is provided in the federal Constitution that proposed amendments shall be ratified by the Legislatures of the states or by conventions assembled for the purpose of considering them. It cannot be urged successfully that the framers of the Constitution used the words "Legislatures" and "conventions" as terms describing then present institutions, for it is well known that at the time the Constitution was adopted some of the states did not have legislative assemblies.

Article 5 can mean no more than this: That no amendment shall be adopted unless it is sanctioned by the supreme legislative power of a sufficient number of the commonwealths, whether such ratification be by legislative assembly, convention, or such other method as might thereafter be adopted by the people in the several states.

[8] If we hold that the words "Legislatures" and "conventions" do not control the plain purpose and spirit of article 5—that is, that the people shall pass upon a proposed amendment by their representatives, if that be the plan provided by them at the time of its submission, or, if not, under such other plan of expressing their will as may not be offensive to the federal Constitution—we are on solid ground. For the framers of the Constitution had well in mind—for they had lived in that time when our political system was being fashioned into concrete form—they understood, as we sometimes forget, that "the theory of our political system is that the ultimate sovereignty is in the people, from whom springs all legitimate authority." Cooley, Constitutional Limitations (6th Ed.) p. 39. Wherefore it may be said

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that it is the meaning and intent of article 5 that an amendment to the Constitution of the United States shall not become effective until it has been ratified by the legislative authority of a sufficient number of the states, and it should not be held that a ratification or rejection by a popular vote, under the referendum clause of a state Constitution, would be contrary to the provisions of article 5 unless it can be said, under sound rules of construction, that the referendum is offensive to the Constitution of the United States.

The people of several of the states, having the sovereign right of self government, excepting only as they may have yielded that right under the Constitution of the United States and its amendments, have adopted the referendum as a rule of government, and the only objection that has ever been urged, or that could have been urged, against it, is that it violates section 4, art. 4, of the Constitution guaranteeing to every state a republican form of government. The Supreme Court of the United States has held that it does not so offend. Pacific States Telephone & Telegraph Co. v. Oregon, 223 U. S. 118, 32 Sup. Ct. 224, 56 L. Ed. 377.

The fault of disassociating a word or correlative words from the text of a written law, and promising a judgment without the warmth of the spirit of that law, may be illustrated. If we are wrong, it may well be that a state might, and withal unwittingly, put it beyond its power to pass upon a proposed amendment to the federal Constitution. If the people of this state had, when they adopted the referendum, provided for the abolition of our legislative assembly (as they might have done), and had provided that all laws should thereafter be initiated by, and voted upon by, direct vote of the people, or that the legislative functions of the state should be exercised by a council of three, and that all their acts should be subject to a referendum at the next succeeding general election, it would follow, under the theory advanced to defeat a referendum in this case, that a proposed amendment could not be either ratified or rejected in the state of Washington, for there would be no "Legislature" or "convention" in the sense in which those terms are employed in the federal Constitution.

Significance is placed on the word "conventions," it being contended that if the word "Legislatures" had been used alone our argument might seem plausible, but the added word "conventions" necessarily implies that Congress had in mind a representative body, and not legislative authority; but we are inclined to take a broader view.

It was doubtless intended that "Legislatures" should mean one thing—that is, the legislative authority of the state—and "conventions" another thing—an extraordinary representative body, convened by and in the state, for the sole purpose of passing upon the proposed amendment to the federal Constitution. If it had no other intention in adopting the term "Legislatures" in specifying one of the instrumentalities for passing upon the proposed amendment than to express the idea of legislative power, of whatever that power consists, then it must be deemed to mean all the branches or component parts of that power, which have included the qualified voters also, if they so desire. Inasmuch as the Constitution was formulated not for a day or a year, but for all time except as amended, we may consider that it contemplated the same kinds of state legislative bodies then in existence and known to the framers, or any other kinds of legislative bodies that should come into existence in the future.

One of the important ideas governing the framers of the national Constitution was that amendments to that instrument should be ratified by the states as units, recognizing and preserving the integrity and sovereignty of the states as parties to the compact creating and continuing that Constitution. Doubtless there was no other idea prevailing in providing for adoption of amendments by the "Legislatures" or "conventions" of three-fourths of the states than that. Certainly it was and is of no concern to the others what sort of Legislature any particular state has, so long as it conforms to the scheme of a republican form of government.

We have preferred to meet the question upon the plane of broad reason, having in mind the spirit and policy of the referendum; but we are not without competent authority to prove that the manner or the name attached to the legislative power of the state, whether it be a representative body or the people themselves, is of no concern to the federal government.

In State ex rel. Schrader v. Polley, 26 S. D. 5, 127 N. W. 848, it was contended, inasmuch as it was provided in the federal Constitution (section 4, art. 1) that "the times, place, and manner of holding elections for Senators and Representatives shall be prescribed in each state by the Legislature thereof, * * *" that the relator was entitled to have his name go upon the ballot at a general election under an act of the Legislature, but against which a referendum petition had been filed. And it would seem, if the argument of the respondent is sound, that the prayer of the relator in that case should have been granted, for there the Constitution of the United States provided that the Legislature should prescribe the times, places, and manner of holding elections, while in the instant case the provision is that the amendment shall be ratified by the Legislatures.

[9] After noting the tenth amendment to the Constitution, that "the powers not delegated to the United States * * * are

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reserved to the states respectively, or to the people," which, by the way, is a declaration that the people of the several states may function their legislative power in their own way, especially so when the Ninth Amendment, "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people," is regarded—for the right to legislate directly or by representative bodies is a right assuredly retained, and, being retained, may be exercised in the form and manner provided by the people of a state—the court says:

"We are also of the opinion that the word 'Legislature,' as used in section 4, art. 1, of the federal Constitution, does not mean simply the members who compose the Legislature, acting in some ministerial capacity, but refers to and means the lawmaking body or power of the state, as established by the state Constitution, and which includes the whole constitutional lawmaking machinery of the state. State governments are divided into executive, legislative, and judicial departments, and the federal Constitution refers to the 'Legislature' in the sense of its being the legislative department of the state, whether it is denominated a Legislature, General Assembly, or by some other name. Under section 1, art. 3, of the state Constitution, it will be observed, the people of this state have reserved to themselves, as a part of the lawmaking power, the right to vote by referendum, upon any law passed by the Legislature, with certain specified exceptions, prior to the going into effect of such law. That the exceptions mentioned are 'such laws as may be necessary for the immediate preservation of the public peace, health, or safety, support of the state government or its existing state institutions.' It is clear that said chapter 223 is not within any of these exceptions. Under the Constitution of this state, the people, by means of the initiative and referendum, are a part and parcel of the lawmaking power of this state, and the Legislature is only empowered to act, in accordance with the will of the people as expressed by the vote, when the referendum is properly put in operation. The term 'Legislature' has a restricted meaning, which only applies to the membership thereof, and it also has a general meaning which applies to that body of persons within a state clothed with authority to make the laws (Bouvier's Law Dic.; Webster's Dic.; 18 Am. & Eng. Ency. 822; 25 Cyc. 182), and which, in this state, under section 1, art. 3, Const. S. D., includes the people. * * *

"In Baldwin v. Trowbridge, 2 Bart. Contested El. Cas. 46, the minority report, in presenting the legal side of the controversy, shows the following pertinent language, which meets with our approval: 'But it was argued that this power was by express terms left, not to the states simply, but to the Legislatures thereof, and that this is such a limitation upon the people of the states that they have now power to restrict their Legislatures in the exercise of this right, conferred upon them by the federal Constitution; but I submit, with all due respect, that not only the history and object of the section under consideration, but the proper definition of the term "Legislature," as therein used, show the fallacy of this construction. The "Legislature" of the state, in its fullest and broadest sense, signifies that body in which all the legislative power of a state resides, and that body is the people themselves, who exercise the elective franchise, and upon their power of legislation there is no limitation or restriction, except such as may be found in the federal Constitution, or such as they themselves may provide by the organic law of the state.'"

The writ was denied.

State ex rel. Davis v. Hildebrant, 94 Ohio St. 154, 114 N. E. 55, is likewise to the point. The General Assembly, being the representative legislative body of the state of Ohio, passed an act on May 27, 1915 (105–106 Ohio Laws, p. 474), redistricting and apportioning the state into several congressional districts. The state had theretofore by an act passed April 28, 1913 (103 Ohio Laws, p. 568), been districted and divided. A sufficient number of the people filed a petition for a referendum of the later act. It was submitted to the electors of the state and was rejected by a majority of the voters. It was contended that the act of 1915 was a valid act, and was not a subject of referendum, because section 4, art. 1, of the federal Constitution, provided that the times, places, and manner of holding elections for members of Congress "shall be prescribed in each state by the Legislature thereof." The court put the question:

"Does the term 'Legislature,' as used in article 1, section 4, of the federal Constitution, comprehend simply the representative agencies of the state, composed of the members of the bicameral body, or does it comprehend the various agencies in which is lodged the legislative power to make, amend, and repeal the laws of the state, including the power reserved to the people empowering them to 'adopt or reject any law' passed by the General Assembly under the provisions of section 1, article 2, of the Constitution of Ohio?"

After reference to the state Constitution, which is in form similar to the Seventh Amendment to our own, the court says:

"These various sections disclose that, while the legislative power has been delegated to the bicameral body composed of the Senate and House of Representatives, the people of Ohio have, by the aforesaid provisions of their Constitution, determined the manner by which such legislative power may be exercised, under what circumstances the laws passed by it may become operative without an appeal to the people, and have further imposed the conditions under which such laws may become operative or inoperative as they may have been adopted or rejected by the popular vote designated as the 'referendum.'

"While article 1, section 4, of the United States Constitution, is controlling upon the states in so far as it grants the Legislature of the state authority to prescribe the times, places, and manner of holding elections, this is the quantum of the federal grant. The character of the Legislature, its composition, and its po-

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tency as a legislative body are among the powers which are, by article 10 of said Constitution, 'expressly reserved to the states respectively, or to the people.'

"Webster's New International Dictionary defines 'Legislature' as follows: 'The body of persons in a state, or politically organized body of people, invested with power to make, alter, and repeal laws.'

"The Century Dictionary defines the same term as follows: 'Any body of persons authorized to make laws or rules for the community represented by them.'

"Under the reserved power committed to the people of the states by the federal Constitution, the people, by their state organic law, unhindered by federal check or requirement, may create any agency as its lawmaking body, or impose on such agency any checks or conditions under which a law may be enacted and become operative. Acting under this recognized authority, the Ohio Constitution, prior to the adoption of the amendment of 1912, provided that the 'legislative power' of the state should be vested in the general assembly, consisting of a Senate and House of Representatives. The same provision now exists, but by the adoption of the amendment of 1912 the people expressly limited this legislative power by reserving to themselves the power to reject any law by means of a popular referendum. The lawmaking body, the Legislature, as defined by lexicographers, comprehends every agency required for the creation of effective laws. It cannot be claimed that the term 'Legislature' necessarily implies a bicameral body. When the term was originally embraced in the Constitution the Legislatures of Pennsylvania, Georgia, and Vermont consisted of but a single house, with a second body in each called an executive council. These states later abolished their councils and established a Legislature consisting of two branches, and such is the character generally of the various state Legislatures to-day. 1 Bryce's American Commonwealth, p. 461, note.

"The constitutional provision relating to the election of congressmen, conferring the power therein defined upon the various state Legislatures, should be construed as conferring it upon such bodies as may from time to time assume to exercise legislative power, whether that power is lodged in a single or two-chambered body, or whether the functions of the latter be curbed by a popular vote or its enactments approved by a referendum vote."

This case went to the Supreme Court of the United States. State ex rel. Davis v. Hildebrant, 241 U. S. 565, 36 Sup. Ct. 708, 60 L. Ed. 1172. That court passed the question of the power of the state to adopt and use the referendum as an instrument of legislative will "as obvious," holding that the state law, which had been made subject to the referendum, was valid and operative. A conclusion manifestly unsound if the word "Legislature" means a bicameral body, and that meaning is inflexible under the Constitution of the United States; for, if that were so, the states would have no power to prevail against it whatever the form of their expression may have been.

But it is said that the Supreme Court may be unsound in that respect, but is sound in result, because the Congress had passed an act (Act Aug. 8, 1911, c. 5, 37 Stat. 13) making the referendum a component part of the legislative authority empowered to deal with the election of members of Congress. There is nothing in the act of Congress which "prevents the people of a state from reserving a right of approval or disapproval by referendum of a state act redistricting the state for the purpose of congressional elections" (syllabus). But, if it were so, it would not avail respondent, for the power of the state to act comes from the Constitution and not from any act of Congress. To give such effect to an act of Congress would be to say that Congress might by act amend the Constitution. Chief Justice White disposed of the controversy when he defined the issue:

"The right to this relief was based upon the charge that the referendum vote was not and could not be a part of the legislative authority of the state, and therefore could have no influence on the subject of the law creating congressional districts for the purpose of representation in Congress;"

and said:

"The court below adversely disposed of these contentions, and held that the provision as to referendum was a part of the legislative power of the state. * * * As to the state power, we pass from its consideration, since it is obvious that the decision below is conclusive on that subject, and makes it clear that, so far as the state had the power to do it, the referendum constituted a part of the state Constitution and laws, and was contained within the legislative power, and therefore the claim that the law, which was disapproved and was no law under the Constitution and laws of the state, was yet valid and operative, is conclusively established to be wanting in merit."

It could not have been so held if the act of the Legislature, as distinguished from legislative authority, was essential under section 4. If that were so, the court must have denounced the referendum in that and all cases where the Constitution leaves a matter to the "Legislature," and refused to follow the state court, for its first duty is to the Constitution.

Our attention is called to an unpublished decision of the Supreme Court of Oregon in Herbring v. Attorney General, 180 Pac. 328. The premise of the decision is that the reserved power of the people is limited to a review of "any act of the legislative assembly," and that the word "act" was used having in mind the exercise of the legislative function as outlined in the original draft of the state Constitution, and that the word "act" did not comprehend a joint resolution.

We have already demonstrated that our Constitution is more comprehensive. The decision does not appeal to us for another

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reason. Its basis is fundamentally unsound, in that it proceeds upon the theory that the right of the people to legislate upon the question rests in the antecedent provisions of the state Constitution, whereas the right comes from the Constitution of the United States.

Other questions were discussed by counsel. We have considered them, and are agreed that they are not controlling.

The writ will issue.

MOUNT, MAIN, and HOLCOMB, JJ., concur.

MACKINTOSH, J. (concurring). By the adoption of the initiative and referendum amendments the people of this state became a part of the legislative branch of the state government, and all legislative actions, except those especially exempted, are subject to their participation. The reasons which have led up to this modern form of legislation are as set forth in Judge CHADWICK'S opinion, and, upon both authority and reason, no curtailment of this power should now be judicially sanctioned. If the people have declared their intention to assert their authority over the Legislature in acts many of which are of temporary or small importance, it was surely their intention to preserve to themselves the right of reviewing legislative action of lasting and great importance, and within this category assuredly fall all actions dealing with the amendment of the federal Constitution. It would be idle to say that the right of referendum could be exercised in the unimportant matters and not in the important.

The dissenting opinion of Judge PARKER indulges in altogether too narrow and restricted an interpretation of the right of referendum, and seems to be entirely out of harmony with the course of the decisions of this court upon this and kindred matters arising under laws affecting modern legislative and governmental functions. By strict adherence to dictionary definitions this dissenting opinion crushes the spirit of the constitutional provisions under consideration, and, if it were the prevailing view in this case, would mark a step backward by a court which has come to be recognized as rather liberal in its interpretation of legislation aimed at the correction of social and public evils. It is clear to my mind that the law contemplated the submission to the people of all legislative acts, using that word in its broad signification, and it is also clear that the Constitution of the United States, in providing for amendments thereof, intended that those amendments should by Congress be submitted to the legislative powers of the various states, and that the term "Legislature," as used in that broad way, was not meant to refer merely to what is commonly called a Legislature.

The view expressed by Judge FULLERTON appears to me to be equally as untenable as those written by Judge PARKER and those agreeing with him. As I understand it, that view is that because the Legislature ratified the proposed constitutional amendment by joint resolution instead of by an act, that therefore there has never been any ratification by the state of Washington of the proposed prohibition amendment. The answer to this has been admirably expressed in the majority opinion, and it would appear to be self-evident that the technical manner of signifying the agreement of the legislative body is a question which should be determined by the Congress of the United States and is not a matter of our concern.

I am compelled by the majority opinion to concur in the result therein arrived at.

PARKER, J. (dissenting). I am unable to concur in the majority opinion of the court. The necessity of a prompt disposition of this case, in view of the decision of a majority of the court to grant the writ prayed for, prevents me setting forth at the length that I would like to my views upon the question presented. I will content myself with the following brief observations, which I think could be materially strengthened, in support of the conclusions I have reached, by a more detailed discussion.

The resolution of Congress here in question reads:

"Joint Resolution.

"Proposing an amendment to the Constitution of the United States.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each house concurring therein), that the following amendment to the Constitution be, and hereby is, proposed to the states, to become valid as a part of the Constitution when ratified by the Legislatures of several states as provided by the Constitution:

"Article —.

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

"Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of the several states, as provided in the Constitution, within seven years from the date of the submission hereof, to the states by the Congress." U. S. Stats. 1918, Sess. II, 40 Stat. 1050.

The Constitution of the United States in the fifth article thereof prescribes the manner of proposing and ratifying amendments to that instrument as follows:

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"The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid, to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress. * * *"

In the sixth article of that instrument we also read:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

It is therefore plain that the above-quoted portion of the fifth article of the federal Constitution is the supreme law of the land touching the subject of amending that instrument. The several states, by the express provisions of that article, have as completely surrendered the power to prescribe a different manner of amending the federal Constitution as they have surrendered to the federal government the sovereign powers enumerated in that instrument to be exercised by the federal government. It is to be noted that the Congress of the United States has the power to prescribe either of two ways in which the several states shall voice their ratification of a proposed amendment to the federal Constitution, to wit, "by the Legislatures," or "by conventions" held in the several states for that purpose; and that Congress has in its proposal of this amendment expressly provided that it "shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of the several states. * * *" In other words, Congress has submitted this proposed amendment for ratification or rejection to the Legislatures of the several states instead of to conventions to be held therein.

It is contended in behalf of the relator that the word "Legislatures," as used in the above-quoted portion of the fifth article of the federal Constitution, means not alone the lawmaking representative body of the several states called "Legislature" or some other name of the same import, but the entire lawmaking body of the state, though such body include the individual electors of the state, when by its Constitution such electors possess the power of direct legislation through the initiative and referendum, as they do in the state of Washington under its Constitution, by virtue of the Seventh Amendment thereto, reading, in so far as we need here notice its language, as follows:

"The legislative authority of the state of Washington shall be vested in the Legislature, consisting of a Senate and House of Representatives, which shall be called the Legislature of the state of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the Legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section or part of any bill, act or law passed by the Legislature."

I am convinced that the ratification by a state Legislature of a proposed amendment to the federal Constitution is an exercise of a power which the Legislature possesses by virtue of the fifth article of that instrument, and the designation by Congress of that method of ratification in pursuance of the power given to Congress by that article, and that the Legislature is not acting in pursuance of any power given to it by the state Constitution, except in so far as the Legislature may owe its existence to the state Constitution. I cannot escape the conclusion that such act of ratification by the Legislature is not lawmaking legislation for the state and its people under its Constitution, but is simply the casting of the vote of the state and its people in the manner prescribed by the federal Constitution and the direction of Congress made in pursuance thereof, as to whether or not the proposed amendment of that instrument shall be ratified. Such act of a state legislature, it may be conceded, is an act of participation in legislation; but I think it is an act of participation in purely national legislation, and is neither state legislation, nor an act of participation in state legislation. I may further observe that the act of ratification would, as I view it, be in substance identical in character, whether done by the Legislature by a vote upon an informal motion, by a formal resolution, or by a formal bill, as in the enactment of ordinary state laws; and that the form of ratification by the Legislature is of no moment in the determination of whether or not the legislative act of ratification is referable to a direct vote of the people. Of course the Legislature might call for an advisory vote of the people before finally acting, but that is not this case.

In Jameson, Constitutional Conventions (4th Ed.) § 583, that learned author says:

"The power of a state Legislature to participate in amending the federal Constitution exists only by virtue of a special grant in that Constitution. It is a power which it could not assume under any notion of a general right to legislate, for that right is confined within state limits and to the enactment of ordinary laws."

Our problem here is, What body of persons compose the "Legislature," within the meaning of that word as used in the fifth article of the federal Constitution? rather than the question of where the whole of

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the state's legislative power resides. Recurring to the language of that article, and having in mind what must have been the commonly accepted meaning of the word "Legislature" when originally placed in that article of the Constitution, I am convinced that it means that body of persons composing the ordinary representative lawmaking body of the state. The fact that Congress is given power to submit proposed constitutional amendments to conventions, manifestly meaning representative conventions, in the several states, as well as to the Legislatures thereof; the manner in which the several states and their people express their choice for president and vice president of the United States through chosen representatives called electors, instead of by direct vote; the manner in which the several states express their choice for United States senators through chosen members of their respective representative lawmaking bodies called "Legislatures," or some other name of the same import, as provided by the federal Constitution, until recent years; the fact that the federal Constitution, until the recent amendment thereto providing for the election of senators by direct vote of the people, never contained any provision for the people of the respective states voicing their will by direct vote upon any federal or national question wherein the decision of a state, or the people thereof as a whole, was called for under some provision of the federal Constitution; and the history of the times touching the original framing and adoption of the federal Constitution—to my mind argue all but conclusively that it was not the intent or purpose of the framers of that instrument that amendments thereto should be ratified by the several states or the people thereof other than by an expression of their will in that behalf through their representative legislative bodies called "Legislatures" or some other name of the same import, or through representative conventions held in the several states for that purpose.

Counsel for the relator call to our attention and invoke in his behalf the decisions of the Supreme Courts of South Dakota and Ohio in State ex rel. Schrader v. Polley, 26 S. D. 5, 127 N. W. 848, and State ex rel. Davis v. Hildebrant, 94 Ohio St. 154, 114 N. E. 55, holding, in substance, that the word "legislature," as used in section 4 of article 1 of the federal Constitution, means and comprehends the entire legislative power of the respective states, including not only the legislative power possessed by the representative legislative body of each state, but also the legislative power which may be reserved in the people of a state by its Constitution, to be exercised by the initiative and referendum, as such power is reserved in the people of South Dakota and Ohio by their Constitutions, in substance the same as such power is reserved in the people of our state by the above-quoted portions of the Seventh Amendment to our Constitution. Section 4 of article 1 of the federal Constitution, the interpretation of which was involved in those decisions, reads:

"The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators."

The question in each of those cases was as to whether or not an act passed by the representative legislative lawmaking body of the state, called "Legislature" in South Dakato, and "General Assembly" in Ohio, dividing the state into congressional districts, and providing for the election of representatives in Congress therefrom, was subject to a referendum vote of the people of the state under the initiative and referendum provision of its Constitution; those courts deciding that such an act was subject to a referendum vote of the people. It seems to me at once apparent that there is a marked distinction between the legislative power reserved to the several states by the provisions of section 4, art. 1, of the federal Constitution, and the provisions of article 5 of that instrument, providing the manner in which the respective states and the people shall express their ratification of proposed amendments to that instrument. The former is the enactment of law, the prescribing of a rule of conduct, by the sovereign legislative power of the state, subject, of course, to be superseded by laws which may be enacted by Congress, but nevertheless within itself an act of legislation, completed, or to be completed, by the sole legislative power of the state; and the fact that such legislation may have to give way to some higher law which Congress may enact does not in the least change the fact that it is an act done by the legislative power of the state, in the doing of which no other state or power has any voice whatsoever. The latter is but the casting of the vote of the state and its people upon the question of amending the federal Constitution in the manner provided for by the terms of that instrument—a question not of state legislation, but of national legislation, in which each state has but one vote. I think that the South Dakota and Ohio decisions are of no controlling force in the solution of this problem.

It has been suggested that a state constitution might not create any representative lawmaking body such as is commonly called "Legislature," but provide for the exercise of the whole of the state's legislative power by direct vote of the people, a thing I concede to be not impossible, and that such a state might decline to provide for the calling of a convention to act upon a proposal

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to amend the federal Constitution. I am quite unable to see, should my view of the question here presented prevail, that such a condition would in the least impair the right and power of Congress to obtain, in an orderly and lawful way, an expression of the will of the people of such a state touching a proposed amendment to the federal Constitution, since Congress is plainly given the power to submit such a proposal to conventions in the several states, and to provide the manner of electing delegates to, and the calling of, such conventions, all of which could be readily done by Congress wholly apart from state constitutional and statutory law.

It is contended in behalf of the relator that the secretary of state should not now be permitted to refuse to file the petition, give a serial number thereto as a referendum measure, transmit a copy thereof to the attorney general for the preparation of a ballot title, and perform the other acts required of him by law looking to the submission of referendum measures to the people, and that we should not at this time entertain the defense made in the secretary's behalf that the proposed measure is not referable to the people. Counsel for the relator call to our attention and rely upon that line of decisions holding, in substance, that the courts will not entertain the question of the constitutionality or validity of a proposed initiative or referendum measure, in a proceeding to compel an officer to perform or refrain from performing some act prescribed by law, to be performed by him, looking to the submission of such measures to the people. Our real concern here is not with the constitutionality or validity of the joint resolution of our Legislature here in question. The real reason why the secretary of state should not be compelled to perform the acts demanded of him by the relator is that the question of the ratification of a proposed federal constitutional amendment is not one to be finally decided by direct vote of the people of the several states, but by the vote of the states and the people thereof, expressed through their representative lawmaking bodies or representative conventions held in the several states for that purpose. No decision of any court has come to our notice holding that an officer whose duty it is to perform acts looking to the submission to the people of initiative and referendum measures can be compelled by mandamus to perform any act looking to the submission of a question to the people which under no circumstances is referable to a direct vote of the people for final decision as an initiative or referendum measure. The demand here made by the relator upon the secretary of state is, in its last analysis, a demand that he perform an act which I think he is not legally required to perform. Our decisions in State ex rel. Case v. Howell, 85 Wash. 281, 147 Pac. 1162, and State ex rel. Case v. Howell, 85 Wash. 294, 147 Pac. 1159, Ann Cas. 1916A, 1231, are in harmony with this view of the law, though this exact question was not there presented to the court

I am of the opinion that the writ should be denied.

MITCHELL, J., concurs in the dissenting opinion of Judge PARKER.

TOLMAN, J. I thoroughly and heartily agree with the construction placed upon our state Constitution by the majority, but am convinced that the question here involved is one upon which our state Constitution and laws have no bearing, and that the manner of amending the federal Constitution is fixed by that instrument itself; I therefore concur with Judge PARKER.

FULLERTON, J. While I concur in the conclusion reached by Judge PARKER, I do so for a very different reason than the reason given by him. I am of the opinion that there has been no valid ratification of the proposed constitutional amendment. If this view be sound, it follows, as matter of course, that there is nothing to submit under the referendum clause of the Constitution to the vote of the electorate.

I need not state at length the reasons which lead me to think there has been no valid ratification of the amendment. It is sufficient to say that in my opinion the term "Legislature," as used in the fifth article of the federal Constitution, has reference to the legislative power of the state, not to that part of the legislative power technically designated in the Constitution as the Legislature. The two houses of the legislative branch of the state government cannot, therefore, ratify a proposed amendment to the federal Constitution by a joint resolution; this for the reason that they do not constitute the sole legislative power. The Governor, by his right of approval or disapproval of legislative enactments, and the people, through the referendum, constitute a part of that power, and the participation of the one in every instance, and the participation of the other if it so desires, are necessary to the passage of laws. That the ratification of the proposed amendment is the enactment of a law seems to me only necessary to be stated to be conceded. It is a surrender of a part of the sovereignty of the state, and it makes that law in the state which was not law before. The state Constitution points out the procedure for the enactment of laws. That procedure has not been followed in this instance; hence my conclusion that there has been no valid ratification of the amendment.

I am aware that the majority meet my objection by arguing that the power to amend the Constitution of the United States emanates from that Constitution, and, since it prescribes no form for state action, any

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suitable form may be adopted which expresses the will of the state. But this line of reasoning overlooks the language of the constitutional provision authorizing amendments. As shown in both the majority and dissenting opinions, the Congress in submitting proposed amendments to the Constitution for ratification by the states may adopt either one of two methods for such ratification; it may submit the amendment to the Legislatures of the several states, or it may submit it to conventions of the several states.

If the majority contention be sound, a submission to the Legislature would be legally ratified if ratified by a convention, and if submitted to a convention would be legally ratified if ratified by the Legislature. This form of reasoning is to my mind unsound.

I think, instead of waiving form, form is expressly insisted upon, and, since the submission is in this instance to the Legislature, the Legislature must act in the manner it is empowered to act by the laws creating it, else there is no valid ratification.

That I am not alone in this view is shown by the cases supporting it cited by the majority. I cannot agree with the majority, however, in thinking them unsound. To my mind the reasoning upon which they are founded is unanswerable.

I think the writ should be denied.

(104 Wash. 354)

CHAS. W. JOHNSON LUMBER CO. v. GREAT NORTHERN RY. CO.

(No. 14859.)

(Supreme Court of Washington. May 31, 1919.)

En Banc.

On rehearing. Affirmed.

For former opinion, see 176 Pac. 343.

PER CURIAM. Upon a rehearing en banc a majority of the court still adhere to the opinion, heretofore filed herein, as reported in 176 Pac. 343, and for the reasons there stated the judgment is affirmed.

(32 Idaho, 257)

WALKER v. EDWARDS et al.

(Supreme Court of Idaho. May 23, 1919.)

1. HABEAS CORPUS ⟸99(3) — CUSTODY OF CHILDREN—WELFARE OF CHILD.

In the exercise of its discretion in determining to whom the custody of a child shall be awarded, in a case like the one here under consideration, the trial court will look to, and be governed by, the welfare of the child.

2. HABEAS CORPUS ⟸113(12) — CUSTODY OF CHILDREN—REVIEW.

In cases of this kind the rule applies that the judgment will not be disturbed because of conflict in the evidence if there is sufficient proof, if uncontradicted, to sustain it.

Appeal from District Court, Canyon County; Ed. L. Bryan, Judge.

Habeas corpus by J. P. Walker, as guardian of Mary Bush, an infant, against Eli Edwards and another, to procure custody of the infant. From a judgment quashing the writ, plaintiff appeals. Affirmed.

Scatterday & Van Duyn, of Caldwell, for appellant.

Walter Griffiths, of Caldwell, for respondents.

MORGAN, C. J. Appellant applied to the district court for a writ of habeas corpus alleging, among other things, that he was the guardian of the person of Mary Bush, an infant, who was under the unlawful control and restraint of respondents. The writ was issued, and respondents answered the allegations in the petition. At the hearing many witnesses were examined, and the judge questioned the child, who was between 10 and 11 years old, in private. Findings of fact were made and judgment entered that the child be returned to the care and custody of respondents. The appeal is from the judgment.

[1, 2] The controlling facts found are as follows: That appellant is the guardian of Mary Bush; that her parents died in January, 1915, leaving three children, of which Mary is the oldest; that her mother, who survived the father by a few days, requested appellant to take the children and find suitable homes for them; that the parents desired the children brought up in the teachings of the religious denomination to which they and appellant belonged; that respondent, Fern Edwards, is of that sect; the other respondent, her husband, is not, but attends its services; that, before the death of the mother, appellant placed Mary in the home of a neighbor until a permanent home could be found for her; that she remained there until May, 1915, when, with the consent of appellant and his wife, she was placed in custody of respondents, with the request that they provide her a permanent home; that she was received into their home upon such request; and that they have at all times since then provided her with "the necessaries, comforts, and pleasures of life, supplied her with excellent educational facilities, medical aid, proper home training, and in all respects treated her as their own child, until there has at this time grown up feelings, ties, and relations between this child and her adopted parents which cannot now

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be broken by separation without inestimable injury to the welfare of the child"; that respondents have the inclination and ability to provide her with all necessary mental, moral, and physical training required by a child of her age and temperament and a home which cannot, under the circumstances, be excelled; that she has no property, and it is for her best interest and welfare that she remain in the care and custody of respondents. These findings are supported by the evidence.

In a case of this kind the trial court will, in the exercise of its discretion, look to and be governed by the welfare of the child (Andrino v. Yates, 12 Idaho, 618, 87 Pac. 787; In re Martin, 29 Idaho, 716, 161 Pac. 573; Allen v. Williams, 31 Idaho, 309, 171 Pac. 493), and the rule applies that the judgment will not be disturbed because of conflict in the evidence if there is sufficient proof, if uncontradicted, to sustain it (Jain v. Priest, 30 Idaho, 273, 164 Pac. 364).

The judgment is affirmed. Costs are awarded to respondents.

RICE, J., concurs.

BUDGE, J. (concurring specially). I agree with the conclusions reached in the majority opinion that the trial court did not err in entering its judgment quashing the writ of habeas corpus, and thereby declining to interfere with the custody of the minor child, Mary Bush.

In determining the custody of a child, its welfare is of paramount importance; yet the right of a guardian to the custody of his ward is entitled to consideration.

C. L. § 5775, provides that:

"5775. *Custody of Minor by Guardian.*—If the minor has no father or mother living, competent to have the custody and care of his education, the guardian appointed shall have the same."

And C. L. § 5776, provides that:

"5776. Every guardian appointed shall have the custody and care of the education of the minor, and the care and management of his estate, until such minor arrives at the age of majority or marries, or until the guardian is legally discharged."

This right of the guardian to the custody of the ward is like the right of the natural parent to the custody of the child. A guardian, lawfully appointed, stands in loco parentis with respect to his ward, and is entitled to the custody of the ward until such ward arrives at the age of majority or marries, or until the guardian is legally discharged, unless the acts or conduct of the guardian have been such as to constitute abandonment, surrender, transfer, or forfeiture of this right, either temporarily or permanently.

The record in this case discloses, among other facts, that in October, 1914, prior to her parents' death, Mary was taken by Mr. Walker to the home of Mr. and Mrs. Fowler, to reside there until a suitable, permanent home could be found for her. She remained there until May, 1915, when she was taken by Mrs. Walker and Mr. Fowler to the home of Mr. and Mrs. Edwards, whereupon it was agreed between Mr. Walker and Mr. and Mrs. Edwards that she was to reside with the latter family, as a member of their household, so long as they wished to keep her and would provide a suitable and proper home for her. The evidence shows that it was never intended that Mary should be taken into the Walker home, but that Mary's mother placed the child in Mr. Walker's care for the purpose of finding a home for her.

It is conceded that Mary's entire care and well-being was left to the Edwards after she was taken to their home; that Mrs. Edwards has been a good mother to her; that she has received proper care, education, and moral training; and that a feeling of parental love and affection has grown up between them and Mary.

To my mind the state of facts disclosed in the record justifies the conclusion that Mr. Walker has surrendered and transferred his right, as guardian, to the custody of Mary, to Mr. and Mrs. Edwards, so long as the latter maintain the same parental love and affection towards Mary and continue to furnish her with a good home, educational advantages, and moral training, according to the agreement under which they assumed her care. The right of guardianship is not vacated by this proceeding, however, for conditions may hereafter arise which would warrant the guardian in again asserting his right to the custody of the child.

In any event I think it can be properly said that this is a case where the right of the guardian to the custody of the minor is not clear, and the best interest of the child should govern the court; the welfare of the child being the main object to be attained. Pool v. Gott, 14 Monthly Law Reporter, 269; Hoxsie v. Potter, 16 R. I. 374, 17 Atl. 129; Hurd on Habeas Corpus, p. 539. To interfere with the relationship which now exists between Mary and the Edwards would be seriously detrimental to her welfare and happiness, and for that reason I think the agreement between Mr. Walker and the Edwards at the time Mary was placed in the custody of the latter should be upheld, and therefore that the court did not err in quashing the writ.

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(32 Idaho, 276)

STATE ex rel. BLACK, Atty. Gen., v. EAGLESON, State Treasurer.

(No. 3388.)

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(Supreme Court of Idaho. June 11, 1919.)

STATES ⇐113—"INDEBTEDNESS"—CONSTITUTIONAL PROVISIONS.

The issuance and sale of treasury notes, in conformity to Laws 1919, c. 94, does not incur an indebtedness within the meaning of article 8, § 1, of the Constitution of Idaho.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Indebtedness.]

Original mandamus by State of Idaho, on the relation of Roy L. Black, Attorney General, against John W. Eagleson, Treasurer of the State of Idaho. Demurrer to answer sustained.

Roy L. Black, Atty. Gen., and Dean Driscoll, Asst. Atty. Gen., for plaintiff.

Frank Martin and I. N. Sullivan, both of Boise, for defendant.

MORGAN, C. J. Relator states in his application for a writ of mandate that he is Attorney General, and the defendant is treasurer of the state of Idaho; that the state board of examiners, on April 30, 1919, by resolution regularly adopted, ordered and directed the issuance and sale of treasury notes of the par value of $1,250,000, as authorized by Sess. Laws 1919, c. 94, p. 346; that there is outstanding in taxes levied for 1919, for general state purposes, payable into the general fund of the state treasury, in 1920, the sum of $2,000,000 in addition to the revenue accruing thereto from sources other than taxation; that there are no treasury notes of the character mentioned in said chapter 94, for 1919, issued or outstanding, and that the defendant has failed and refused, and still fails and refuses, to perform the duties devolving upon him as treasurer in making sale of said notes.

Section 1 of chapter 94, above cited, is as follows:

"That for the purpose of anticipating the revenue to accrue in the general fund of the state of Idaho from taxes levied for the current biennium and thereby advancing the time of payment of the outstanding claims and charges against the said general fund, together with accruing charges, claims and appropriations against said fund, a loan for the use and benefit, and in the name of, the state of Idaho, in the principal sum of three million dollars, lawful money of the United States of America, is hereby authorized and directed, the proceeds of which said loan shall be deposited in the treasury of the state of Idaho in the general fund therein and shall be subject to the appropriations now made or hereafter to be made from or against said general fund and to disposition in like manner as all other moneys accumulating in said fund."

The chapter under consideration authorizes the state board of examiners to order the sale of such amounts of treasury notes as it may deem best, provided it shall not order, nor permit to be sold, during the year 1919 an amount of the total par value, plus interest to date of maturity, exceeding the total tax levy in that year for general state purposes payable into the treasury in 1920, and during 1920 it shall not order nor permit to be sold an amount exceeding, in like manner, the taxes levied in that year for general state purposes payable into the treasury in 1921. It is further provided that upon the adoption by the state board of examiners of a resolution directing the sale of notes the treasurer shall perform certain acts, in the law specified, looking to the sale thereof. The purpose of this action is to procure the performance of these acts.

The defendant answered, in effect, that if treasury notes be issued as prayed for the indebtedness thereby created will, together with the bonded indebtedness of the state now outstanding, be in excess of the amount permitted by article 8, § 1, of the Constitution which, so far as it is material to this case, provides:

"The Legislature shall not in any manner create any debt or debts, liability or liabilities, which shall * * * exceed in the aggregate the sum of two million dollars. * * *"

The answer was demurred to, on the ground that it does not state facts sufficient to constitute a defense, and the only question presented is as to whether or not the treasury notes in question will, if issued and sold, constitute an indebtedness within the meaning of that section of the Constitution.

This court, in Stein v. Morrison, 9 Idaho, 426, at page 451, 75 Pac. 246, at page 254, said:

"The appropriations for current expenses and the raising of revenue to meet those appropriations have been treated by the people in framing and adopting the organic law as a cash transaction."

The decision of the court upon this point is summarized in the syllabus as follows:

"The public revenues may be appropriated by the Legislature in anticipation of their receipt, * * * and it is not necessary to the validity of such an appropriation that funds should be in the treasury at the time to meet the same.

"Such appropriations do not constitute a debt or liability against the state within the provisions of section 1, article 8, of the Constitution. * * *"

See, also, State v. McCauley, 15 Cal. 430; In re Incurring of State Debts (R. I.) 37 Atl. 14; Ash v. Parkinson, 5 Nev. 15; Rhea v. Newman, 153 Ky. 604, 156 S. W. 154, 44

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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L. R. A. (N. S.) 989; Rowley v. Clarke, 162 Iowa, 732, 144 N. W. 908; State v. Medbery et al., 7 Ohio St. 522; State v. Donahey (Ohio) 113 N. E. 263.

A question similar to the one before us arose in South Dakota, where the Legislature had provided for the issuance and sale of state warrants, in anticipation of the payment of taxes already levied, to procure cash with which to pay the current expenses of state government. The court held that "appropriations from the assessed, but uncollected, revenues of the state, and the issuance of warrants in pursuance thereof, is not the incurring of an indebtedness," within the meaning of a constitutional provision of that state which, so far as this question is concerned, is the equivalent of our article 8, § 1. In re State Warrants, 6 S. D. 518, 62 N. W. 101, 55 Am. St. Rep. 852. See, also, Bryan v. Menefee, 21 Okl. 1, 95 Pac. 471. This is the correct rule, and it applies to treasury notes with equal force as to state warrants.

The demurrer to the answer is sustained.

RICE and BUDGE, JJ., concur.

(32 Idaho, 280)

STATE ex rel. HALL, Commissioner Public Works, et al. v. EAGLESON, State Treasurer. (No. 3387.)

(Supreme Court of Idaho. June 12, 1919.)

1. STATES ⇐113—"INDEBTEDNESS"—CONSTITUTIONAL PROVISIONS.

The issuance and sale of treasury notes, in conformity to Laws 1919, c. 95, does not incur an indebtedness within the meaning of article 8, § 1, of the Constitution of Idaho.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Indebtedness.]

2. EVIDENCE ⇐33—JUDICIAL NOTICE—CONTENTS OF JOURNALS OF LEGISLATIVE HOUSES.

The court will take judicial notice of the contents of the journals of the houses of the Legislature.

Original mandamus by the State of Idaho, on relation of W. J. Hall, Commissioner of Public Works, and Roy L. Black, Attorney General, against John W. Eagleson, Treasurer of the State of Idaho. Demurrer to answer sustained.

Roy L. Black, Atty. Gen., and Dean Driscoll, Asst. Atty. Gen., for plaintiff.

Frank Martin and I. N. Sullivan, both of Boise, for defendant.

MORGAN, C. J. [1] This is an original application for a writ of mandate, commanding the defendant to perform certain duties devolving upon him as state treasurer, pursuant to the provisions of Sess. Laws 1919, c. 95, p. 353. That chapter provides for the issuance and sale of treasury notes in anticipation of revenues to be raised by taxes already levied for the years 1919 and 1920 for the benefit of the state highway fund. It is similar to chapter 94, of the same Session Laws, enacted for the purpose of anticipating revenue to accrue in the general fund, which last-mentioned chapter was under consideration in case of State of Idaho on relation of Roy L. Black, Attorney General, v. John W. Eagleson, Treasurer, 181 Pac. 934.

In this case, as in that, the defendant answered, in effect, that if treasury notes be issued as prayed for the indebtedness thereby created will, together with the bonded indebtedness of the state now outstanding, be in excess of the amount permitted by article 8, § 1, of the Constitution. The answer was demurred to on the ground that it does not state facts sufficient to constitute a defense. On authority of the case above cited the defendant's contention in this case will be resolved against him, the court holding that the issuance of treasury notes, in conformity to Sess. Laws 1919, c. 95, does not incur an indebtedness within the meaning of article 8, § 1, of the Constitution of Idaho.

[2] It is further alleged in the answer that chapter 95, Sess. Laws 1919, is not a law of the state of Idaho, for the reason that it was not read on three several days in the House of Representatives, and that the provisions of article 3, § 15, of the Constitution were not dispensed with. That section provides:

"No law shall be passed except by bill * * * nor shall any bill become a law unless the same shall have been read on three several days in each house previous to the final vote thereon.

"Provided, in case of urgency, two-thirds of the house where such bill may be pending may, upon vote of the yeas and nays, dispense with this provision. * * *"

It appears from the answer that the matter relied upon by defendant as a failure to conform to the provisions of the Constitution consists of a record appearing in the House Journal of the Fifteenth Legislative Session which shows that upon a yea and nay vote the following motion, made by one of the members, unanimously carried:

"I move that all rules of the House interfering with the immediate passage of House Bill No. 283 be suspended; that the portions of section 15 of article 3 of the Constitution of the state of Idaho, requiring all bills to be read on three several days, be dispensed with, this being a case of urgency, and that House Bill No. 286 be read the first time by title, second

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time by title, and the third time at length, section by section, and be put upon its final passage."

It also appears that chapter 95 in question was designated and known in the Legislature as House Bill No. 283.

It is difficult to imagine a member of the Legislature intentionally moving that the rules of the House interfering with the immediate passage of a bill be suspended and another bill be put upon its final passage. It is also difficult to imagine the entire membership of the House of Representatives intentionally voting for such a motion. That the motion was made with respect to House Bill No. 283 appears from the fact that there was no house bill numbered 286 introduced in the fifteenth session of the Legislature, House Bill No. 284 being the last one presented. This is shown by the House Journal, and the court will take judicial notice of the contents of the journals of the houses of the Legislature. Burkhart v. Reed, 2 Idaho, 503, 22 Pac. 1. It is quite clear reference to House Bill No. 286 in the record of the motion is a typographical error, and that the motion was made and carried with respect to House Bill No. 283.

The demurrer to the answer is sustained.

RICE and BUDGE, JJ., concur.

(75 Okl. 71)

JACOBS et al. v. DUNCAN et al. (No. 9538.)

(Supreme Court of Oklahoma. March 11, 1919. On Petition for Rehearing, June 17, 1919.)

(Syllabus by the Court.)

1. ADOPTION ⟸21—INHERITANCE—STATUTE.

An adopted child has only such rights to inherit the property of his adopting parent as the statute under which he is adopted gives him.

2. ADOPTION ⟸21 — INHERITANCE FROM ADOPTING PARENT—LAWS OF CHOCTAW NATION.

Record examined and *held*, that the right of an adopted child to inherit from his adopting parent is not conferred by the statutes of the Choctaw Nation relied upon for that purpose.

(Additional Syllabus by Editorial Staff.)

3. ADOPTION ⟸3—RELATION—WHAT LAW GOVERNS.

The law in force at the date of adoption controls as to the relation created by the act of adoption, and not the law in force at the date of death of the adopting parent.

4. ADOPTION ⟸21—INHERITANCE.

The right of inheritance is not necessarily incident to the relationship of parent and child, and hence is not necessarily incident to the relationship of adoption, and the adopted child has only such right to inherit from adopting parent as the statute under which he is adopted gives him.

Error from District Court, Jefferson County; Cham. Jones, Judge.

Action by Rhoda Jacobs and others against Lester Duncan and others. Judgment for defendants, and plaintiffs bring error. Reversed and remanded, with directions.

R. C. Drake, of Duncan, and Geo. T. Arnett, of Idabel, for plaintiffs in error.

Bridges & Vertrees, of Waurika, and W. F. Semple, of Durant, for defendants in error.

KANE, J. The land involved herein was the allotment of Sallie Hokabe, a full-blood Choctaw Indian, who died during the year 1903; the land being subsequently allotted by an administrator. The allottee left surviving her her sister, Rhoda Jacobs, the children of several deceased sisters, and one James Meshaya, who it was alleged was legally adopted by the allottee pursuant to the laws in force in the Choctaw Nation, some time during the year 1897 or 1898. The plaintiffs claim the land through conveyances from the kindred of the allottee and their assigns, and the defendants claim the land through conveyances from James Meshaya and his assigns. The court below decided in favor of the latter claimants and entered judgment accordingly, to reverse which this proceeding in error was commenced.

The sole question involved is stated by counsel for plaintiffs in error in their brief as follows: Plaintiffs in error claim the title by deed from James Meshaya, and contend that the said James Meshaya, by reason of the purported adoption, was heir to the land, and, if their contention is correct, this case should be affirmed; otherwise, plaintiffs in error should recover their three-fourths interest in the land.

[1-3] The theory of the prevailing parties is stated by their counsel in their brief as follows:

"At the date of the death of the allottee in this case the laws of descent and distribution as embraced in chapter 49 of Mansfield's Digest of the Statutes of Arkansas were in force in the Indian Territory; but at the date of the adoption the laws of the Choctaw Nation were in force, and controlled as to the status created by the act of adoption. Nothing is said in chapter 49 of Mansfield's Digest with reference to adopted children. The right to inherit is neither conferred nor denied by statute. * * * It is not a question of a change of domicile, nor strictly a question of comity between states, nor of the effect to be given to a judgment or statute of a foreign state. To all intents and purposes, James Meshaya was the child of Sallie Hokabe, when the Choctaw laws of inheritance

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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were supplanted by chapter 49 of Mansfield's Digest. How he attained that status is not material. It is sufficient to say that the law in force at the date of adoption controls as to the relation created by the act of adoption, and not the law in force at the date of death of the adopting parent."

Assuming that James Meshaya was legally adopted as alleged, we will now examine the Choctaw statutes, by virtue of which it was claimed he acquired the status which entitled him to inherit the lands of Sallie Hokabe as her heir.

The Choctaw statute on adoption provides:

"Any person or persons who may wish to adopt an illegitimate or orphan child or children shall file a petition to that effect with the clerk of the county they may reside in, which shall remain on file for thirty days; and if no legal or just cause is shown why the petition shall not be granted, then the county judge shall grant the petition and cause the same to be recorded in the county clerk's office, after which the adoption shall be as binding as if done by special act of the General Council."

There was some evidence tending to show that James Meshaya was adopted under this law, but, the records themselves having been burned, no attempt was made to show the contents of the petition filed or of the order of the county court granting the petition.

The Choctaw law of inheritance in force in that nation at the time of the alleged adoption provides as follows:

"An act relating to persons dying intestate or without a will.

"Be it enacted by the General Council of the Choctaw Nation assembled, that, from and after the passage of this act, the property of all persons who died intestate or without a will shall descend to his legal wife or husband and their children."

[4] The contention is that the mere event of adoption fixed the legal status of the adopted child and that thereafter he stood, as to the property of the adopting parent, in the same light as a child born in lawful wedlock. Powers v. Hafley, 85 Ky. 671, 4 S. W. 683, Wolf et al. v. Gall et al., 174 Cal. 140, 162 Pac. 115, In re Estate of Wardell, 57 Cal. 484, Humphries v. Davis, 100 Ind. 274, 50 Am. Rep. 794, and other cases of this class are relied upon to support this contention. We have examined these cases and the other cases discussing similar questions, and find that invariably the right of inheritance was either fixed by the special act providing for the adoption, as in the Kentucky case, or by the general law upon that subject as in the other cases. There is no dissent from the proposition that the right of inheritance is not necessarily incident to the relationship of parent and child and hence is not necessarily incident to the relationship of adoption, or that the enactment itself must be looked to to ascertain the right of the parties to inherit. In other words the adopted child has only such right to inherit the property of his adopting parent as the statute under which he is adopted gives him. Coombs et al. v. Cook, 35 Okl. 326, 129 Pac. 698; Boaz et al. v. Swinney et al., 79 Kan. 332, 99 Pac. 621. This is the principal question appealing parties contend for.

Discussing the very statute which counsel claim confers the right of succession upon James Meshaya, Mr. Justice Hayes, in delivering the opinion for the court in the Coombs Case, says:

"What effect an adoption under the statute has upon the right of an adopted child to inherit from its adopting parent is not disclosed by the foregoing statute pleaded and proved, which states that adoption made in county courts shall be as binding as if done by special act of the General Council."

As we fully agree with the conclusion of the learned justice that the right of an adopted child to inherit from his adopting parent is not disclosed by this statute, and as it is conceded that James Meshaya was not entitled to inherit either under the common law or under the statute of descent and distribution in force at the time of the death of the allottee, it must follow that the right does not exist.

For the reasons stated, the judgment of the court below is reversed and the cause remanded, with directions to proceed in accordance with the views herein expressed.

All the Justices concur, except RAINEY, J., not participating.

On Petition for Rehearing.

PER CURIAM. Upon rehearing it is suggested by counsel for defendants in error that, if the cause is remanded for a new trial, they will be able to amend their pleadings and show that, under the construction placed upon the statutes involved herein by the Supreme Court of the Choctaw Nation, adopted children had the same status as natural children in the matter of inheriting the lands of adopting parents. This question was not in the case as formerly presented to this court, and it was not the purpose of the opinion to foreclose raising it in the trial court if, in the opinion of the judge thereof, it furnishes a proper subject for amendment.

The same may be said of the question raised by the third ground for reversal assigned by counsel for plaintiff in error: "Is the deed from Rhoda Jacobs and Emma Jacobs a valid deed?" This question was not passed upon by the trial court, and consequently was not subject to appellate review.

Without expressing an opinion upon either of these questions the cause will be reversed and remanded for a new trial.

As thus modified, the petition for rehearing is denied.

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(75 Okl. 70)

COMMON SCHOOL DIST. NO. 32 et al. v. INDEPENDENT SCHOOL DIST. NO. 56 et al. (No. 10499.)

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(Supreme Court of Oklahoma. June 10, 1919.)

(Syllabus by the Court.)

1. COURTS ⟸207(2) — ORIGINAL JURISDICTION OF SUPREME COURT—CONSTITUTIONAL PROVISIONS.

This court has power, under the provisions of section 2, art. 7, of the Constitution, to issue the common-law writ of certiorari, in cases where no appeal or proceeding in error lies, to bring up the record of commissions or boards created by law for review as to jurisdictional errors only.

2. SCHOOLS AND SCHOOL DISTRICTS ⟸39 — TRANSFER OF TERRITORY—CERTIORARI—JURISDICTION OF SUPREME COURT.

Where, on appeal from an order of the county superintendent of public instruction transferring territory to an independent school district, under section 2, art. 6, c. 219, Session Laws 1913, the county commissioners exceed their jurisdiction in affirming the order, in that the territory transferred exceeds 5 per cent. of the assessed valuation of the district from which the territory is transferred, writ of certiorari will lie from this court, and the order of the board of county commissioners will be set aside.

Original proceeding for writ of certiorari by Common School District No. 32 and others against Independent School District No. 56 and others to review and vacate an order by the county superintendent of public instruction of Creek county, affirmed on appeal by the board of commissioners of Creek county, transferring certain parts of District No. 32 to District No. 56 of said county. Order of board of county commissioners set aside.

C. B. Rockwood and W. V. Pryor, both of Sapulpa, for plaintiffs in error.

Speakman & Murrell, of Sapulpa, for defendants in error.

KANE, J. This is an original proceeding for a writ of certiorari for the purpose of having this court review and vacate an order made by the county superintendent of public instruction of Creek county and affirmed on appeal by the board of county commissioners of Creek county, transferring certain portions of common school district No. 32 of Creek county to independent school district No. 56 of said county.

[1, 2] Section 2, art. 6, c. 219, Session Laws 1913, and section 11, art. 2, c. 219, Session Laws 1913, together provide that appeal may be taken from the action of the county superintendent of public instruction transferring territory to an independent school district to board of county commissioners, and that the decision of the county commissioners, shall be final. There being no appeal or other adequate remedy, the writ of certiorari will lie to bring up the record of commissions or boards created by law for review as to jurisdictional errors only. Baker v. Newton et al., 22 Okl. 658, 98 Pac. 931; In re Benedictine Fathers of Sacred Heart Mission, 45 Okl. 358, 145 Pac. 494; Tiger et al. v. Creek County Court et al., 45 Okl. 701, 146 Pac. 912; Parmenter v. Ray, 158 Pac. 1183; Grady County v. Chickasha Cotton Oil Co., 164 Pac. 457, 458; Southern National Bank v. Wallace, 164 Pac. 461, 462.

"'Jurisdiction' is the power to hear and determine the subject-matter in controversy between parties to an action or in a statutory proceeding; to adjudicate or exercise any judicial power over them. It does not relate to the rights of the parties, as between each other, but to the power of the court." Parmenter et al. v. Ray, supra.

It is the contention of the petitioners that the board of county commissioners exceeded its jurisdiction in affirming an order of the county superintendent of public instruction transferring a portion of the territory of common school district No. 32 to independent school district No. 56. Section 2, art. 6, c. 219, Session Laws 1913, which provides for the transfer of territory to an independent school district, contains the following proviso:

"* * * And provided, further, that the boundary of any district shall not be changed in annexing territory to an independent district, or to a city or town, constituting an independent district, so that the assessed valuation of the original district shall be reduced more than five per cent. of the assessed valuation."

It is stipulated by the parties to the proceeding that making the proposed transfer would reduce the assessed valuation of common school district No. 32 more than 5 per cent. Counsel for defendants state that they are unable to find any law to sustain the position of the defendants, and ask that they be not required to file brief. It seems clear that the board of county commissioners has exceeded its jurisdiction, and that the order made by it affirming the order of county superintendent of public instruction transferring territory from common school district No. 32 to independent school district No. 56 is void. Counsel stipulate that the issuance of the writ of certiorari may be waived, and the case submitted upon an agreed statement of facts.

The board of county commissioners of Creek county having exceeded its jurisdiction, its order affirming the order of the county superintendent of public instruction,

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which order was also void, is a nullity, and the same is hereby set aside.

OWEN, C. J., and RAINEY, HARRISON, and JOHNSON, JJ., concur.

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(75 Okl. 125)

DUNKIN v. GALLOWAY. (No. 8618.)

(Supreme Court of Oklahoma. April 29, 1919. Rehearing Denied July 1, 1919.)

(Syllabus by the Court.)

1. EVIDENCE ⟸82—DEED TO LAND INHERITED BY INDIAN HEIRS—APPROVAL BY COUNTY COURT—STATUTE.

Chapter 198, Session Laws 1915, does not specifically require that an order of the county court approving a deed to lands inherited by full-blood Indian heirs shall contain specific findings as to all jurisdictional facts required by section 2 of said act to be alleged in the petition for such approval, and, though it might be the better practice that such order of approval contain such findings, yet, in the absence of such special findings, the order will be presumed to be based upon all the facts necessary to give it validity.

2. APPEAL AND ERROR ⟸856(1)—GROUND—REVERSAL.

Where a judgment does not disclose which of several grounds it is based upon, but is general in its terms, it will not be reversed if any one of such grounds is a valid basis for the judgment, and there is sufficient evidence to sustain it upon such ground.

Error from District Court, Jefferson County; Cham Jones, Judge.

Ejectment by J. O. Galloway against F. P. Dunkin. Judgment for plaintiff, and defendant brings error. Affirmed.

Bridges & Vertrees, of Waurika, for plaintiff in error.

Guy Green, of Waurika, for defendant in error.

HARRISON, J. This was a suit in ejectment by J. O. Galloway against F. P. Dunkin and for mesne profits on a tract of land in Jefferson county, the same being the N. E. ¼ S. E. ¼ and the E. ½ N. W. ¼ S. E. ¼ and N. ½ S. ½ S. E. ¼ of sec. 33, Tp. 4 S. R. 7 W.

Galloway relied upon the following chain of title: Allotment patent from Choctaw and Chickasaw Nations to Alvin Nelson; warranty deed from Nancy Nelson, sole surviving heir of Alvin Nelson, deceased, to him, J. O. Galloway; and the order of approval of said deed by the county court of McCurtain county. Copy of each instrument was attached to and made part of his petition.

Dunkin answered by a general denial, and for further defense alleged that he was in possession under a valid and subsisting lease from Alvin Nelson, deceased, to one C. P. Baker, duly assigned by Baker to the defendant Dunkin.

The various instruments of conveyance were introduced in evidence, and oral testimony heard on the issues presented. The court, after hearing the testimony and being advised in the premises, rendered judgment in favor of Galloway for the recovery of the land and for the sum of $120 as rents for the year 1915.

Defendant Dunkin appealed from such judgment, and presents the following propositions for reversal, to wit:

(1) That the deed from Nancy Nelson to Galloway was void.

(2) That the court erred in holding the lease upon which defendant relied to be an overlapping lease.

[1] In the first proposition it is claimed that the deed from Nancy Nelson to Galloway was void for the reason that chapter 198, Session Laws 1915, was not complied with by the county court in approving said deed, and that the failure of the court's order to comply with said act consisted in the failure to make the jurisdictional findings of fact which said act requires to be made. Said act, however, does not require the county court to make any specific findings of fact. Section 2 of said act requires that petitions for the approval of deeds shall contain the following information: The names of all grantors and grantees; the description of the land to be conveyed; the character and extent of the interest to be conveyed; the roll number and quantum of blood of the grantor and decedent; the permanent residence of decedent at the time of death; the relationship of each grantor to the decedent; and the names and relationship to the decedent of each heir who is not a grantor. But it does not require any specific finding of fact to be made by the county judge, and, while it might be the better practice to make such findings, yet, in the absence of proof to the contrary, the presumption is that the court acted upon a petition which alleged all the essential jurisdictional facts. Owen v. Holmes, 27 Okl. 140, 111 Pac. 320; Walker v. McKemie, 44 Okl. 468, 145 Pac. 359.

But, aside from the legal presumption in favor of the county court's order of approval, it appears from the record that the county court, in approving the deed in question, made a specific finding of fact upon every allegation which the petition for approval is required to contain. Hence the district court was correct in holding said deed valid and in decreeing the title to the land in controversy to plaintiff, Galloway.

[2] As to the second proposition it does not

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appear from the journal entry of judgment that the trial court made any findings in reference to the leases. The trial court rendered judgment decreeing that the plaintiff have and recover of and from defendant the land in question, describing it, and rendered judgment against defendant for the sum of $120 due as rents for the year 1915. No mention is made of the leases in the judgment, nor are any specific findings of fact made therein. It is a general judgment. Hence we are unable to say whether it was based upon the strength of plaintiff's deed or whether upon the fact that on the date of the execution of the lease under which defendant held there was then a valid and subsisting lease upon the premises from Ben McFarland, the guardian of Alvin Nelson, or whether upon the fact that defendant's lease was an overlapping lease and void, or whether, because of the failure of defendant to pay the rents due under his lease, it were a valid lease, or whether the judgment is based upon all these reasons.

If the judgment was based upon any one of said reasons, same being sufficient to sustain the judgment, and there being evidence to support it, the decree will not be reversed. The evidence in the case clearly warranted a judgment that plaintiff was entitled to possession by reason of defendant's failure to pay rent and the fact that the judgment does not disclose which ground it is based upon, and the fact that plaintiff in error has not pointed out the ground upon which it was based, we will not reverse the judgment when the record discloses sufficient grounds to sustain it. Gorman v. Carlock, 179 Pac. 38; Shawnee Life Ins. Co. v. Watkins, 53 Okl. 188, 156 Pac. 181; Tel. Co. v. Best, 56 Okl. 85, 155 Pac. 901.

The judgment is affirmed.

(75 Okl. 68)

FAUST v. FENTON. (No. 8498.)

(Supreme Court of Oklahoma. June 10, 1919.)

(Syllabus by the Court.)

1. FORCIBLE ENTRY AND DETAINER ⟸6(2)—TRIAL ISSUES.

In an action for forcible entry and detainer, the only issue for trial is the right of possession, and not the title to the land.

2. APPEAL AND ERROR ⟸1170(1)—TECHNICAL ERRORS.

Record examined, and *held*, that it does not appear that the errors complained of have probably resulted in a miscarriage of justice or constitute a substantial violation of any constitutional or statutory right.

Error from County Court, Woodward County; Clyde H. Wyand, Judge.

Action for forcible entry and detainer by Frank L. Fenton, administrator of the estate of B. F. Fenton, deceased, against George Faust. Judgment for plaintiff in justice's court, and, on defendant's appeal, there was a judgment against him, and he brings error. Modified and affirmed.

C. W. Herod, of Woodward, for plaintiff in error.

R. H. Nichols and S. M. Smith, both of Woodward, for defendant in error.

KANE, J. This was an action for forcible entry and detainer, commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below, before a justice of the peace. The justice of the peace rendering judgment in favor of the plaintiff, the defendant appealed to the county court, where judgment was also rendered against him, to reverse which this proceeding in error was commenced. Hereafter, for convenience, the parties will be called "plaintiff" and "defendant," respectively, as they appeared in the trial court.

The errors relied upon by counsel for defendants, as we gather from their brief, may be summarized as follows: (1) The trial court erred in striking out defendant's amended bill of particulars and answer. (2) The court erred in denying defendant's motion to make one Snyder a party defendant to the action. (3) The court erred in overruling defendant's motion to withdraw the notice to quit from the consideration of the jury. (4) The court erred in sustaining certain objections to certain evidence offered by the defendant. (5) The court erred in overruling certain objections made by the defendant to evidence offered by the plaintiff. (6) The court erred in giving certain instructions which were excepted to by defendant. (7) It was error of the court in instruction No. 5 to say that the damages were fixed by our statute at double the rental, and the court in instruction No. 7 gives the jury a rule that conflicts with instruction No. 5.

[1] When we consider that, in an action for forcible entry and detainer, the only issue for trial is the right of possession, and not the title to the land, we are satisfied that this case was properly tried upon the only issues that could be presented, and that none of the errors complained of constitute reversible error, with the possible exception of the last assignment, which it will not be necessary to notice on account of a remittitur filed in this court by the prevailing party, disclaiming any right to a judgment for damages.

[2] It will be observed that all of the errors assigned belong to the class enumerated in section 6005, Rev. Laws 1910, which

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provides that no judgment shall be set aside or new trial granted upon such grounds, unless in the opinion of the court, after an examination of the entire record, it appears that the errors complained of have probably resulted in a miscarriage of justice or constitute a substantial violation of any constitutional or statutory right.

After an examination of the entire record, we are convinced that this case was properly tried and decided by both the justice of the peace and county court.

On account of the remittitur hereinbefore referred to, it is not necessary to review the last assignment of error, predicated upon the instruction given by the court upon the question of the measure of damages. In pursuance of the remittitur, the part of the judgment allowing recovery of damages will be set aside, and, as thus modified, the judgment will be affirmed.

OWEN, C. J., and RAINEY, HARRISON, and JOHNSON, JJ., concur.

(75 Okl. 69)

ROBINSON v. BEATY. (No. 7222.)

(Supreme Court of Oklahoma. June 10, 1919.)

(Syllabus by the Court.)

1. CONTRACTS ⟸295(1)—PLEADING — SUBSTANTIAL PERFORMANCE—RECOVERY.

Since the rule of exact or literal performance has been relaxed, literal compliance with a building contract is not essential to a recovery thereon, but a performance thereof in all its material and substantial particulars is sufficient.

2. SUBSTANTIAL PERFORMANCE—EVIDENCE.

Record examined, and *held*, that the evidence reasonably tends to show a substantial performance of the building contract involved herein, in all its material and substantial particulars.

3. INDIANS ⟸13 — LIEN FOR MATERIAL — HOMESTEAD ALLOTMENT—EXEMPTION.

Where building material is used for the erection of a dwelling house upon the homestead allotment of a restricted Indian, which allotment, together with the surplus allotment, comprises a quarter section of land which is used by the owner as one farm, the materialman is not entitled to a lien upon the surplus allotment; the homestead allotment being exempt from such lien.

Rainey, J., dissenting.

Error from District Court, Bryan County; Jesse M. Hatchett, Judge.

Action by R. A. Beaty against Coleman Robinson. Judgment for plaintiff for part of the amount sought to be recovered, denying his claim to a lien, motions for new trial filed by each party overruled, and defendant brings error, and plaintiff files a cross-petition in error. Affirmed.

McPherren & Cochran, of Durant, for plaintiff in error.

Hayes & McIntosh, of Durant, for defendant in error.

KANE, J. This was an action on account to recover the purchase price of certain building material, and to foreclose a materialman's lien upon certain lands, commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below. Hereafter, for convenience, the parties will be called "plaintiff" and "defendant" respectively, as they appeared in the trial court.

The petition of the plaintiff was in the usual form and stated facts sufficient to constitute a cause of action. The answer of the defendant consisted of:

(1) A general denial.

(2) Allegations, in effect, that the defendant was a restricted member of the Choctaw Tribe of Indians, and the land upon which it was sought to fasten a lien, being his homestead allotment, was restricted land, and not subject to the lien of the materialman.

(3) An allegation charging failure of the plaintiff, who was a contractor and builder, to substantially comply with the building contract sued upon.

The amount alleged to be due under the contract was $1,500. Upon trial to a jury there was a verdict for the plaintiff in the sum of $1,200, for which sum judgment was rendered in favor of the plaintiff, the court also holding that the plaintiff was not entitled to a lien for the reason that it appeared that the building was erected upon restricted land; the same being the homestead allotment of the plaintiff. Thereafter plaintiff and defendant each filed motions for a new trial, which were overruled, whereupon the defendant commenced this proceeding in error the plaintiff filing his cross-petition in error.

The only ground for reversal assigned by counsel for the defendant is "that the verdict and judgment is not supported by the evidence." On the other hand, counsel for the plaintiff contends that, inasmuch as the material was furnished for the purpose of erecting a dwelling house upon a quarter section of land, which was used by the defendant as a single farm, the fact that the house was erected upon the portion of this entire tract constituting the homestead allotment of the defendant, which admittedly was not subject to the lien, did not prevent the lien from attaching to the remaining portion of the farm constituting the surplus allotment of the defendant, which admittedly was unrestricted land.

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[1] On the first proposition it is sufficient to say that we have examined the record carefully, and are satisfied that the evidence reasonably tends to show a substantial compliance with the contract on the part of the builder. Since the rule of exact or literal performance has been relaxed, literal compliance with a building contract is not essential to a recovery thereon, but a performance thereof in all its material and substantial particulars is sufficient. Keeler v. Herr, 157 Ill. 57, 41 N. E. 750; Evans v. Howell, 211 Ill. 85, 71 N. E. 854; Crouch v. Gutmann, 134 N. Y. 45, 31 N. E. 271, 30 Am. St. Rep. 608.

[2] Being satisfied that the evidence shows a substantial compliance with the contract, the contentions of counsel for the defendant must be denied.

[3] Section 3862, Rev. Laws 1910, by virtue of which the plaintiff claims he is entitled to a lien on the unrestricted portion of the defendant's land, reads as follows:

"Any person who shall, under oral or written contract with the owner of any tract or piece of land, perform labor, or furnish material for the erection, alteration or repair of any building, improvement or structure thereon, * * * shall have a lien upon the whole of said tract or piece of land, the buildings and appurtenances."

After citing this statute counsel for plaintiff say:

"It seems almost unnecessary in the face of this statute to argue that the lien in this case, in the absence of any restriction, would give a lien upon the entire 160 acres, but we contend that that is the case and will submit some authorities to that effect."

One of the cases cited, Montadon v. Deas, 14 Ala. 33, 48 Am. Dec. 84, is typical of the rest. In that case it was held that, if a party owns a section of land and contracts for a building on one corner of it, or fails to specify where the building should be placed, and it is erected on one corner of the section, the lien covers the whole tract if necessary to pay the debt. We do not deem these decisions to be in point. In the case at bar, while the defendant used the entire 160 acres as one farm still it was divided by the laws of the United States into two well-known legal subdivisions familiarly designated as homestead and surplus allotments, and this division was further emphasized by the circumstance that under the law the homestead was restricted, while the surplus allotment was unrestricted, land. Moreover, it will be observed that the statute provides that the materialman "shall have a lien upon the whole of said tract or piece of land, the buildings and appurtenances." This, it seems to us, means that the buildings for which the material was furnished must be so situated that the lien will attach, not only to the tract or piece of land, but to the buildings and appurtenances erected thereon for which the material was furnished.

We find no authorities holding, under similar statutes, that a lien may be created on any other land than the piece or parcel of land upon which the buildings themselves are erected, and we see no reason for making a novel exception to the general rule. The surplus and homestead allotments of restricted Indians are well-known subdivisions of the lands in the Indian Territory, part of this state, and it is also well known that the homestead allotment is restricted land, and not subject to mechanics' or materialmen's liens. Keel v. Ingersoll, 27 Okl. 117, 111 Pac. 214. Persons dealing with restricted Indians must take notice of these subdivisions.

For the reasons stated, the judgment of the court below is affirmed.

All the Justices concur, except RAINEY, J., who dissents.

RAINEY, J. (dissenting). I dissent. I agree that the lien did not attach to the restricted homestead, but I think it did attach to the unrestricted surplus; it being a part of the whole tract, which constituted a single farm.

(16 Okl. Cr. 684)

SMITH v. STATE. (No. A-3060.)

(Criminal Court of Appeals of Oklahoma. June 27, 1919.)

(Syllabus by Editorial Staff.)

1. COMMERCE ⇐33—UNLAWFUL TRANSPORTATION—DEFENSES.

Defendant's admission that he was conveying beer, and his contention that the three barrels belonged to three different named individuals, to whom he was merely taking the shipments from a depot as a drayman, and that the beer was a part of an interstate shipment into part of state formerly Oklahoma Territory, which consignees had a right to have conveyed to them from depot, did not bring him within protection of interstate commerce clause (Const. U. S. art. 1, § 8).

2. CRIMINAL LAW ⇐586 — CONTINUANCE — ABSENCE OF WITNESS—DILIGENCE—DISCRETION.

Applications for continuance are addressed to the sound discretion of the trial court.

3. CRIMINAL LAW ⇐594(1)—CONTINUANCE—DISCRETION.

The denial of an application for a continuance for absence of witnesses was not an abuse of discretion, where no diligence was used to obtain their attendance, and where the application showed that there was no likelihood of ever obtaining their attendance or taking their depositions.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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4. INTOXICATING LIQUORS ⇐233(3)—UNLAWFUL TRANSPORTATION—EVIDENCE.

In a prosecution for unlawful transportation of intoxicating liquor, a certified copy of the United States internal revenue collector's register of taxpayers for liquor dealers in the city, showing that defendant had paid both a retail and wholesale liquor dealer's tax, was admissible to rebut his testimony that he was conveying the three barrels of beer for other parties.

5. CRIMINAL LAW ⇐444—PAYMENT OF INTERNAL REVENUE TAX—NAME.

In a prosecution for unlawfully conveying intoxicating liquors, payment of a retail and wholesale liquor dealer's internal revenue tax in the name of "John B. Smith" was sufficiently identified with defendant by his testimony that his true name was "John B. Smith," and authorized admission of such payment.

Appeal from County Court, Garfield County; E. L. Swigert, Judge.

Bert Smith was convicted of a violation of the prohibitory liquor law, and he appeals. Affirmed.

L. C. McLean, of Enid, and E. C. Patton, of Oklahoma City, for plaintiff in error.

S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM, This is an appeal from the county court of Garfield county, wherein defendant, Bert Smith, whose full name is John B. Smith, was convicted of the crime of unlawfully conveying intoxicating liquor, and his punishment fixed at a fine of $200 and imprisonment in the county jail for 60 days. The evidence discloses that the defendant was caught in the act of conveying three barrels of bottled beer on the public streets of the city of Enid very early in the morning in the latter part of the month of March, 1917.

[1] Defendant, being caught with the goods, was compelled to admit that he was conveying beer, but contended that the three barrels belonged to three different individuals of the respective names of Gordon, Thompson, and Allen, and that he (defendant) was merely taking those shipments from the Rock Island depot for said parties as a drayman or transfer man, that said barrels of beer constituted a part of an interstate shipment of intoxicating liquors into that part of the state formerly Oklahoma Territory, and that the consignees had the right to have same conveyed from the depot to their respective residences or places of business, as held by this court in Gastineau v. State, 7 Okl. Cr. 512, 124 Pac. 464, and other cases to the same effect.

The facts testified to by the defendant do not place him within the protection of the opinions of this court in the cases relied upon. The evidence does not disclose or even create a reasonable doubt that defendant was transporting this beer to either the residence or place of business of either of the parties who were alleged to be the consignees.

If said parties were not fictitious, they were at least nonresidents of the city of Enid, and were total strangers to the defendant prior to the time he contends this conveyance was being made for them. They had no residence or place of business to which defendant could convey these barrels of beer in the city of Enid. None of them ever made an appearance, either to claim their beer, which, if defendant is to be believed, it was lawful for them to have conveyed, or as witnesses in behalf of defendant at the trial.

[2, 3] A continuance was asked for on account of the absence of these witnesses, and the application was properly overruled, because no diligence was used to obtain their attendance, and the application shows that there was no likelihood of ever obtaining their attendance or taking their depositions, as the whereabouts of each said party was unknown to the defendant personally. Applications for continuance are addressed to the sound discretion of the trial court. No abuse of discretion is shown in overruling the motion in this case.

[4] The introduction of the certified copy of the United States internal revenue collector's register of taxpayers for liquor dealers in the city of Enid, showing that John B. Smith had paid both a retail and wholesale liquor dealer's tax, was proper. It tended to rebut the testimony of defendant that he was conveying this large amount of beer for other parties.

[5] The contention that there was no evidence to connect the defendant with the payment of these taxes is untenable. The tax was paid in the name of "John B. Smith." Defendant testified his true name was "John B. Smith." That was sufficient identity of party paying the tax with the defendant to authorize the evidence to be admitted.

Other alleged errors are without merit. Under defendant's testimony, he is guilty of unlawfully conveying intoxicating liquors; especially is the evidence convincing of this fact as to the two barrels of beer alleged to have been consigned to Gordon and Thompson, and which defendant only contends he was taking from one depot to another, and intended to leave them on the depot platform at the Frisco depot. There is no contention on his part that these shipments were being conveyed by him to either the residence or place of business of either Gordon or Thompson.

The conviction in this case is just, and the judgment is affirmed.

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(16 Okl. Cr. 689)

PHILLIPS et al. v. STATE. (No. A-3237.)

(Criminal Court of Appeals of Oklahoma. July 9, 1919.)

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(Syllabus by Editorial Staff.)

CRIMINAL LAW ⟸1182 — APPEAL — AFFIRMANCE.

Where an appeal was perfected by filing in Criminal Court of Appeals a petition in error with case-made, but no brief was filed, and cause was submitted on Attorney General's motion to affirm for failure to prosecute appeal, and an examination of record discloses evidence sufficient to sustain conviction, and that appeal was without merit, judgment will be affirmed.

Appeal from County Court, Stephens County; J. W. Marshall, Judge.

Tom Phillips and Lester Keeter were convicted of a violation of the prohibitory liquor law, and they appeal. Affirmed.

J. B. Wilkinson, of Duncan, for plaintiffs in error.

W. C. Hall, Asst. Atty. Gen., for the State.

PER CURIAM. Tom Phillips and Lester Keeter were convicted on an information jointly charging that they did unlawfully convey 13 sacks of intoxicating liquor from a place in Stephens county unknown to a place about five miles southeast of the town of Comanche, and were each sentenced to be confined in the county jail for 90 days and to pay a fine of $300. From the judgment an appeal was perfected by filing in this court on January 8, 1918, a petition in error with case-made. No brief has been filed, and the cause was submitted on motion by the Attorney General to affirm the same for failure to prosecute the appeal. An examination of the record discloses that the evidence is sufficient to sustain the verdict; that the appeal is without merit.

The judgment is therefore affirmed. Mandate forthwith.

(16 Okl. Cr. 688)

HARRIS et al. v. STATE. (No. A-3116.)

(Criminal Court of Appeals of Oklahoma. June 30, 1919.)

(Syllabus by Editorial Staff.)

CRIMINAL LAW ⟸1182—APPEAL AND ERROR —RULE OF COURT—AFFIRMANCE.

Where an appeal was pending since August 16, 1917, and no brief was filed and no appearance made by defendants' counsel to orally argue cause when it was submitted, and the court, on examining the pleadings, instructions, exceptions, judgment, and sentence, finds no trial error prejudicial to either defendant, a judgment as to each would be affirmed, as required by Criminal Court of Appeals rule 9 (165 Pac. x).

Appeal from County Court, Tulsa County; H. L. Standeven, Judge.

J. M. Harris and Carl Burton were each convicted of the crime of unlawful possession of intoxicating liquor, and they appeal. Affirmed.

Ed Crossland, of Tulsa, for plaintiffs in error.

S. P. Freeling, Atty. Gen., for the State.

PER CURIAM. This is an appeal from the county court of Tulsa county, wherein the defendants, J. M. Harris and Carl Burton, were jointly tried and convicted of the crime of unlawful possession of intoxicating liquor, the said Burton being sentenced to pay a fine of $100 and to serve 30 days' imprisonment in the county jail, and the said Harris to pay a fine of $200 and to serve 30 days' imprisonment in the county jail. This cause has been pending in this court since the 16th day of August, 1917. No brief has been filed and no appearance was made at the date this cause was submitted by counsel representing the defendant to orally argue the same.

Rule 9 of this court (165 Pac. x) provides:

"When no counsel appears, and no briefs are filed, the court will examine the pleadings, the instructions of the court, and the exceptions taken thereto, and the judgment and sentence, and, if no prejudicial error appears, will affirm the judgment."

An examination of the pleadings, instructions, judgment, and sentence fails to disclose any error committed in the trial prejudicial to either defendant.

In conformity with rule 9, supra, the judgment as to each defendant is affirmed.

(16 Okl. Cr. 687)

HARRIS et al. v. STATE. (No. A-3204.)

(Criminal Court of Appeals of Oklahoma. June 30, 1919.)

(Syllabus by Editorial Staff.)

CRIMINAL LAW ⟸884, 1184—VERDICT—SENTENCE.

Where jury by one verdict assessed a fine of $50 and 30 days' imprisonment, and by another a fine of $500 and 6 months' imprisonment, without designating in either verdict the name of either H. or D., jointly tried for unlawful possession of intoxicating liquor, it was impossible to say that they showed an intention to give H. the maximum punishment, and court's maximum sentence against him would be modified to provide a fine of $50 and an imprisonment of 30 days.

Appeal from County Court, Tulsa County; H. L. Standeven, Judge.

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J. M. Harris and Carl Burton were each convicted of the crime of unlawful possession of intoxicating liquor, and they appeal. Modified and affirmed as to Harris. Affirmed as to Burton.

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Ed Crossland, of Tulsa, for plaintiffs in error.

S. P. Freeling, Atty. Gen., for the State.

PER CURIAM. This is an appeal from the county court of Tulsa county, wherein the defendants, J. M. Harris and Carl Burton, were each convicted upon a joint trial for the crime of unlawful possession of intoxicating liquor.

This appeal was filed in this court on the 24th day of November, 1917. No brief has been filed or no appearance made by counsel for plaintiffs in error to orally argue the cause at the date of its submission.

The jury returned two separate verdicts assessing a penalty of a fine of $50 and 30 day's imprisonment in one verdict and a fine of $500 and 6 months' imprisonment in the other verdict, but failed to designate in either verdict the name of either defendant. Upon such verdicts the court pronounced the minimum sentence against the defendant Burton and the maximum sentence against the defendant Harris. While it is clear from the verdicts that it was the intention of the jury to find each defendant guilty as charged, it is impossible to say, however, that it clearly appears from the verdicts that it was the intention of the jury to give the defendant Harris the maximum punishment.

It is the opinion of the court, therefore, that as to the defendant Harris, the judgment should be modified to provide a punishment of $50 fine and 30 days' imprisonment in the county jail, and as thus modified that the same be affirmed, and that the judgment against the defendant Burton be affirmed; and it is so ordered.

(16 Okl. Cr. 690)

ABERNATHY v. STATE. (No. A-3241.)

(Criminal Court of Appeals of Oklahoma. July 9, 1919.)

(Syllabus by Editorial Staff.)

CRIMINAL LAW ⇐1182 — BRIEFS — AFFIRMANCE.

Where defendant perfected an appeal by filing a petition in error with case-made, but no brief was filed, and an examination of the record shows evidence sufficient to sustain the conviction, and that he had a fair and impartial trial, without material error committed, the judgment will be affirmed.

Appeal from County Court, Pontotoc County; Orel Busby, Judge.

A. N. Abernathy was convicted of a violation of the prohibitory liquor law, and appeals. Affirmed.

King & Crawford, of Ada, for plaintiff in error.

W. C. Hall, Asst. Atty. Gen., for the State.

PER CURIAM. A. N. Abernathy was convicted on a charge that he did sell to one Amon Walker intoxicating liquor, to wit, four-ounce bottle of Jamaica ginger, and in accordance with the verdict of the jury, was sentenced to be confined in the county jail for 30 days and to pay a fine of $50. From the judgment an appeal was perfected by filing in this court on January 15, 1918, a petition in error with case-made. No brief has been filed. An examination of the record discloses that the evidence is sufficient to sustain the verdict. It appears that the plaintiff in error had a fair and impartial trial, and no material error was committed.

It follows that the judgment should be, and the same is hereby, affirmed.

Mandate forthwith.

(104 Kan. 84; 105 Kan. 174)

FRANKOVICH et al. v. WEIGANT. (No. 21826.)

(Supreme Court of Kansas. Jan. 11, 1919. On Rehearing, July 5, 1919.)

(Syllabus by the Court.)

MORTGAGES ⇐33(5)—DEED WITH OPTION TO REPURCHASE.

The instruments executed by the plaintiffs examined, and *held* clearly to evidence a deed with an option to purchase back within a year —which option was not exercised.

Appeal from District Court, Doniphan County.

Suit by Michael Frankovich and another against Albert C. Weigant. Judgment for plaintiffs, and defendant appeals. Reversed, with direction to enter judgment for defendant.

J. J. Baker, of Troy, for appellant.

Alcid Bowers and C. Dubach, both of St. Joseph, Mo., for appellees.

WEST, J. The plaintiffs sued to have a certain deed declared a mortgage and for an accounting by the grantee. The defendant admitted the execution of the deed and the accompanying contract, and alleged that he had purchased the land subject to two mortgages, one of which he had paid off and had paid the interest on the other, and also taxes on the land and money for certain improvements thereon, and further alleged that

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when the deed was executed the plaintiffs owed him certain sums which were canceled by the conveyance. The deed covering about 38 acres of land recited a consideration of $5,000, and warranted the title in the grantors, except mortgages for $2,650 and $1,500, "which grantee assumes as part of purchase price." There was also a contract, executed and acknowledged by the plaintiffs, which recited that the latter had sold and conveyed by warranty deed the land in question, the consideration being the assumption of the two mortgages already referred to, and the cancellation of certain indebtedness owed to the grantee, after which came the following:

"Therefore as a separate and subsequent agreement this option to purchase is given and contract made and it is agreed that first party will sell and convey to either Anna Frankovich or Michael Frankovich the land above described and they are given the option to purchase the same at any time within one year from date hereof by paying the first party, his heirs or assigns, a sum equal to the full amount paid for said land by first party as aforesaid, together with all other money expended by him on said land hereto, including taxes, improvements, interest on any mortgage indebtedness that may be paid together with 8 per cent. per annum, interest on said sums, and the assumption by second party or either of them of any unpaid indebtedness on mortgages aforesaid of record or any taxes, liens or indebtedness."

Also:

"It is also expressly understood between the parties hereto that the deed heretofore made and given by second parties hereto to first party, was intended as an absolute conveyance in fee simple and in no wise as security for debt."

The case was tried by the court, and the issues were found in favor of the plaintiffs, and the defendant was adjudged to be indebted to them in the sum of $1,000. The defendant appeals and insists that the deed was not a mortgage, and that in any event the judgment against him is excessive.

Counsel have presented able and admirable arguments and briefs in support of their contentions. We regard the transaction between the parties as one in which the plaintiffs conveyed the land to the defendant in satisfaction of what they owed him, he to pay the existing mortgages on the land, with the privilege on the part of the plaintiffs to repurchase the land within the time and on the terms fixed by the accompanying contract. McNamara v. Culver, 22 Kan. 661; Yost v. Bank, 66 Kan. 605, 72 Pac. 209; Martin v. Allen, 67 Kan. 758, 74 Pac. 249; Root v. Wear, 98 Kan. 234, 157 Pac. 1181.

The defendant testified that he was to hold the land for a certain length of time so that if they wanted to redeem it they could, but that Mrs. Frankovich told him to trade it or sell it, that she would never move back to Wathena, and to do whatever he liked with the place, and that he traded it. Mr. Dubach, a friend of the plaintiffs who seems to have had much to do with the arrangement between the parties, testified that before the end of the first year he saw the defendant, who told him that he had collected the rent and applied it to his claim and the payment of the interest on the mortgage; that he (Dubach) told the defendant that the plaintiffs wanted the time extended for another year, and that if the defendant did not want to do that the witness would pay him his money and let him convey the land back to the plaintiffs, and the witness would make his arrangements with him to secure the money; that the defendant said he thought he would have a sale for the land about the first of March, and would rather leave it as it was, as he did not have the exact amounts figured up; that he again saw the defendant about a settlement, and was asked by him if he (Dubach) was willing to take the place of the Frankoviches and pay him his money, but they did not come to any agreement.

Mrs. Frankovich testified that the defendant said if she would deed the land to him she could buy it back inside of a year; that she did not take any interest in the contract in which he agreed to sell them back the land; that after more than a year the defendant talked to her about trading the land for a restaurant, but she told him Mr. Dubach would look after it; that, when she was talking to him about giving him a deed to secure him, she told him to try to sell the place, "that we did not want it"; that, after the deed had been made some time, she told him to sell the place, and he said he would do his best to sell it; that she knew she had to exercise her option within a year, but did not make any offer to do so within that time. She testified that shortly after the deed was made the defendant mailed her something which she threw in the fire, and did not know whether it contained the notes she had given him or not; and, asked why she thought the package was the notes, she said, "I just thought it was those notes."

The defendant testified that he traded the land for some St. Joseph property and something like $1,600 to boot; that he took the property at $600; that his grantee paid one mortgage, and he (the defendant) paid the other, which was for $1,500.

Mr. Dubach testified that the landlord's share of the fruit from the tenant on the farm for 1915 and 1916 should have been from $800 to $900. The defendant claimed to have received $150 or $175 the first year, but kept no record the second year. There was testimony that the land was worth $6,000, although the defendant claimed it was only worth about $125 an acre.

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There is nothing in all the testimony, except a slipshod course of dealing, to indicate that the Frankoviches had any purpose or desire to purchase back the land within a year, and they seem to have taken very little interest in the affair after the conveyance was made. The package which evidently contained the notes owing by them to the defendants was burned. It does appear that Mr. Dubach wanted to save something for them and that the defendant for some time talked as if he might, if they should make a settlement or he should make a sale, allow them something. But the land was his, and their legal right to buy back was not exercised within the time covered by the contract. Their indebtedness had been paid, the mortgages on the land had been taken care of, and it is difficult to see on what theory they can hold the defendant liable for any profit he may have made on the land after holding it something like two years.

The deed and the contract clearly evidence the contract on which the minds of the parties met, and nothing occurred subsequently to destroy its binding force. Elston v. Chamberlain, 41 Kan. 354, 21 Pac. 259.

The judgment is reversed, with directions to enter judgment for the defendant.

All the Justices concurring.

On Rehearing.

Upon a rehearing of this case no additional briefs were filed, but the presentation, orally, has been carefully considered.

It was strenuously insisted that the statement in the former opinion to the effect that Mr. Dubach and the defendant talked over the matter of the former taking the place and paying the money, but did not come to any agreement, was not borne out by the testimony. But the transcript was sent for, and shows that this discussion ended in a talk or promise of settlement, rather than in a settlement.

Finding no sufficient reason to change what has already been written, the former opinion will be adhered to.

All the Justices concurring.

(25 N. M. 305)

WATTERS v. TREASURE MINING & REDUCTION CO. et al. (No. 2171.)

(Supreme Court of New Mexico. Nov. 12, 1918. Rehearing Denied June 28, 1919.)

(Syllabus by the Court.)

1. JUDICIAL SALES ⟸42 — APPLICATION TO SET ASIDE SALE—PARTIES—PURCHASER.

Where a judicial sale has been confirmed, the purchaser has such an interest as to require notice to him of an application to set aside the sale. He is an indispensable party to the proceeding, and his omission is jurisdictional. This proposition is supported by all the authorities.

2. APPEAL AND ERROR ⟸783(1), 1166—REVERSAL OR DISMISSAL — WANT OF PROPER PARTIES.

A want of proper parties below appearing upon the face of the record requires a reversal or dismissal on appeal, unless the objection has been waived.

3. APPEAL AND ERROR ⟸887—ADDITIONAL PARTY—APPLICATION ON APPEAL.

An application for the first time on appeal to add a new party comes too late, although such party might have been joined in the original action.

Appeal from District Court, Socorro County; M. C. Mechem, Judge.

Suit by Thomas E. Watters as trustee, to foreclose a mortgage, in which there was a confirmed foreclosure sale and a distribution of purchase price, after which the Treasure Mining & Reduction Company and others moved to set aside the sale. Motion denied, and movants appeal. Appeal dismissed.

R. P. Barnes and E. W. Dobson, both of Albuquerque, for appellants.

J. G. Fitch, of Socorro, for appellee.

ROBERTS, J. On the 4th day of January, 1917, a sale of certain property theretofore ordered sold by decree of the court in foreclosure proceedings was made by Milton J. Helmick, as special master. At such sale H. L. Gary, of Kansas City, Mo., was the purchaser. Gary was not a party to the suit. On the 6th day of January thereafter an order was entered by the court approving and confirming such sale so made by the special master. The purchase price was paid and distribution thereof made. On the 24th day of September, 1917, appellants filed their motion in said cause, and moved the court to set aside the sale so made. Gary, the purchaser, was not made a party to the proceeding, and was not notified of the filing of said motion. He did not appear in the court below. Thomas E. Watters, as trustee, appeared and resisted the motion. The court refused to set aside the sale, and appellants have appealed.

[1] Upon the submission of the case to this court, appellee suggested the failure of appellants to make Gary a party or to serve him with notice, and asks the court to dismiss the appeal. It is well settled that, where a judicial sale has been confirmed, the purchaser has such an interest as to require notice to him of an application to set aside the sale. He is an indispensable party to the proceed-

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ing, and his omission is jurisdictional. This proposition is supported by all the authorities. See note to the case of Miller v. Henry, 105 Ark. 261, 150 S. W. 700, Ann. Cas. 1914D, 754; 16 R. C. L. "Judicial Sales," § 74. In the case of Schulz v. Hasse, 227 Ill. 156, 81 N. E. 50, the court said:

"The sale could not be set aside without first notifying the purchaser, Maria Hatsch, and making her a party. Dunning v. Dunning, 37 Ill. 306; Comstock v. Purple, 49 Ill. 158; Roberts v. Clelland, 82 Ill. 538. We cannot find from this record that she was made a party to these proceedings or notified in any way. It is indispensable that she be notified in order to set aside the sale."

In the case of Ellguth v. Ellguth, 250 Ill. 214, 95 N. E. 169, the court said:

"If appellant desired to insist upon errors, not affecting the jurisdiction of the court, which could only be remedied by setting aside the sale, it was indispensable that Boguszewski, the purchaser, should be notified and made a party. Schulz v. Hasse, 227 Ill. 156 [81 N. E. 50]. The action of the court in confirming the sale to Boguszewski must therefore be sustained."

As the only relief sought was the order setting aside the confirmation of the sale, and the purchaser, Gary, was not a party to the proceeding, it is apparent that the lower court could not grant the desired relief, and there is nothing for review in this court.

[2, 3] Appellants have filed, in this court, a motion to be allowed at this time to make Gary a party to the proceedings. No authority is cited in support of such right, and we believe that none can be found. In 3 C. J. p. 1035 (section 1018) it is said:

"A want of proper parties below appearing upon the face of the record requires a reversal or dismissal on appeal, unless the objection has been waived."

And in 3 C. J. p. 768, it is said:

"An application for the first time on appeal to add a new party comes too late, although such party might have been joined in the original action."

This court, therefore, has no right to grant the motion. Gary, the purchaser, had a right to be heard in the court below upon the application to set aside the confirmation of the sale. Should he be made a party now, this court would be attempting to bind him by a judgment, or the reversal of a judgment, entered in the court below, to which he was not a party and had no opportunity of being heard.

For the reasons stated, the appeal will be dismissed; and it is so ordered.

HANNA, C. J., and PARKER, J., concur.

(54 Utah, 474)

LEE v. PRICE et al. (No. 2270.)

(Supreme Court of Utah. June 2, 1919.)

CONSTITUTIONAL LAW ⟸7 — AMENDMENTS —"ENTERED" ON JOURNALS.

Under Const. art. 23, § 1, providing that proposed amendments to the Constitution shall be entered on the journals of the two houses, it is not necessary to enter a proposed amendment upon the journals in full, but entry of an identifying reference is sufficient; "entered" not necessarily meaning to copy or to transcribe.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Enter.]

Petition for writ of prohibition by Arthur J. Lee against Price, a municipal corporation, and others. Writ denied, and complaint dismissed.

L. A. McGee, of Price, for plaintiff.

Ferdinand Ericksen, of Salt Lake City, for defendants.

WEBER, J. Arthur J. Lee, a resident and taxpayer of Price, a city of the third class, commenced this action in this court to have defendants prohibited from selling and disposing of certain municipal bonds, the issue and sale of which had previously been authorized by the qualified electors of said Price at a special election duly called and regularly held "for the purpose of raising money for the purpose of supplying Price, Carbon county, Utah, with water, and to that end to improve the works for supplying said water, which said works are owned and controlled by said Price." The plaintiff alleges that the total assessed valuation of the property of Price upon which the bond issue was based is $1,729,142; that the municipality at the time of the election and at the time of the filing of the suit had a bonded indebtedness of $45,000, and that it had in its sinking fund for the payment and redemption of outstanding bonds the sum of $8,000.64; that as a city of the third class it had no legal right or authority to become indebted in the aggregate with all other indebtedness in any amount in excess of 8 per cent. of the value of the taxable property for the purpose of supplying said city with water or for any other purpose whatsoever and, for the reasons aforesaid, no bonds could be lawfully issued for any amount in excess of approximately $101,000, whereas the city claims to have the right to bond in the sum of $170,000, upon the basis of 12 per cent. of the assessed valuation of the property within the municipal boundaries.

The plaintiff prays that a writ of prohibition be issued prohibiting and enjoining the defendants, and each of them, from issuing, negotiating, or selling any of said bonds of said city in excess of $101,000, and that of the said proposed bond issue of $170,000 the amount of $69,000 be declared invalid and

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to be in excess of the debt limit of said city.

Defendants have interposed a demurrer to the complaint upon the ground that it does not state facts sufficient to justify the issuance of such a writ, and does not state facts sufficient to constitute a cause of action.

This proceeding raises the question as to the validity of an amendment to the Constitution of the state of Utah, same being an amendment to section 4 of article 14, in relation to the limit of indebtedness of counties, cities, towns, and school districts and authorizing cities of the third class to incur larger indebtedness than permitted under the theretofore existing Constitution for the purpose of raising money for supplying third class cities with "water, artificial light, or sewers, when the works for supplying such water, lights and sewers shall be owned and controlled by the municipality." Under the Constitution as it existed before the amendment the limitation of such indebtedness was not to exceed 8 per cent. while under the provisions of the amendment the maximum of such indebtedness was raised to 12 per cent. of the assessed valuation of the taxable property within the municipality.

Section 1, article 23, of the Constitution, prescribing how amendments may be made, reads as follows, so far as pertinent to this inquiry:

"Any amendment or amendments to this Constitution may be proposed in either house of the Legislature, and if two-thirds of all the members elected to each of the two houses, shall vote in favor thereof, such proposed amendment or amendments *shall be entered on their respective journals* with the yeas and nays taken thereon. * * * (Italics ours.)

It is alleged that Comp. Laws 1917, § 792, being the authority under which the city of Price proceeded to order and hold the bond election above described, was "attempted to be enacted by the Legislature of the state of Utah pursuant to the provisions of section 4, article 14, of the Constitution of the state of Utah which section of the Constitution was attempted to be amended by virtue of a resolution proposed and introduced as House joint resolution by Mr. Davis in the House of Representatives, one of the houses of the Legislature of the state of Utah, on or about the 4th day of February, 1909, but which said resolution so proposed was not entered on the respective journals of the two houses of the Legislature as required by section 1, article 23, of the Constitution of the state of Utah"; that is to say, that the resolution above described was not entered in the House Journal except by the way of an identifying description as follows: "H. J. R. No. 6 by Mr. Davis entitled 'A Joint Resolution Proposing an Amendment to Section 4 of Article 14 of the Constitution of the State of Utah, in Relation to the Limit of Indebtedness of Counties, Cities, Towns and School Districts,'" and that for the reason aforesaid the proposed amendment to the Constitution is invalid and of no effect, and consequently the statute under the provisions of which the city proceeded to bond is unconstitutional and void.

Comp. Laws Utah 1917, § 792, reads as follows:

"Any city or town in this state is hereby authorized to incur an indebtedness not exceeding in the aggregate, with all other indebtedness, eight per centum of the value of the taxable property therein for the purpose of supplying such city or town with water, artificial light, or sewers when the works for supplying such water, light, and sewers shall be owned and controlled by the municipality; provided, that cities of the third class and towns may become indebted to an amount not exceeding in the aggregate, with all other indebtedness, twelve per centum of the value of the taxable property for the purpose of supplying such city or town with water, artificial light, or sewers when the works for supplying such water, light, and sewers shall be owned and controlled by the municipality, when the proposition to create such debt shall have been submitted to the vote of such qualified electors as shall have paid a property tax in the year preceding such election and a majority of those voting thereon shall have voted in favor of incurring such debt."

The parties have stipulated what purports to be the full proceedings had by the respective houses of the Legislature affecting said proposed amendment, and from the stipulation it appears that in the Senate Journal the resolution proposing the amendment was set out in full; that in the proceedings of the House of Representatives it was not set out at length, but was described as follows:

"H. J. No. 6 by Mr. Davis entitled 'A Joint Resolution Proposing an amendment to Section 4, of Article 14, of the Constitution of the State of Utah, in Relation to the Limit of Indebtedness of Counties, Cities, Towns and School Districts.'"

It is further stipulated by the parties that the identical resolution as set out in the proceedings of the Senate was duly enrolled and engrossed, signed by the presiding officers of the Legislature and the Governor, filed with the secretary of state, published in at least one newspaper in each county of the state for two months immediately preceding the next general election (held November 8, 1910), at which time the amendment was separately submitted to the electors for approval or rejection, and that at said election a majority of the electors voting thereon approved the same; the vote being for the amendment 10,018 and against it 5,652.

From the foregoing statement of facts it will be observed that the only question for determination is whether or not the amendment herein described was proposed in the manner required by section 1, article 23, of

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our state Constitution, inasmuch as it appears that it was not entered in full or at length upon the respective journals of the two houses of the Legislature.

This inquiry involves a construction of the language employed, "such proposed amendment or amendments shall be *entered* on their respective journals." (Italics ours.) The provision just quoted is mandatory, and if the verb "entered" is synonymous with or means "entered at large" or "entered in full," the constitutional provision has not been complied with. In our opinion, "to enter" does not necessarily mean "to copy" or "to transcribe," and to enter upon the journals does not imply that an amendment must be copied in full or entered at large upon the journals of both houses of the Legislature or of either of them. Among the framers of our state Constitution were lawyers, jurists, and publicists of signal ability and varied experience. Their work was done with care and deliberation. At the time the constitutional convention was in session (1895) the courts of last resort of California, Kansas, Nebraska, and Maryland had construed the phrase in question, and had held that a constitutional requirement that an amendment shall be "entered" on the journals was sufficiently complied with by an entry on the journals of an identifying reference. Had the members of the constitutional convention not taken the view then entertained and indorsed by the courts of the states named they would certainly have made themselves clearly understood, and would have said "entered in full" or "entered at large," as they did in section 8 of article 7 of the Constitution in which it is required that when a bill passed by the Legislature is not approved by the Governor and is returned by the executive with his objections, the house it originated in "shall *enter* the objections *at large* upon its journal." (Italics ours.)

Ever since the adoption of the Constitution the practice in the Legislature has been to enter proposed amendments by reference only and not in full. Referring to the fact that according to previous custom amendments had been spread at length upon the journals of both houses in Iowa, the majority opinion of the Supreme Court of that state, in Koehler & Lange v. Hill, 60 Iowa, 543, 14 N. W. 738, 15 N. W. 609, in which it was held that the prohibition amendment adopted in 1882 was invalid because it had not been entered in full upon the journals of the Utah Legislature said:

"Here we have a legislative construction of the Constitution which should not and cannot be ignored."

By parity of reasoning we may well arrive at the conclusion from the fact that no proposed amendment had ever been entered in full upon the journals of the Utah Legislature that:

"Here we have a legislative construction of the Constitution which should not and cannot be ignored."

The only purpose of entering a proposed amendment upon the journals is to keep a record that will be sufficiently certain to identify the proposition to be submitted to the people, and that the identical amendment proposed shall be the one voted upon by the electors. In the instant case it is conceded that the proposed amendment was submitted to the people and adopted by an overwhelming majority of the electors voting thereon. In our opinion it would do violence to both the spirit and letter of the law to hold that the formal entry on the legislative journals is subject to some technical criticism, and that therefore the amendment should be declared void and invalid and the expressed will of the people thwarted. In the opinion in the "Prohibitory Amendment Cases," 24 Kan. 499, Mr. Justice Brewer, who thereafter served with distinction as a member of the Supreme Court of the United States, brushed aside all sophistry and all technicalities, and discussed the question under consideration in these clear and forceful words:

"Is a proposition to amend the Constitution in the nature of a criminal proceeding, in which the opponents of change stand as defendants in a criminal action, entitled to avail themselves of any technical error or mere verbal mistake; or is it rather a civil proceeding, in which those omissions and errors which work no wrong to substantial rights are to be disregarded? Unhesitatingly, we affirm the latter. * * *

"Again, in constitutional changes the popular voice is the paramount act. While to guard against undue haste and temporary excitement, to prevent unnecessary and frequent appeals to constitutional amendments, the assent of two-thirds of the Legislature is prescribed as a condition precedent, yet, after all, that which determines constitutional changes is the popular will. This is a government by the people, and, whenever the clear voice of the people is heard, Legislatures and courts must obey. True, a popular vote without previous legislative sanction must be disregarded. There is no certainty that all who could would take part in such a vote, or that they who did, all realize that it was a final action. It lacks the sanction of law, is a disregard of constitutional methods and limitations, and should be taken as a request for a change, rather than as a change itself. But, notwithstanding this, legislative action is simply a determination to submit the question to popular decision. It is in no sense final. No number of Legislatures, and no amount of legislative action, can change the fundamental law. This was made by the people, who alone can change it. The action of the Legislature in respect to constitutional changes is something like the action of a committee of the Legislature in respect to the legislative disposition of a bill. It presents, it recommends, but it does not decide. And who ever thought of declaring a law invalid by reason of any irregularities in the

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proceedings of the committee which first passed upon it? It is the legislative action which is considered in determining whether the law has been constitutionally passed; and it is the popular action which is principally to be considered in determining whether a constitutional amendment has been adopted."

Other cases supporting the doctrine adopted by Kansas are: Oakland Pav. Co. v. Tompkins, 72 Cal. 5, 12 Pac. 801, 1 Am. St. Rep. 17; Thomason v. Ashworth, 73 Cal. 73, 14 Pac. 615; People v. Strother, 67 Cal. 624, 8 Pac. 383; West v. State, 50 Fla. 154, 39 South. 412; Worman v. Hagan, 78 Md. 152, 27 Atl. 616, 21 L. R. A. 716; In re Senate File 31, 25 Neb. 864, 41 N. W. 981; Gottstein v. Lister, 88 Wash. 462, 153 Pac. 595, Ann. Cas. 1917D, 1008; Cudihee v. Phelps, 76 Wash. 314, 136 Pac. 367.

Both because of our conception of what should be the law and for the reason that we are supported by the weight of authority we conclude that it is not necessary to enter in full a proposed constitutional amendment upon the journals of the Legislature; that the amendment in question was properly adopted and is valid, and that the bonds offered for sale by the city of Price are not invalidated because of any reason assigned in plaintiff's complaint. It follows that the demurrer interposed by defendants should be sustained, that the writ of prohibition prayed for by plaintiff should be denied, and that the plaintiff's complaint should be dismissed. Such is the order.

(20 Ariz. 516)

STATE et al. v. INTERNATIONAL SMELTING CO. (No. 1667.)

(Supreme Court of Arizona. July 2, 1919.)

1. TAXATION ⟸493(4)—ORDERS APPEALABLE—APPEAL FROM BOARD OF EQUALIZATION.

Order of Superior Court on taxpayer's appeal from board of equalization, under Civ. Code 1913, par. 4887, is appealable.

2. TAXATION ⟸493(1)—ASSESSMENT—APPEAL—SUPERIOR COURT.

Superior court, under Civ. Code 1913, par. 4887, *held* without jurisdiction of appeal by taxpayer dissatisfied with amount of assessment of mills and smelters for reduction of ore, as fixed by state tax commission and board of equalization; the matter being wholly within province of state tax commission's duties.

Ross, J., dissenting.

Appeal from Superior Court, Gila County; G. W. Shute, Judge.

Proceedings by the International Smelting Company protesting against tax assessment. From order of superior court, the State and the County of Gila appeal. Vacated and remanded, with instruction.

Wiley E. Jones, Atty. Gen., and L. B. Whitney, Clyde M. Gandy, F. J. K. McBride, and Alexander B. Baker, Asst. Attys. Gen., for appellants.

Edward W. Rice, of Globe, for appellee.

CUNNINGHAM, C. J. The property assessed, the valuation of which is the subject-matter of this action, consisted of mills and smelters for the reduction of ores. The taxpayer was dissatisfied "with the amount of its assessment as fixed by the state tax commission and the board of equalization," and therefore gave notice, filed the protest, paid the taxes, and filed the receipt for such payment in the office of the clerk of the board of supervisors on the 15th day of September, 1917. The papers were filed in the superior court, and the procedure indicated by paragraph 4887, R. S. A. 1913, was substantially followed. The court denied a motion to dismiss the appeal, and a trial resulted in favor of the plaintiff, "that the tax as levied by the tax commission is excessive; that the amount of taxes be fixed in the sum of $2,000,000 in round figures; and that execution issue as provided by law.

The state and county appeal. The taxpayer moves to dismiss the appeal for the reason that the order made is not appealable. In State v. Inspiration Consolidated Copper Co. (cause No. 1668) 181 Pac. 955, now decided, we have held adversely to such contention.

[1] The motion to dismiss this appeal is consequently denied.

[2] The judgment rendered in this cause was rendered in a matter wholly within the province of the state tax commission's duties, of which the superior court acquired no jurisdiction, through the course of the proceedings by which the matter came before the court. We have considered all of the questions involved in this case in cause No. 1668, supra, and on the authority of that case the judgment is vacated, and the cause remanded to the lower court, with instructions to dismiss the action.

Vacated and remanded, with instructions.

BAKER, J., concurs.

ROSS, J. I dissent for the reasons set forth in case No. 1668, State of Arizona and the County of Gila, Appellants, v. Inspiration Consolidated Copper Co., a Corporation, Appellee, 181 Pac. 955, just decided.

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(20 Ariz. 518)

WEDGWORTH et al. v. WEDGWORTH.
(No. 1622.)

(Supreme Court of Arizona. July 2, 1919.)

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1. PLEADING ⟸192(2), 367(2) — INDEFINITENESS—SUFFICIENCY AGAINST GENERAL DEMURRER.

In an action to enjoin interference with the flow of irrigating water in a ditch, if the description of the ditch in the complaint was not specifically sufficient to inform defendants as to its location, or to designate which of several ditches might be referred to, the remedy was by motion to make the complaint more definite and certain, and as against general demurrer it was sufficient.

2. WATERS AND WATER COURSES ⟸144½ — ACQUIESCENCE IN USE OF DITCH—ESTOPPEL TO DENY RIGHT.

Long-continued use by plaintiff of a ditch to conduct water purchased by him from an irrigation company, such use being under a claim of absolute and permanent right, and acquiesced in by defendants, not only by silence but by affirmative acts and conduct, *held* to give rights amounting to more than a mere revocable license; the doctrine of estoppel by acquiescence applying to prevent defendants from denying plaintiff's right.

3. WATERS AND WATER COURSES ⟸130—IRRIGATION—"SURPLUS WATER."

Surplus water is not subject to prior appropriation for any use, so that any property right is established by such appropriation and use, "surplus water" being water running off from ground which has been irrigated; water not consumed by the process of irrigation; water which the land irrigated will not take up; waste water.

4. WATERS AND WATER COURSES ⟸130 — IRRIGATION—WASTE WATER.

If waste water runs upon land, the owner may capture and use it, but that is the limit and extent of his right; he not being entitled to relief imposing on the owner permitting the waste or escape of the water to cause it to be wasted or to require the continuance of its flow off the premises.

5. WATERS AND WATER COURSES ⟸152(9) — IRRIGATION—WASTE WATER—DAMAGES.

No damages recognized by the law can result to an appropriator from interference with the flow of surplus or waste water from another's irrigated land.

Appeal from Superior Court, Maricopa County; Frank H. Lyman, Judge.

Action by J. W. Wedgworth against J. B. Wedgworth and another. From judgment for plaintiff, defendants appeal. Modified, reversed in part, affirmed in part, and remanded, with instructions.

Benton Dick and J. E. Nelson, both of Phœnix, for appellants.

J. L. Gust, of Phœnix, for appellee.

PATTEE, Superior Court Judge. This is an action brought by J. W. Wedgworth, the appellee and plaintiff below, against the appellants, defendants below, to enjoin interference with the flow of irrigating water in a ditch over the defendants' lands to the plaintiff's land, and for damages claimed to have been caused by such interference. The defendant B. F. Wedgworth does not appear to be the owner of any lands, and apparently is made a party because he personally interfered with the flow of water, acting on behalf of his codefendant. The parties will be referred to hereinafter as plaintiff and defendant. The plaintiff obtained a decree granting the injunctive relief sought and awarding him damages in the sum of $250. From this judgment the defendants appeal to this court.

The plaintiff is the owner of 80 acres of land situated in section 21, township 1 south, range 4 west, in Maricopa county. The defendant J. B. Wedgworth occupies and cultivates the south half of section 16, said township and range, lying north of the plaintiff's land. The land of the plaintiff is slightly lower than the land of the defendant J. B. Wedgworth, so that water from the irrigating system supplying the lands reaches plaintiff's premises through ditches over land of J. B. Wedgworth, and by a ditch on lands adjoining the same. The sharply contested question is whether the plaintiff had acquired a right to receive water through a certain ditch designated in the testimony as the "Center ditch" over defendant's lands. The trial court found that the plaintiff had acquired the right to conduct water through that ditch and had also acquired the right to waste water and to conduct such waste water through the same ditch to his lands, and to irrigate 30 acres of land; that the defendants interfered with such rights; and thereupon rendered the following judgment:

"And by reason of the law and the findings aforesaid, it is ordered, adjudged, and decreed that the defendants, and each of them, and their agents, servants, employés, and attorneys, be, and they hereby are, perpetually enjoined and restrained in the following respects, to wit:

"(1) From interfering with the plaintiff in conducting or receiving irrigation water for his premises above described through the irrigation ditch across the premises of the defendants, commonly known as the Center ditch, and hereinabove described, at such reasonable times as will not unnecessarily interfere with the defendants' use of said ditch, for the purpose of irrigating their own premises above described, and in such reasonable manner as will not overflow or otherwise damage the premises of defendants.

"(2) From interfering with the plaintiff in entering upon the premises of the defendants for the purpose of cleaning said ditch or making such repairs thereto as from time to time may become necessary, in such manner as will

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not damage defendants' premises or the crops thereon, except in such minor respects as is necessarily incident to such entry, cleaning and repairing.

"(3) From preventing surplus waters from collecting or flowing in said ditch above described in the manner that the same have heretofore been accustomed to collect and flow therein and from interfering with the plaintiff in receiving such surplus water from said ditch and irrigating his premises above described therefrom, to the extent of twenty acres thereof. * * *

"And it is further ordered, adjudged, and decreed that the plaintiff have and recover from the defendants, joint and several, judgment for the sum of $250 damages, and his costs," etc.

[1] The ditch through which the plaintiff claimed the right to conduct water was described in the complaint generally as a ditch constructed through section 16. To this complaint a general demurrer was interposed, and the overruling of this demurrer is assigned as error. The only ground raised in the court below and in this court on appeal is that the ditch is not described with sufficient particularity. If the description was not sufficiently specific to inform the defendants as to the location of the ditch mentioned, or to designate which of several ditches might be referred to, the remedy was by motion to make the complaint more definite and certain in that respect. As against a general demurrer, the complaint is sufficient.

It is also assigned as error that the court erred in finding and adjudging that the plaintiff had a right to conduct irrigating water through the so-called Center ditch. The evidence upon this question, and upon practically every issue in the case, was very conflicting; but there was evidence tending to prove and sufficient to justify the trial court in finding that for some years prior to 1910 some portions of the 80 acres of land now owned by the plaintiff had been irrigated and cultivated to some extent, and that for several years prior to the time the plaintiff acquired title to his land the defendant J. B. Wedgworth had occupied and irrigated a portion of that land, all from waters conducted through the Center ditch; that early in the year 1910 plaintiff acquired title to the 80 acres since owned by him, and ever since, with the exception of one-half year, plaintiff has purchased from the Buckeye Irrigation Company sufficient water to irrigate ten acres of land, and such water during the year 1910 and subsequent years until September, 1916, had been conducted to the plaintiff's premises through the ditch constructed through section 16, designated as the Center ditch; that the plaintiff had caused this water to be conducted through that ditch under a claim of absolute and permanent right to do so, hostile to any adverse claim by the defendants or any other person, and that such claim of right on his part had been acquiesced in by the defendants; that directions had been given by the plaintiff and defendant J. B. Wedgworth to the Buckeye Irrigation Company respecting the time and manner of turning the water used by the respective parties into the ditch; that the plaintiff had furnished labor and expended money each year to maintain and keep in repair the ditch, and, when controversies had arisen between the defendant J. B. Wedgworth and third parties, the plaintiff had been called upon by the defendant J. B. Wedgworth to come to his assistance and maintain their joint right to the use of the ditch; that the plaintiff had purchased and entered into the possession of the land during the year 1910, and since that time has brought additional land into cultivation at considerable expense; and that his claim to the absolute and permanent right to conduct the water purchased from the Buckeye Irrigation Company through the ditch had never been questioned until September, 1916, when defendants summarily prevented the flow of such water to the plaintiff's premises. And generally the testimony warrants the conclusion that the plaintiff had cultivated his land and adjusted his farming operations in conformity with his claimed right to have the water delivered to him through the Center ditch.

It appears from the evidence that there is another ditch, designated in the testimony as the East ditch, running around the eastern boundary of section 16, and hence onto some portion of plaintiff's land, and it is claimed by the defendants that the plaintiff's water has been heretofore conducted through this ditch and should hereafter be so conducted. The evidence, however, justified the conclusion obviously reached by the court below that the water had been conducted through the Center ditch, and it also justified the conclusion that it would be impracticable, if not impossible, to conduct the water purchased by the plaintiff from the Buckeye Irrigation Company through the ditch known as the East ditch.

[2] The long-continued use by the plaintiff of the Center ditch for the purpose of conducting the water purchased by him from the Buckeye Irrigation Company under a claim of absolute and permanent right, under the circumstances above stated, amounted to more than a mere revocable license. The right claimed by the plaintiff was not temporary in its character, but evidently based upon the assumption that he had such right and followed by conduct on his part consistent therewith. The acquiescence on the part of the defendant J. B. Wedgworth was not merely by silence, but by affirmative acts and conduct on his part. On the basis of such right, the plaintiff expended money and adjusted his affairs, so to speak, with

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reference to such right. In this situation, the doctrine of estoppel by acquiesence applies, and the defendants are estopped from denying the right claimed by the plaintiff. Miller v. Douglas, 7 Ariz. 41, 60 Pac. 722; 2 Kinney on Irrigation and Water Rights, §§ 1126, 1127. The court below therefore properly enjoined the defendants from interfering with the right of the plaintiff to conduct the water purchased by him from the Buckeye Irrigation Company through the Center ditch.

The appellants make the following assignment of error:

"The court erred in finding, and entering judgment on said finding, that plaintiff for many years has received surplus waters flowing or collecting in the ditch above described, and has applied same to beneficial use in the irrigation of approximately 20 acres, and the plaintiff has the right to continue to receive such surplus water from said ditch to irrigate said 20 acres."

[3, 4] Surplus water is not subject to prior appropriation for any use so that any property right is established by such appropriation and use. "Surplus water" must be understood as water running off from ground which has been irrigated; water not consumed by the process of irrigation; water that the land being irrigated will not take up, but the water that flows off the lands; waste water.

We held, in Lambeye v. Garcia, 18 Ariz. 178, 157 Pac. 977, that one using waste water had no vested right in the use of such water, and therefore the user could not restrain another from diverting the waste water from the former user's premises. We adhere to this proposition. The identical question arises under the facts found in this case. The provision of the decree enjoining and restraining the defendants from "preventing surplus waters from collecting or flowing in the said ditch above described, in the manner that the same have heretofore been accustomed to collect and flow therein, and from interfering with the plaintiff in receiving such surplus water from said ditch," is therefore erroneous and places a greater burden on the defendants than the law requires. If waste water runs upon the plaintiff's land, he may capture and use it; but that is the limit and extent of his right. He is not entitled to relief which would impose upon the defendants any duty to cause water to be wasted, or to require the continuance of a flow of waste water off of their premises. The assignment of error above quoted is therefore good in so far as the court adjudged the plaintiff had a right to continue to receive surplus or waste water from said ditch to irrigate 20 acres.

[5] The court below found that the plaintiff sustained damages for the wrongful acts of the defendants in preventing him from receiving water through the Center ditch, in the sum of $250, and judgment was accordingly entered in favor of the plaintiff in that amount. The evidence justifies the finding that the plaintiff was damaged by the defendants' interference with the flow of water, but is not definite enough to show what damage was caused by the prevention of the flow of water which the plaintiff had a right to conduct through the Center ditch, and the amount of such damage as adjudged by the court is manifestly based upon the finding, set forth in the judgment, that 30 acres of land were irrigated—20 from surplus water, and the balance, 10 acres, from water purchased from the Buckeye Irrigation Company—and that the defendants interfered with the delivery of water from both these sources, and that $250 damages resulted to the plaintiff. No damage which the law recognizes can result to an appropriator from the interference with the flow of surplus or waste water, and, it being found that 20 acres of plaintiff's lands depended upon such surplus or waste water for irrigation it is not apparent how damages in the sum found could have resulted from the interference with the flow of the water purchased to irrigate 10 acres. No reason is perceived why the plaintiff might not recover such damages as were directly caused by the interference with the flow of the water purchased from the Buckeye Irrigation Company; but both the evidence and the finding are merely that the plaintiff sustained damage, without limiting it to that resulting from the interference with the flow of water to which plaintiff was entitled. That portion of the judgment awarding damages is therefore erroneous.

The judgment will therefore be modified so as to conform to this opinion, eliminating from that portion of the judgment awarding injunctive relief the language referring to the surplus or waste water; and the judgment in favor of the plaintiff for $250 is reversed, and a new trial upon the question of damages ordered. In all other respects the judgment is affirmed. If, as urged by the defendants, the judgment is too indefinite as to the time and manner of conducting the plaintiff's water through the ditch, the court below may provide in the modified decree that either party may apply from time to time for appropriate orders with respect to such matters, and that jurisdiction be retained for that purpose.

The cause is remanded to the court below, with instructions to enter a decree for injunctive relief in accordance with this opinion, and for a new trial upon the question of damages.

CUNNINGHAM, C. J., and ROSS, J., concur.

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BAKER, J., being disqualified, the remaining members of the court called in Samuel L. PATTEE, judge of the superior court of Pima county, to sit with them at the hearing of this case.

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(20 Ariz. 503)

STATE et al. v. INSPIRATION CONSOL. COPPER CO. (No. 1668.)

(Supreme Court of Arizona. July 2, 1919.)

1. TAXATION ⟸495 — RIGHT OF APPEAL — "FINAL JUDGMENT" — COMMENCEMENT OF ACTION.

Where state tax commission, as authorized by Civ. Code 1913, par. 4829, subd. 13, substituted its valuation and assessment of mines for that of county assessor, and the owner, after payment under protest, appealed to superior court under paragraph 4887, where commission's valuation was reduced, owner's notice of appeal and receipt of payment accompanying its protest, was a compliance with Civ. Code, par. 390, relating to commencement of a civil suit in superior court, in order to determine cash value, and not a proceeding to review, and that court's determination was equivalent to a "final judgment" in a special tax proceeding commenced in superior court, which, under Civ. Code, par. 1227, subd. 1, is appealable to Supreme Court.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

2. TAXATION ⟸495 — APPEAL FROM ASSESSMENT—TIME FOR APPEAL—STATUTE.

Under Civ. Code 1913, par. 4887, permitting any corporation, etc., dissatisfied with assessment fixed by board of equalization, to appeal to superior court of county on or before the 15th day of September following board's adjournment and where a corporation's appeal to superior court from act of state tax commission in appraising and assessing its mines, in substitution of assessment of county assessor, not taken until three days after 15th day of September, the state's demurrer should have been sustained.

3. TAXATION ⟸495 — APPEAL FROM ASSESSMENT—STATUTES APPLICABLE.

Civ. Code 1913, par. 4887, permitting any corporation dissatisfied with its assessment as fixed by board of equalization to appeal to superior court of county in which board holds its sessions on or before a certain date, has no application to the matters of taxation as required by orders of state tax commission, so that, on appeal from commission's valuation and assessment, the superior court acted in excess of its jurisdiction in reducing the commission's valuation.

Ross, J., dissenting.

Appeal from Superior Court, Gila County; G. W. Shute, Judge.

From the appraisal and assessment of the mines of the Inspiration Consolidated Copper Company by the State Tax Commission, substituting its assessment for that of the assessor of Gila County, the company protested and appealed to the superior court, wherein there was a defense by the State, and the trial judge without a jury reduced the Commission's valuation, and from the final judgment the State and the County of Gila appeal. Motion to dismiss appeal denied, and judgment vacated and cause remanded, with directions to sustain the demurrer and dismiss the action.

Wiley E. Jones, Atty. Gen., and L. B. Whitney, Clyde M. Gandy, F. J. K. McBride, and Alexander B. Baker, Asst. Attys. Gen., for appellants.

Edward W. Rice, of Globe, for appellee.

CUNNINGHAM, C. J. The mines of the appellee were appraised and assessed for taxes by the state tax commission under authority of paragraph 4829, R. S. A. 1913, subd. 13, viz.:

"It shall be the duty of the said commission, and it shall have the power and authority: (1) To have and exercise general supervision over the administration of the assessment and tax laws of the state, over city, town, and county assessors, over county and city boards of equalization, boards of supervisors, and all local boards of levy and assessments, to the end that all assessments of property of every class, kind, and character, real, personal, and mixed, be made at its full cash value; and to require assessors and county boards of equalization to assess all property of every class, kind, and character at its full cash value. * * *

"(13) To make appraisement and assessment * * * of all patented and unpatented producing mines, within the state. And on or before the second Monday of July to transmit, as provided by law, to the several county boards of supervisors, the assessed valuation found by it * * * on all patented and unpatented producing mines to the several county boards of supervisors of the counties in which the mines are located. The several county boards of supervisors shall enter on the roll all assessments transmitted to them by the state tax commission. * * *"

The mines of the appellee in Gila county were assessed for taxes for the year 1917 by the county tax assessor. The valuation placed thereon did not meet with the approval of the state tax commission, and, as a consequence, the state tax commission duly considered the matter of valuation of said mines, and proceeded to assess the same on the valuation said commission placed on the mines, under authority of paragraph 4829, supra. The said state tax commission ordered the board of supervisors of Gila county "to strike the assessment made by the county assessor from the tax roll, and to enter instead the assessment made by the state tax commission." The appellee paid the amount of taxes levied on the valuation placed on said

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⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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mines by the state tax commission, under protest, and gave notice of appeal to the superior court, following the procedure set forth in paragraph 4887, R. S. A. 1913.

The appellee's notice of appeal is to the effect that—

It "hereby appeals from the action of the state tax commission or county assessor, fixing the valuation of the producing mines" in Gila county, Ariz., for purposes of taxes for the current fiscal year.

"This appeal is based upon the written protest of this company, addressed to and filed with the county treasurer and county tax collector of Gila county, Ariz. Copies of said protest and of the receipt of the full amount of taxes due from this company are attached hereto.

"Dated at Globe, Ariz., this 15th day of September, 1917."

This notice was filed in the office of the clerk of the board of supervisors of Gila county, September 15, 1917, and with the state tax commission on September 18, 1917.

The protest is addressed to the county treasurer and ex officio tax collector of the said county, and recites that the company owning the producing mines and other property in said county "pays you this day, under protest, the sum of $624,224.14, being the full amount of taxes levied and assessed upon said mines and other property by the state tax commission or the county assessor in accordance with the valuation for tax purposes as fixed by the state tax commission or the county assessor for the current fiscal year. This company protests against these taxes, and against this assessment and against the amount thereof upon the following grounds:

"(1) The assessment is erroneous for the reason that the same is based wholly upon the profits of this company from said mines for the years 1915 and 1916, capitalized at 15 per cent. whereas the assessment of other producing mines of the same class in this state is based wholly upon the average profits of such mines for the five years from 1912 to 1916, both inclusive, and therefore the taxes so levied and assessed upon the property of this company are not on an equal or uniform basis with the taxes levied and assessed on the same class of property in the state, and all taxes are not uniform on the same class of property within the state. The assessment is in violation of section 1 of article 9, Constitution of Arizona.

"(2) The assessment and the amount thereof is erroneous because it is unequal, inequitable, and discriminatory as between the company and owners of other properties of the same class according to the classification of the state tax commission, because said assessment is based wholly upon the profits of this company for the years 1915 and 1916, without taking into account the factors of the lower price of copper and the restricted production prevailing as to other properties in the same class during the years prior to 1916, which factors were taken into account in fixing the assessment of all properties of the same class, and resulted in the lowering, to a material extent, of the valuations of all other properties of the same class below the level of that fixed for the property of this company.

"(3) Said assessment is erroneous, and the amount thereof is excessive. It is in excess of the full cash value of the property.

"(4) * * * Because it is in excess of the speculative value of the property. * * *

"(5) * * * Because it is based on the profits and income and earnings therefrom.

"(6) Said assessment is illegal for the reasons stated in paragraphs numbered 1, 2, 3, 4, and 5 of this protest, and violates section 1 of article 9 of the Constitution of Arizona. Said assessment is further illegal, in that it deprives this company of its property without due process of law, and violates section 4 of article 2 of the Constitution of Arizona, and section 1 of article 14 of the Amendments to the Constitution of the United States, and denies to this company the equal protection of the laws, and violates section 1 of article fourteen of the Amendments to the Constitution of the United States."

Dated and signed.

The receipt of the county treasurer appears in form required by the statute, and bears the same date with the notice of appeal.

The abstract of the record fails to disclose the date upon which the said documents were filed in the superior court. The state's defense was filed on the 18th day of February, 1918. The trial was had before the judge of the court without a jury, and on the 20th day of February, 1918, the trial was concluded, and the judge rendered his verdict, to the effect "that the full cash value of the Inspiration Consolidated Copper Company be, and it is, hereby fixed in the sum of $61,456,104.43."

From the assessment made by the state tax commission, the full cash value of the productive mines, patented and unpatented, and all claims in a group contiguous thereto, belonging to said owner, and situated in the county of Gila, state of Arizona, * * * $74,168,808.00," there follows a detailed description of the property.

The parties filed written stipulations for continuances of the hearing, the first of which stipulations was filed September 24, 1917. The final judgment was entered March 7, 1918, from which the state appealed to this court by filing a notice of appeal on the 19th day of April, 1918.

[1] The appellee has moved a dismissal of this appeal upon the ground that the law provides no appeal from the order made in this proceeding to the Supreme Court, and relies upon the case of Mohave County v. Stephens, 17 Ariz. 165, 149 Pac. 670. The same question was presented in that case, and decided by this court in accordance with the principle now contended for by the appellee in the case at hand.

This court decided in that case that when

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the parties have invoked the procedure authorized in paragraph 4887, R. S. A. 1913, and proceeded to a final judgment in the superior court, no further appeal is provided for in such statute from such order to this court. Also, that no appeal in such case is provided by the general statute of appeals. We point out subdivision 6 of paragraph 1227, R. S. A. 1913, the general appeal statute, which provides appeals "from a final order affecting a substantial right made in special proceedings or upon a summary application in an action after judgment." We said that "the final orders mentioned in subdivision 6 * * * is the equivalent to final judgment; still that subdivision undoubtedly has application to a final order affecting a substantial right made in a special proceeding commenced in the superior court from or brought into a superior court from any other court." In fact, it would seem that all the orders, judgments, and decrees mentioned in paragraph 1227 must be orders, judgments, and decrees entered in the superior court in actions or proceedings commenced therein or brought to that court from some other court. These words of original jurisdiction pervade the whole of section 1227, and limit the appellate jurisdiction of this court to a review of orders and judgments in actions originating in a court of statutory or constitutional creation.

We treated the matters of assessment and equalization of the taxable property in said Mohave County Case as the commencement of the special proceeding as a matter of course, as clearly appears from the opinion in the case.

"All civil suits in courts of record shall be commenced by complaint filed in the office of the clerk of such court." Paragraph 390, C. C. 1913. Of course, the special tax proceeding, when pending in the superior court, is a civil suit, in that court. The question is, How and when was it commenced in that court? The answer is not in doubt. It was commenced by the dissatisfied taxpayer's filing its protest complaint with the notice and receipts accompanying such protest.

The protest with the notice and receipt of payment of the taxes accompanying the protest filed in the superior court is the complaint paragraph 390 requires to be filed in order to commence a civil suit in the superior court for the purpose of contesting and determining the full cash value of taxable property when the value placed thereon by the county authorities is not satisfactory to the taxpayer. The determination reached in such proceedings is equivalent to a final judgment entered in a special tax proceeding, commenced in the superior court, and under subdivision (1), par. 1227, C. C. Ariz., an appeal lies to this court.

In the matter of considering the filing of the protest notice and receipt in the superior court as the commencement of a special proceeding in that court for the purposes of appeal, we are not stepping beyond the bounds recognized by other courts.

The Supreme Court of Minnesota, in Witt v. St. P. & N. P. Ry. Co., 35 Minn. 404, 29 N. W. 161, had for consideration a motion to dismiss an appeal from a judgment in condemnation proceedings on the grounds that the judgment entered therein on the verdict of a jury, in pursuance of the statute, is not appealable. The court said:

"We are of the opinion that when cases of this character are brought into the district court, for trial of the issues in respect to the amount of the landowner's damages, they should, for the purposes of appeal, be treated as actions commenced in the district court. * * * A different view of this question was taken by this court in Canter v. St. P. & S. City R. Co., 24 Minn. 313; but we are of the opinion that the rule above suggested better accords with the general practice and policy of statutes in relation to appeals, which are to be liberally construed." King v. Board Etc., 116 Minn. 433, 133 N. W. 1018.

I am of the opinion that we have restricted too narrowly the right to appeal in the Mohave County v. Stephens Case, supra. We have read subdivision (1) of paragraph 1227 as if the matter of assessing taxes by determining the valuation of the property by the tax officers is the commencement of the proceeding to determine a dispute as to the actual cash value of such property assessed. When the officer whose duty it is made places a value on property for taxation purposes, he has exhausted his authority in the premises, and such officer is no longer a factor with regard to such matter. If the taxpayer controverts the justness of the valuation fixed, he does not move for a new trial of the question of the value, but he, for the first time, invokes the aid of the courts, under paragraph 4887, as is contended, by filing or causing to be filed in the superior court the said documents showing on their face the taxpayer's cause of action in the superior court.

The taxpayer's grounds for protest are his grounds for action, and the rights asserted by this protest filed have never been determined by any board, officer, tribunal, or court, statutory or constitutional, and for such reason the matter is not before the court for the purpose of review of a prior determination, but is there for the purpose of an original inquiry into and determination of the right of the plaintiff as set forth in such protest. Clearly, an original determination, and not a review or trial de novo.

The Mohave County v. Stephens Case is therefore based upon a wrong premise, and the conclusion is erroneous. For that reason the case is now overruled. An appeal does lie from a final judgment of the superior court entered in the proceeding commenced

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in said court by means of the filing of the documents mentioned in paragraph 4887, R. S. A. 1913, and based upon the merits of the case, having for its purpose the determination of the actual cash value of the property to be taxed.

As a consequence, the appellee's motion to dismiss the appeal is denied.

The state, when brought before the superior court, objected to the consideration by the said court of the taxpayer's protest for the reason the proceeding so filed fails to set forth a cause of action, and upon the further grounds that the superior court has no jurisdiction of the cause. These objections were overruled, and the trial resulted in a judgment, reducing the valuation of the mines fixed by the state tax commission about $18,000,000. It is from such judgment that this appeal is prosecuted.

[2] The taxpayer prosecuted his appeal to the superior court under authority of paragraph 4887, R. S. A., 1913. That paragraph provides that—

"Any person, firm or corporation dissatisfied with the amount of his, their, or its assessment as fixed by the board of equalization, may appeal from the action of said board to the superior court of the county in which said board holds its sessions, on or before the fifteenth day of September following the adjournment of said board. Appeal shall be taken," etc.

—which procedure the appellee owner has substantially followed.

The appellee gave notice, and conducted the cause as against both the county board of equalization and against the state tax commission. The acts of both such boards are attacked by the appeal. Assuming that paragraph 4887 is yet in existence as a valid, subsisting statute, although directly conflicting with paragraph 4827, yet the facts appearing in the record conclusively established that the appeal and proceeding in the superior court is directed against the action of the state tax commission's order appraising and assessing appellee's producing mines. The contention that the new entry made by the board of supervisors of Gila county substituting the assessment and valuation of the state tax commission for the stricken county assessor's valuation was such an entry by the county authorities as was subject to appeal and review under paragraph 4887, supra, is untenable. The county authorities made the entry under compulsion. The act of entry was an act of the state tax commission, and no other authority was answerable therefor. The county authorities were the mere agency provided by law to carry out the act of the state tax commission in such matters. For the purposes of this argument, we will assume that paragraph 4887 authorizes the taxpayer to set in motion the procedure authorized thereby, and such procedure when followed did take before the superior court when filed the act of the state tax commission whenever the notice and receipt were filed with it, and said commission in such case, on receiving notice, etc., was required to file said papers with a certified copy of its record pertaining to the matter in the superior court, all as required of the county officers, in which case the matter should be deemed before that court; yet, on the face of the papers filed, it appears that the state tax commission was notified of the company's appeal on the 18th day of September, 1917. The appeal from the act of the state tax commission was not taken on or before the 15th day of September, 1917, but it was attempted on the 18th day of September, 1917, three days after a right to appeal had expired. The demurrer of the state should have been sustained for the said reason.

[3] The procedure pointed out in paragraph 4887 has reference only to matter of appeal from acts of the county taxing authorities, and has no application to the matters of taxation as required by the orders of the state tax commission. Hence the superior court acted in excess of its jurisdiction in lowering the valuation of the property fixed by the state tax commission. Such judgment is therefore absolutely void because entered beyond authority of the court.

It seems that paragraph 4887, supra, has been superseded wholly by paragraph 4827. I can see no room for the procedure permitted in said paragraph 4887, while the state tax commission is given the broad powers set forth in paragraph 4827, viz.:

"The said commission shall have full power to classify all property and shall have general supervision of the system of taxation throughout the state, and shall have power to make a thorough investigation thereof; and its decision upon all matters pertaining to the assessment of property of whatever nature, class, or kind, and the valuing and listing of the same, shall be final, except as otherwise provided by law."

The question is not involved in this case other than as above indicated, and I do not express an opinion to the effect that paragraph 4827 repeals, by conflict, paragraph 4887. I prefer to pass that question until it is presented regularly.

The judgment of the superior court is vacated, and the cause is remanded to the superior court, with instructions to sustain the demurrer and dismiss the action.

BAKER, J. (concurring). I concur in reversal. The proceeding authorized by paragraph 4887, Civil Code 1913, is essentially a special proceeding, and summary in character, but it does not follow that because there is no express provision in the act itself for an appeal that it was contemplated that the judgment of the superior court should be

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final. Conceding that the Legislature might have in terms declared a judgment in such proceedings final, the fact that it did not do so is persuasive to the effect that if any right of appeal was given under the general provisions of paragraph 1227, Civil Code 1913, it was not intended to be set aside or abrogated. If the right of appeal is given by the provisions of paragraph 1227, supra (which I do not doubt), I can see no satisfactory reason why the Legislature, if it contemplated depriving the parties of the right of appeal in such cases, did not say so. It seems to me that if the Legislature intended to deny the right of appeal, it would have used some apt language in the act, such as making the judgment of the superior court final, or final and conclusive.

The argument that the Legislature has provided a complete scheme or procedure for the assessment of taxes and valuations of property and has nowhere in that system expressly provided for any appeal to this court by the county or state, and therefore no appeal lies, is not conclusive to my mind. Such a conclusion is incompatible with the effectual right to appeal given by paragraph 1227, supra, in special proceedings.

The case of Mohave County v. Stephens, 17 Ariz. 165, 149 Pac. 670, is properly overruled. That decision is too narrow and restricted in the interpretation of paragraph 1227, supra, which clearly gives the right of appeal to this court from a final judgment entered in an action or special proceeding commenced in a superior court, or brought into a superior court from any other court. I have no difficulty in holding, in view of subdivision 1 of paragraph 1227, supra, that when the protest of appellee was filed in the superior court the proceedings were "commenced" in a judicial sense, as distinguished from the mere administrative function of the county board of equalization. The right of appeal is remedial, and statutes giving such right should be broadly and liberally construed in favor of the right. If a doubt exists, such doubt should be resolved in favor of the right to appeal.

Nor am I disturbed by the argument that no appeal lies from the decision of the superior court because the decision is void. I have no doubt that the decision is a nullity, for the reason that paragraph 4887, supra, does not give the right of an appeal to the superior court to a dissatisfied taxpayer from the action of the state tax commission, nevertheless, the decision is in the form of a judgment, and the appellee is asserting that such decision or determination is valid and binding as a judgment. While the decision is void, it may be regarded as in existence for the purpose of allowing the appellant to challenge its validity, on appeal, and to enable this court to declare its invalidity and to reverse it.

ROSS, J. (dissenting). I do not believe the statute authorizes or permits an appeal from the superior court to this court in this kind of cases, and therefore must dissent. The general statute on appeals to this court (paragraph 1227, subd. 1, Civil Code) is broad enough to cover a special proceeding in tax matters, such as this one, if it be held — as I think it should be — that it was "commenced in a superior court." While the tax statute (paragraph 4887, Civil Code) describes the proceeding for a review of the order of the board of equalization as an appeal from the board to the superior court, it is not in fact an appeal, but an original proceeding. Rowand v. Little Vermilion Special Drainage District, 254 Ill. 543, 98 N. E. 969. The case of Mohave County v. Stephens, 17 Ariz. 165, 149 Pac. 670, restricted too much the right of appeal as applied to special proceedings generally, and should be modified or overruled when a proper case for it arises.

But the judgment in the Stephens Case, denying the county the right of appeal from the superior court on the ground that the tax statute by its very terms prohibited it, is correct. Paragraph 4885, Civil Code, makes the decision of the county board of equalization as to the value of any property final so far as the county is concerned, and only permits the taxpayer to question it as provided in paragraph 4887. This last paragraph grants the right to any taxpayer dissatisfied with the amount of his assessment, upon conditions therein named, to take it into the superior court for review, but it is limited to the taxpayer. There is no provision anywhere, either in direct terms or by implication, allowing the county or the state to appeal. I suppose upon the theory that the agencies selected by the Legislature to fix the valuation of property will fully and amply protect the interests of the government by fixing values, as the law requires, at its full cash value. Somewhere along the line these taxing agents selected by the Legislature must finally determine the question of valuation. The one designated by the Legislature in this state is the superior court, when in a proper case a dissatisfied taxpayer is permitted to invoke the aid of that court. The only question that the superior court may review or examine is as to whether the valuation fixed by the county board of equalization is too high or too low. As Judge Cooley said in Auditor v. Pullman Palace Car Co., 34 Mich. 59, the superior court is "an appellate tax tribunal, and nothing more. Its conclusions would not be a judgment, but only an assessment." Before this court should convert itself into an appellate tax tribunal, granting, for the sake of argument, that the Legislature could so constitute it, it ought to be required to say so by direct and plain language. If the determination of the superior court were properly before us,

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we would not and could not pass upon the question as to whether it had assessed the taxpayer's property for too little or too much. The Legislature has appointed its agents for that purpose, and the Supreme Court is not one of them.

Paragraph 4887 was incorporated in the Laws of Arizona for the first time in 1901 as paragraph 3875, Revised Statutes of 1901. The Territorial Legislature evidently construed it as not permitting an appeal to any one except the dissatisfied taxpayer, for in 1907 it passed an act "to provide for the taxation of mines and mining claims and the ores or mineral products from the same," and therein amended paragraph 3875, so that "in the event the territory or the owner of any such productive mine or mining claims being dissatisfied with the valuation fixed by the assessor or by any county board of equalization, such owner or the territory * * * shall have a right to appeal from the valuation as fixed to the district court." Section 12, c. 20, Laws of 1907. In the revision of the Laws of 1913 this provision allowing appeals by the state was left out, and paragraph 3875 was carried forward in the revision, word for word, as paragraph 4887. The meaning of such action or omission is too plain to require comment. In 1913 a special mine tax law was passed (chapter 12, Title 49, Civil Code), the general provisions of which as to the right of appeal are the same as those contained in paragraph 4887, and therein it was provided that the state of Arizona shall have the same right of appeal from the action of the state tax commission or county assessor fixing the valuation of mines or mining claims as a taxpayer. Paragraph 4993, Civil Code. The life of this law was limited to the years 1914 and 1915, but it indicates that in the legislative mind no appeal could be had by the taxing power, state or county, under paragraph 4887.

It must be admitted that the taxing power of the state is vested in the Legislature alone. The assessment of taxes is not a judicial act; it partakes of no element of a judicial character; it is a legislative act; it requires the exercise of legislative power. The Legislature may appoint its agents to assess, equalize, and levy taxes, and whether the agent be an assessor, a board of equalization, or a superior court, in each case it exercises administrative or legislative functions, and not judicial functions. If a hearing be granted a taxpayer before any one of these agents, the law may stop there, and the taxpayer may not be heard thereafter to complain of an excessive valuation. That this is so is evidenced by the holding in the main opinion that the decision of the state tax commission in fixing valuations is final. The Legislature could have made the decision of the assessor or the county board of equalization final if it had so chosen, and it did, in my opinion, make the decision of the superior court on the question of valuation final in those cases appealable to that court from the county board of equalization.

In Mayor of Baltimore v. Bonaparte, 93 Md. 156, 48 Atl. 735, it was held, notwithstanding the statute specifically allowed an appeal to the Court of Appeals, none could be entertained when the only question involved was the valuation of property for taxation purposes, as such was not a judicial but an administrative duty.

"As a general rule, statutes upon the subject of appeals do not embrace proceedings by courts, boards, or officers under special acts when the latter do not include a provision authorizing an appeal." 3 C. J. 225, § 42.

The tax statute, paragraph 4887, does not authorize an appeal by the county or state. Neither is permitted to take into the superior court the question of valuation of property. They cannot initiate such a proceeding, and certainly it was never thought they could prosecute an appeal from a decision of the superior court fixing valuations.

I think this appeal should be dismissed for want of jurisdiction. The state, however, is not without a remedy, if it be the law does not provide for an appeal from an order of the state tax commission fixing valuation of property for taxation—and in that I think the majority opinion is correct—then the superior court possessed no jurisdiction of the subject-matter, and the judgment entered was null and void. In that event, the state's remedy was by certiorari and not by appeal. 2 Cooley on Taxation, p. 1400; 11 C. J. 134, § 96.

(43 Nev. 78)

PERSHING COUNTY et al. v. SIXTH JUDICIAL DIST. COURT et al. STATE ex rel. PERSHING COUNTY v. EBERT et al. ODEN v. PETERSON et al. (Nos. 2397, 2396, 2401.)

(Supreme Court of Nevada. June 16, 1919.)

1. COUNTIES ⟸3 — CREATION, EXISTENCE, AND CHANGE—LEGISLATIVE CONTROL.

Since a county is called into existence by the Legislature, and therefore is its creature, its territory may be cut up in parcels by the Legislature, and its common property and common burden apportioned in such manner as the Legislature may deem reasonable and equitable, or its existence as a county may be blotted out, all even against the will of its inhabitants.

2. STATUTES ⟸46—LAW TO TAKE EFFECT ON CONTINGENCY—POWER OF LEGISLATURE.

The Legislature has power to pass a law to take effect on a contingency expressed in the body of the law; and may designate such contingency as a vote of the people of the territory affected by the law.

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8. COUNTIES ⟸14—FORMATION OF NEW OUT OF OLD—REFERENDUM—CONSTITUTION—"IN AND FOR."

St. 1919, p. 75, creating and organizing the county of Pershing out of a portion of Humboldt county, is not a local law "in and for" Humboldt county, making necessary referendum to the voters of such latter county under Const. art. 19, § 3, providing the referendum powers are reserved to the electors of each county as to all local legislation in and for the respective counties.

[Ed. Note.—For other definitions, see Words and Phrases, In and For.]

4. STATUTES ⟸120(1)—TITLE—ORGANIZATION OF COUNTY—CONSTITUTIONALITY.

St. 1919, p. 75, organizing the county of Pershing out of a portion of Humboldt county, and certain of its provisions, *held* not unconstitutional on the ground that such provisions are not embraced by the title, the disputed provisions being incident to the complete organization of the county, and germane to the main object of the act.

5. STATUTES ⟸64(1)—PARTIAL INVALIDITY—EFFECT.

Unless the validity of a whole statute depends on the constitutionality of one or more provisions not germane to the title, or are so blended with the scope and purpose of the act as a whole as to affect its validity or any other of its provisions, the invalidity of one or more of such provisions does not defeat the general scope and purpose of the act.

6. CONSTITUTIONAL LAW ⟸46(1)—DETERMINATION OF CONSTITUTIONAL QUESTIONS.

The constitutionality of statutory provisions should not be passed upon until some right dependent on the particular provision is brought before the court for adjudication.

7. CONSTITUTIONAL LAW ⟸42 — RIGHT TO QUESTION STATUTE.

One not prejudiced by the enforcement of a statute cannot question its constitutionality or obtain decision as to its validity on the ground it impairs the rights of others, so that a county from whose territory another is formed by the Legislature cannot question the validity of the formative statute in its provisions designating officers of the new county, etc.

Appeal from District Court, Humboldt County; E. F. Lunsford, Judge.

Petition for writ of prohibition by the county of Pershing and others against the Sixth Judicial District Court and others, and petition for mandamus by the state of Nevada, on the relation, etc., against Tom P. Ebert and others, and suit by Zoe Palmer Oden, against John I. Peterson and others, resulting in an injunctive order, from which defendants appeal. Alternative writ of prohibition made permanent and peremptory, writ of mandate directed to issue, and injunctive order affirmed.

T. A. Brandon and Warren & Hawkins, all of Winnemucca (Edw. F. Treadwell, of San Francisco, Cal., of counsel), for appellants.

R. M. Hardy, Dist. Atty., of Lovelock, and Moore & McIntosh and Norcross, Thatcher & Woodburn, all of Reno, for respondents.

SANDERS, J. These cases were argued and submitted as a single case. For convenience we will refer to it as the case of Pershing county against Humboldt county, since it appears that the latter declines to recognize Pershing county as being a legally created and established county of the state.

On March 18, 1919, an act of the Legislature was approved entitled "An act creating and organizing the county of Pershing out of a portion of Humboldt county, and providing for its government, and to regulate the affairs of Humboldt county and Pershing county." Stats. 1919, p. 75. On the same day, to wit, March 18, 1919, the Governor approved an act entitled "An act to amend sections 16 and 19 of an act entitled 'An act creating and organizing the county of Pershing out of a portion of Humboldt county, and providing for its government, and to regulate the affairs of Humboldt county and Pershing county.'" Stats. 1919, p. 82.

On the change from the territorial to a state government the several counties of the territory of Nevada were recognized as legal subdivisions of the state. Since that time the Legislature has, by special legislative enactments, changed the boundaries of some, consolidated and divided others, until there now exists seventeen organized counties in the state, including the alleged county of Pershing.

Subject in a state only to constitutional limitation, a county is the merest creature of the Legislature. It is recognized by the fundamental law of this state as a body corporate. Section 1, art. 17, Const. of Nevada.

[1] From the Legislature a county derives its name, its extent of territory, its mode and manner of government, its powers and rights. It is the creature of the Legislature. Called into existence by it, and subject to the restrictions named, its whole being may be changed by the same power which created it. Its territory may be cut up and parceled out to the other counties; its common property and common burden apportioned in such manner as to the Legislature may be reasonable and equitable; its existence as a county blotted out; and this all against the will of its inhabitants. Vincent v. County of Lincoln (C. C.) 30 Fed. 751; Comrs. of Laramie Co. v. Comrs. of Albany Co., 92 U. S. 307, 23 L. Ed. 552; Board of Comrs. v. City of Osborne (Kan.) 180 Pac. 233; Cooley, Const. (2d Ed.) 192; 11 Cyc. 341-345; 7 R. C. L. 923-926.

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[2, 3] But if we clearly interpret the position taken by the learned counsel for Humboldt county in these original proceedings, it is their contention that since the enactment of the initiative and referendum by the Legislature, and its ratification by the people, the fundamental principle that a state, through the legislative department of its government, may divide the established territory of a county, and give to a new county taken therefrom a corporate existence, is "local legislation," within the meaning of the referendum clause of the Constitution and the act passed in aid of its execution (section 3, art. 19, of the Const., Stats. 1915, p. 157), and therefore the act creating and organizing Pershing county out of a portion of Humboldt county is reserved by the referendum law to the people of Humboldt county to signify by their votes, at an election called for that purpose, their approval or rejection of the law, and that, the referendum having been duly invoked with reference to the law in question its operation is suspended until the qualified electors of Humboldt county have been given an opportunity to signify their approval of the law. We fully recognize the rule that the Legislature has the power to pass a law to take effect on a contingency expressed in the body of the law, and that the Legislature may designate that contingency as a vote of the people of the territory affected by the law. 26 Am. & Eng. Enc. of Law, 567. This rule is recognized to a certain extent by this court in the case of Hess v. Pegg, 7 Nev. 28; and was expressly applied by the Supreme Court of California to the division of a county in the case of People v. McFadden, 81 Cal. 489, 22 Pac. 851, 15 Am. St. Rep. 66. But it is manifest from section 20 of the act that it was the intention of the Legislature that the act creating and organizing the county of Pershing out of a portion of Humboldt county should become effective immediately without regard to the will of the inhabitants of Humboldt county. This is a matter for the Legislature, and it is not for this court to oppose its judgment to that of the Legislature in this important particular. Unless the law be in "clear, palpable, and direct conflict with the written Constitution" it must be sustained.

Section 3, art. 19, of the Constitution, provides, inter alia:

"The initiative and referendum powers in this article provided for are further reserved to the qualified electors of each county and municipality as to all local, special and municipal legislation of every character in or for said respective counties or municipalities."

We concede, or it must be conceded, that an act creating a new county out of territory of an established county relates to and necessarily affects the latter; but we are unable to bring ourselves to the conclusion that such legislation is a local law "in or for" the county out of which the new county is created. But, on the contrary, if it be "local legislation," as the term is used in section 3, art. 19, Const., it is legislation for the new county of Pershing, and not for the old county of Humboldt.

Counties are of purely a political character, constituting the machinery and essential agency by which free governments are upheld, and through which, for the most part, their powers are exercised. Their functions are purely of a public nature. 11 Cyc. 351.

Whatever may be the literal import of the initiative and referendum amendment to the Constitution, it must be construed with others of the organic law. It cannot be construed that the Legislature and the people intended by its enactment and adoption to surrender the sovereignty of the state over a particular portion of its territory to the people who inhabit it. Such interpretation would amount to a recognition of the state's independent right of dissolution. It would lead to sovereigntial suicide. It would result in the creation of states within the state, and eventually in the surrender of all state sovereignty. Hedges, "Where the People Rule," 15, 16.

In view of the essential character and nature of a county as it relates to, and is connected with the sovereignty of the state, we are of the opinion that the power which the Legislature possesses to divide counties and apportion their common burdens is not abridged, limited, restricted, or affected by the initiative and referendum, and the law in question is not thereby suspended.

[4] It is next insisted, and strenuously urged, that the special provisions of the act, incident to the organization of the county of Pershing, are within the constitutional prohibition against the enactment of special and local laws, and void, as in section 9 of the act it is attempted to consolidate the offices of clerk and treasurer, and the offices of sheriff and assessor; that section 19 of the act is contrary to the general law regarding the apportionment of senators and representatives; that the act purports to divide township, school districts, and election precincts, and makes no provision for township government in that portion of territory falling within Pershing county; that the act contains provisions not embraced by its title, and attempts to amend specific statutes not referred to in the title, and which are not re-enacted. To discuss these disputed provisions separately would extend this opinion to an unreasonable length. The law concerning them is well settled and has been applied in numerous cases arising out of just such cases as this.

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By the very terms of the title of the act the disputed provisions are incident to the complete organization of Pershing county and are germane to the main object of the act.

[5] Unless the validity of the whole act depends upon the constitutionality of one or more of these provisions, or that they are so blended with the general scope and purpose of the act as a whole as to affect the validity of the whole act, or any other of its provisions, its validity, if it should be invalid, does not defeat the general scope and purpose of the act. People v. McFadden, supra.

[6, 7] Conceding, but not deciding, that one or more of the provisions is against the general law for a uniform system of government for the counties of the state, we ought not in this action to express any opinion as to its constitutionality. "It will be time enough to pass upon it when some right dependent thereon is brought before the court for adjudication." Furthermore, we are of the opinion that the parties respondent have not shown themselves to be in a position to attack the constitutionality of these separate provisions. The rule is well established that one who is not prejudiced by the enforcement of an act of the Legislature cannot question its constitutionality, or obtain a decision as to its invalidity, on the ground that it impairs the rights of others. 6 R. C. L. 89. This rule applies to the position of Humboldt county in this case. We are unable to perceive in what manner the designation of officers of Pershing county and the manner of its organization affects Humboldt county.

Without regard to the constitutionality of the separate and distinct provisions of the act, we are clearly of the opinion that the act as a whole is constitutional. It is therefore ordered that the alternative writ of prohibition heretofore issued be and is hereby made permanent and peremptory; and it is further ordered that the writ of mandate, as demanded, do issue; and the injunctive order appealed from is affirmed.

COLEMAN, C. J., and DUCKER, J., concur.

(43 Nev. 98)

CAMPBELL v. VANETTI et al. (No. 2364.)

(Supreme Court of Nevada. July 1, 1919.)

BROKERS ⟸86(1)—ACTION FOR COMMISSION.

In a broker's action for commissions for the sale of land, a finding that the contract was one of general employment to find a purchaser at any price, defendant to pay 5 per cent. commission, was not supported by proof of a contract that plaintiff was to find a buyer for the property at a stated price upon which a 5 per cent. commission was to be paid.

Appeal from District Court, Washoe County; Thomas F. Moran, Judge.

Action by W. H. Campbell against Joe Vanetti and another. Judgment for plaintiff, and from an order denying a new trial, defendants appeal. Remanded, and new trial directed.

Mack & Green, of Reno, and Orvis Speciale, of San Jose, Cal., for appellants.

Roy W. Stoddard and Le Roy F. Pike, both of Reno, for respondent.

SANDERS, J. This action was brought by W. H. Campbell, plaintiff, to recover from the defendants a real estate brokerage commission, alleged to have been earned by the plaintiff in finding a purchaser for the defendants' ranch, and personal property thereon, situate in Pleasant Valley, Washoe county, Nev.

The trial court conformed its findings to the facts alleged in the complaint, and found in the language of the complaint that the defendants were owners of the property; that in the latter part of February, 1917, the defendant, Joe Vanetti, for himself and his cotenant, Angello Capuro, entered into a certain agreement and contract with the plaintiff, conditioned that, if the plaintiff would find a buyer for the property, the defendants would pay to the plaintiff 5 per cent. commission on the sale price of the said property for and in consideration of his services; that thereafter, on or about the 8th day of May, 1917, the plaintiff took one L. A. L. Green to the property, where he introduced Green to the defendants, the said Green stating that he desired to purchase a ranch; that Green, in the presence of the defendants, inspected the ranch and entered into negotiations with the defendants to purchase the same; that thereafter, on the 24th of November, 1917, Green purchased the property for the price of $23,250; and that thereafter the plaintiff demanded of the defendant Vanetti that the defendants pay to him, under the terms of the contract, 5 per cent. of the sale price of the ranch and personal property, to wit, $1,162.50.

As a conclusion of law the court found that the plaintiff was entitled to recover from the defendants the said sum and his costs of suit. Upon these findings the court rendered judgment in favor of the plaintiff and against defendants for said sum. From the judgment and an order denying to the defendants a new trial the defendants prosecute this appeal.

This action is upon a special contract of employment, oral it is true, but clear and definite in its terms, and the respective rights and obligations of the parties should have been decided by the terms of the agreement

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and appropriate rules of law applied to the particular facts.

The finding that the defendant Joe Vanetti entered into an agreement or contract with the plaintiff conditioned that, if the plaintiff would find a buyer for the defendants' ranch and personal property thereon, the defendants would pay to the plaintiff, in consideration of his services, 5 per cent. commission on the sale price, is not sustained by the evidence. The only evidence in support of this finding is the plaintiff's understanding of his rights under or flowing from the contract and his acts and conduct indicative of such understanding, but the contract as proved furnishes no foundation for his understanding. The evidence of the plaintiff, testifying as a witness in his own behalf, shows that he was employed to find a buyer for the property at a stated price of $24,000, and it was agreed that for this service he should be paid 5 per cent. commission on the sale price of the property. The court, in effect, found that the contract was one of a general employment of the plaintiff to find a purchaser at any price, and that the defendants promised to pay 5 per cent. commission on the sale price, whatever it might be. This was not the contract.

There being an essential difference between the express contract declared on and that proved, the defendants' exception to the refusal of their motion for a new trial is sustained, and the cause is remanded to the district court for a new trial.

DUCKER, J., concurs.

COLEMAN, C. J. I concur in the judgment of reversal, for the reason that it appears from the evidence that the defendant Capuro was not a party to the employment of the plaintiff. He was asked, "Did you ever have any conversation or make any contract with Mr. W. H. Campbell, the plaintiff, with regard to the sale of your ranch to Mr. Green or any one else?" to which he answered "No." He was asked similar questions several times, and his answer was invariably "No." His codefendant gave similar testimony. The plaintiff testified that he had had no conversation with defendant Capuro concerning the deal, as they could not understand each other. There could have been no ratification by Capuro, as there is not a scintilla of evidence to the effect that the terms of the contract which Vanetti made were ever brought to his knowledge prior to the closing of the deal.

I am not in accord with the conclusion reached by my learned Associates on the question discussed in their opinion. Where a broker is employed to sell real estate, it is a general rule that, then he finds a person who is ready, willing, and able to buy upon the terms named, he has earned his commission; and when the broker introduces a prospective purchaser to the seller, and the seller, without breaking off negotiations, thereafter sells the property at a reduced figure, the broker is entitled to his commission. See exhaustive note to Smith v. Preiss, Ann. Cas. 1913D, 823, 824, citing many cases; 19 Cyc. 249–251.

In the instant case, in my opinion, the court was justified from the evidence in concluding that the negotiations initiated in February were never broken off, and that plaintiff was the procuring cause of the sale which was consummated. Appellants have sought to make much of the fact that several months elapsed between the time of the introduction of Green to Vanetti and the date of the sale. In the light of the testimony, I fail to see the force of this contention. Furthermore, there is evidence that it was necessary to bring two suits to quiet title to certain portions of the ranch. What, if any, effect the defects in the title had in causing the delay is not apparent.

(26 Wyo. 219)

MERRILL et al. v. ROCKY MOUNTAIN CATTLE CO. et al. (No. 898.)

(Supreme Court of Wyoming. June 23, 1919.)

1. VENDOR AND PURCHASER ⟸137—SUFFICIENCY OF MUNIMENTS OF TITLE—SUBMISSION OF ARBITERS.

Where vendors agreed to convey all lands to which it secured good title during two-year period and at expiration of period to submit muniments of title to named arbiters for determination as to sufficiency of its title to lands not theretofore conveyed, they were not required, upon expiration of period, to tender deed to land for which they had only such muniments of title possessed at date of contract, and were not bound to submit such muniments of title to arbiters; purchasers having been dissatisfied therewith at date of contract.

2. VENDOR AND PURCHASER ⟸78—CORPORATION'S AGREEMENT WITH STOCKHOLDER—TIME ESSENCE OF CONTRACT.

Where corporation, having arranged to distribute assets to its stockholders according to their respective interests, agreed to convey to certain stockholders such lands as it could perfect its title to during two-year period, and gave the stockholders possession thereof during such period, time was of the essence of the contract.

3. VENDOR AND PURCHASER ⟸61—AGREEMENT TO CONVEY UPON OBTAINING TITLE—SUFFICIENCY OF TITLE.

Vendor being owner of forest lien scrip in name of another, giving it the right to select, enter, and patent in name of such other party, vacant public lands, and having agreed to convey such lands to which it is able to obtain title during certain period, was not bound to

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convey land patented during period, where land was not conveyed to vendor by grantee named in patent within period.

4. PUBLIC LANDS ⟸114(1)—ISSUANCE OF PATENT—TITLE.

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Title passes to grantee named in patent to United States vacant public land on date that patent is issued and recorded in the proper office at Washington.

5. VENDOR AND PURCHASER ⟸137—CONSTRUCTION OF CONTRACT—"MUNIMENTS OF TITLE"—"POSSESS."

Contract, requiring vendor to convey lands to which it obtains title during certain period and to submit to arbiters at expiration of period such "muniments of title as it or its agents or trustees then possess or possesses," construed to provide for submission to arbiters of documentary evidence of title in actual possession and control of vendor, as distinguished from constructive possession, at the expiration of period.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Possess.]

6. SPECIFIC PERFORMANCE ⟸32(3) — LAND CONTRACT—MUTUALITY.

If land contract be construed as obligating vendors to sell after certain date and does not obligate purchasers to accept land after such date, it is lacking in mutuality and will not be specifically enforced.

7. SPECIFIC PERFORMANCE ⟸100 — LAND CONTRACT—CHANGE IN VALUE OF PROPERTY.

Where purchasers, knowing that vendors had obtained title to land they had agreed to convey upon obtaining title within certain period, and knowing of prospective increase in value because of discovery of oil wells on other lands, did not sue for specific performance until after tests had been made and the land found to produce oil, they will be estopped from asserting their right to specific performance at such time.

8. SPECIFIC PERFORMANCE ⟸1—LAND CONTRACT—RIGHT TO.

Specific performance of land contract is not decreed as a matter of course, but is granted or withheld according as equity and justice seem to demand in view of all the circumstances of the case.

Error to District Court, Hot Springs County; E. C. Raymond, Judge.

Action by George Merrill and others against the Rocky Mountain Cattle Company and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

C. A. Zaring, of Basin, and Frank Pierce, of Los Angeles, Cal., for plaintiffs in error.

Edward T. Clark, of Billings, Mont., and Herbert V. Lacey and John W. Lacey, both of Cheyenne, for defendants in error L. G. Phelps and Rocky Mountain Cattle Co.

POTTER, J. This is an action for specific performance wherein, as the case is presented here, the plaintiffs are seeking a decree requiring execution and delivery to them of a good and sufficient deed conveying a tract of land containing approximately 40 acres and described as lot 2 of section 19 in township 46 north of range 98 west of the sixth principal meridian in this state. Upon a trial in the district court, judgment was rendered upon a general finding in favor of the defendants, and the case is here on error.

As the plaintiffs in error were plaintiffs below and the defendants in error defendants below, they will be referred to respectively as plaintiffs and defendants, when not mentioned by name; but a reference to the defendants collectively will include only the Rocky Mountain Cattle Company and L. G. Phelps against whom only a decree for specific performance is sought. The plaintiffs are George Merrill, G. J. Guthrie Nicholson, and George Pennoyer.

The contract upon which the action is based is in writing and set out in full in the amended petition upon which the action was tried, and the material parts thereof are as follows:

"This agreement made and entered into in triplicate this 9th day of May, A. D. 1912, by and between Rocky Mountain Cattle Company, a corporation, duly organized and existing under the laws of the state of Wyoming, by L. G. Phelps, its president, duly authorized, party of the first part, and George Merrill, G. J. Guthrie Nicholson and George A. Pennoyer, of Embar, Big Horn county, Wyoming, parties of the second part, and L. G. Phelps, witnesseth:

"That whereas, under the terms of a certain contract made and entered into by certain of the stockholders of the Rocky Mountain Cattle Company on the 13th day of August, 1910, wherein it was agreed by the said stockholders that the assets of the company should be distributed upon terms therein designated, which said contract was duly ratified at a regular meeting of the stockholders of the said company at the office of the company on August 13, 1910, and,

"Whereas, under the terms of the said contract there was no time limit placed upon the acquisition of titles to certain lands then initiated, which said lands were subsequently conveyed by warranty deed to George Merrill, G. J. Guthrie Nicholson and George A. Pennoyer under the terms of the contract aforesaid, and,

"Whereas, the parties hereto have agreed that title to the following lands included in the lands described in the warranty deed aforesaid, viz. (describing several tracts of land, containing a total of 1,040 acres, and including the 40-acre tract aforesaid) which were initiated at the date of the contract aforesaid, so entered into, should not have been included in the warranty deed aforesaid, title not having inured to the Rocky Mountain Cattle Company.

"Now, therefore, for and in consideration of the payment of the sum of twenty thousand eight hundred ($20,800.00) dollars to them in hand paid, the receipt whereof is hereby ac-

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knowledged, the parties of the second part herein do hereby agree to execute and deliver to the party of the first part herein a quitclaim deed to all of the property hereinbefore enumerated, and the party of the first part herein agrees that it will use all due diligence to obtain title to the lands hereinbefore described within two (2) years from this date and will convey the same to the parties of the second part herein for the sum of fourteen ($14.00) dollars per acre, it being understood and agreed that the party of the first part herein is not required, under the terms of this contract, to obtain such title whenever it would be required to pay any sum in excess of fourteen ($14.00) dollars per acre for such land. And the parties of the second part herein agree that they will pay the said sum of fourteen ($14.00) dollars per acre upon tender of good and sufficient title, as the same may be secured from time to time during the period of two (2) years aforesaid, to any of the lands herein set forth and will execute a good and sufficient bond in favor of the party of the first part herein conditioned that upon tender of good and sufficient deed to any of such lands save and excepting where surface rights only are acquired by the party of the first part under the terms hereof, then and in that event such surface rights shall be considered a full compliance with the terms hereof and such payment of fourteen ($14.00) dollars per acre shall be made, it being understood and agreed, however, that such purchase and payment of and for the lands hereinbefore designated is conditioned upon the sale and disposal of all of the stock of the parties of the second part herein in the Rocky Mountain Cattle Company under the terms of this agreement prior to such purchase and payment; should such title be perfected and offered before the sale of the stock of the parties of the second part herein, then the payment shall be made at the rate of twenty ($20.00) dollars per acre for such land.

"It is understood and agreed by and between the parties hereto that the right of possession of the parties of the second part, without let or hindrance of the party of the first part, to the lands hereinbefore set forth shall continue during the period of two (2) years herein designated and that the quitclaim deed shall contain a clause to that effect and the parties of the second part paying the taxes thereon.

"It is understood and agreed by and between the parties hereto that a deed or deeds to the lands hereinbefore designated, as titles shall be acquired from time to time under the terms hereof, shall be tendered to S. C. Parks, of Cody, Wyoming, who shall be authorized by the parties of the second part herein to receive such deed or deeds and make payment therefor within thirty (30) days of such tender.

"It is further understood and agreed by and between the parties hereto that the party of the first part herein does not guarantee the procurement of title to any of the land hereinbefore designated within the time designated, but agrees to use all reasonable diligence to procure the same under the terms and conditions of this contract and the parties of the second part agree that they will not molest or hinder the party of the first part in its endeavor to procure such titles.

"It is further understood and agreed by and between the parties hereto that at the expiration of two (2) years from the date hereof the party of the first part shall submit to E. E. Enterline and E. T. Clark of Sheridan, Wyoming, at Sheridan, Wyoming, such muniments of title as it or its agents or trustees then possesses or possess to lands hereinbefore described but which have not been, in the meantime, conveyed, to the parties of the second part, under the terms of this agreement, and the said E. E. Enterline and E. T. Clark shall thereupon determine what muniments of title are sufficient, in their judgment, to warrant the party of the first part conveying or assigning its right thereto in the lands to which such muniments of title pertain to the said parties of the second part, as well as the parties of the second part receiving the same, and designate the character of instrument or instruments in writing by which the ownership thereto shall pass from the party of the first part to the parties of the second part, the parties of the second part agreeing to pay the sum of fourteen ($14.00) dollars per acre for all such lands or muniments of title so conveyed or assigned."

The petition aforesaid, after setting out said contract, describes the lands covered thereby to which said petition relates by classifying them as parcels 1, 2, 3, and 4, respectively, and designating the land in controversy here as parcel 3. The allegations as to parcel 4 were eliminated upon demurrer. The petition alleges, and the answer admits, that title to the separate tracts described as parcels 1 and 2, respectively, was acquired by the defendant Phelps and conveyed to the plaintiffs within the two-year period prescribed by the contract; title to parcel 1 having been acquired in May, 1913, and conveyed to plaintiffs in August of that year, and title to parcel 2 having been acquired in June, 1912, and thereafter conveyed to plaintiffs. The averment as to parcel 2 does not state the date of its conveyance to the plaintiffs; but it must have been within said two-year period, for, as shown by the evidence, no muniments of title covering that parcel were submitted at the end of that period.

The petition aforesaid alleges certain other facts which are admitted by the answer of said defendants, including the following:

That the defendant Phelps for a long time prior to May 9, 1912, was, and ever since has been, the president of the Rocky Mountain Cattle Company, and executed and delivered said contract as such officer; that he owned a large majority of the stock of said company, and managed its business and dictated its policy; that in his proceedings to secure title to said lands he was acting for the company; that said company was at all times dominated and controlled by him; and that he signed and executed said contract thereby binding himself to all the covenants and conditions thereof. That during all the times referred to said company was the owner of 320 acres of "Jed L. Washburn Forest Lieu Scrip," authorized by certain stated acts of Congress and regulations of

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the Secretary of the Interior, which gave the owner of such scrip the right to select, enter, and receive patent in the name of said Jed L. Washburn, but for the use and benefit of the owner of the scrip, a number of acres of vacant public lands open to settlement equivalent to the amount of scrip so held by the owner. That when said contract was executed most of the lands therein described had been selected by this state under its various land grants, and applications had been made by the defendant Phelps on behalf of said company to purchase the same from the state; that the remainder of said lands had theretofore been entered with said "Forest Lieu Scrip" for or on behalf of the defendants; and that the defendants, at the date of the contract, had already secured substantial rights to each and every parcel of land described therein. That on April 5, 1911, the defendant Phelps, acting for and on behalf of said company, selected and caused to be entered in the United States Land Office at Lander, Wyo., in the name of said Jed L. Washburn, the lands described as parcel 3, using for said entry a part of said 320 acres of the Jed L. Washburn forest lieu scrip, owned by said company, and that said defendants used great diligence to obtain title to said parcel 3, and on the 7th day of May, 1914, patent thereto was issued by the United States in the name of said Jed L. Washburn.

It is also alleged as to said parcel 3, but denied by the answer, that after the issuance of the patent thereto, and on the 13th day of August, 1914, and in violation of the terms of said contract, the defendant Phelps caused said land to be conveyed to himself, and that he still holds the legal title thereto. It is assumed in the brief of plaintiffs that it was intended by the denial of said averment to deny only that the conveyance alleged was in violation of the contract; and presumably that is what was intended, for it appears that the land was conveyed to the defendant Phelps on the date alleged under a power of attorney executed by said Jed L. Washburn to whom the patent was issued.

The petition further alleges that said defendants, at the expiration of two years from the date of the contract, refused, and still refuse, to submit any muniments of title to said Enterline and Clark, claiming that plaintiffs have no right to any of said lands. This was also denied by the answer. There are other averments of the petition denied by the answer which need not be recited here, but may be referred to in the course of the discussion if found necessary.

The answer alleges as a separate defense: That the defendants did not, during the two-year period aforesaid—two years from May 9, 1912—possess any muniments of title to the lands designated in the contract, save and except to those parcels which were conveyed during that period to the plaintiffs under the terms of the contract, and that the plaintiffs were notified of that fact on May 13, 1914, and that the contract was terminated and closed. That no demand was made upon the defendants for the conveyance of the land designated as parcel 3 until August 28, 1914, at which time the plaintiffs believed the land to be of great value because of the discovery of valuable mineral thereon, which discovery had been made by said defendants a few weeks prior to that date, and that such demand was made solely because of such valuable discovery of mineral. That on May 9, 1914, said defendants were not in a position to offer the plaintiffs any better title to the said land than they were on May 9, 1912, when the contract was entered into, and could not on May 9, 1914, and for a month subsequent thereto, offer any other muniment of title thereto than they were in possession of at the date of the contract. A reply was filed denying generally said new matter in the answer.

The following facts are shown by the evidence: On May 9, 1912, the date of the contract aforesaid, the plaintiffs executed to the defendant company a quitclaim deed conveying the land described in the contract, which deed was thereafter duly recorded, and it contained, as required by the contract, a provision reserving a right of possession in the plaintiffs "for two years hereafter"; that is to say, two years after the date of said deed, or until and including May 9, 1914. That deed, or the copy thereof in the record, also recites as the consideration therefor the payment to the grantors, the plaintiffs herein, of the sum of $20,400, by the said grantee, the defendant company; but the contract states such consideration as $20,800, and that sum is mentioned in the testimony as the consideration. Mr. Nicholson, one of the plaintiffs, explained the consideration and the reason for the contract provision for the deed, when testifying as a witness, as follows:

"In the original agreement of the dissolution of the Rocky Mountain Cattle Company, we arrived at so much land should go to Mr. Merrill and myself and so much should go to himself. On the books of the company there were two charges $200,000 against L. G. Phelps and $100,000 against Merrill, Pennoyer, and myself. For that $100,000 so much land was to be turned over to us by warranty deed. It was made out, and, when it was gone into and we hunted up the titles, there was a certain part of that for which there was no title, so that in 1912 we agreed to quitclaim back the land to Phelps and he was to surrender to us that $20,800 for which he had already charged us."

Mr. Phelps testified concerning the matter:

"Growing out of a deed in 1911, the sufficiency of which was questioned, at a meeting or at

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several meetings in May, 1912, the present agreement was entered into by which under the contract I bought back, or the Rocky Mountain Cattle Company bought back, all the lands in which the titles was questioned, and $20,800 was paid in cash for this property, and I entered into possession of it, or the Rocky Mountain Cattle Company, whichever you wish to style it, and in order to compromise any question and to settle all matters amicably it was agreed that for two years Merrill, Nicholson, and Pennoyer were to occupy the lands and I was to use my best endeavor to secure title to the land."

An objection being made to the statement of the witness "it was agreed," he added:

"I have stated the reason; part of my titles were questioned, and I bought back the land," paying $20,800 for it.

The defendants had no notice or knowledge of the issuance of the patent to parcel 3 on May 7, 1914, until the receipt by Mr. Phelps between the 19th and 23d of May, 1914, of a postal card from the Land Office at Lander, Wyo., dated May 15, 1914, stating that a patent had been issued to Jed L. Washburn, and that upon surrender of the proper evidence of ownership it would be delivered to the holder of the title; and the patent was obtained by Mr. Phelps on August 13, 1914. On that date, also, the land was conveyed to him by deed executed in the name of Jed L. Washburn by Ed. T. Clark, his attorney in fact.

By an agreement dated August 12, 1914, but acknowledged on August 13, 1914, Mr. Phelps leased the land to the Ohio Oil Company, a defendant in this case, for the purpose of mining and operating for oil and gas and laying pipe lines, constructing tanks, buildings, and other structures thereon to take care of said products. Under that lease a producing oil well was drilled on the land by said oil company in October, 1914. The land is shown to be valuable for oil purposes, and to be worth "several thousand dollars." And Mr. Phelps testified, and we think the fact is to be inferred also from other testimony, that when the land was leased it appeared to have a large prospective value because of oil discoveries on other lands; but it does not appear whether such discoveries were or were not in the immediate neighborhood of the land in controversy.

The two-year period prescribed by the contract having expired on May 9, 1914, Mr. Phelps, on that date, wrote to the Mr. Clark named in the contract to act with Mr. Enterline in passing upon any muniments of title submitted by defendants at the expiration of said period requesting him to inform Mr. Enterline that he (Mr. Phelps) had no other muniment of title, and therefore desired to terminate the contract; and on May 13th Mr. Clark wrote to Mr. Enterline to the effect that he had received a letter from Mr. Phelps stating that with the exception of some lands already conveyed, and for which he had been paid, there was no change in the conditions affecting the remainder of the lands, and that "we would be glad to take up this matter with you so that it may be closed." He received no answer to that letter, but on the day it was written he met Mr. Enterline, told him that he had written the letter, and explained its contents, whereupon he was asked by Mr. Enterline if there were any different muniments of title, if he had any other muniments of title than they had on May 9, 1912. Mr. Clark replied: "No, we have no other proof of title than we had at that time." And Mr. Enterline then said that he should consider the contract closed and would write his clients (the plaintiffs) to that effect. On August 26, 1914, Mr. Enterline notified Mr. Clark that he wished a consultation about the Nicholson-Phelps contract, and Mr. Clark then informed him that "we considered the contract closed."

As testified by two of the plaintiffs, money was left or deposited by the plaintiffs with Mr. S. C. Parks of Cody, during all the time after the date of the contract, to pay for such deeds as might be tendered and accepted under the contract.

The exact time when the plaintiffs first learned that a patent to the land had been issued, or when demand for a conveyance of the land was made upon Mr. Phelps, is not definitely shown by the record, owing to the absence therefrom of a letter and telegram introduced in evidence, as exhibits, through no fault, however, of the official reporter who certifies that the missing exhibits were, after the trial, handed to one of the attorneys for the plaintiffs at his request and had not been returned, but, as he (the reporter) was informed, they had been mislaid or lost. But the time when the plaintiffs learned about the patent seems to have been after the 1st of June, 1914; and the demand for a conveyance which was by telegram from Mr. Enterline—the missing telegram—was probably in August, at or about the time when Mr. Enterline notified Mr. Clark of his desire for a consultation about the matter, or on August 28, 1914, as alleged in the answer.

The contract aforesaid, in addition to the provisions thereof above quoted, provided for the sale or division among its stockholders of certain other real and personal property of the defendant company, which, as recited in the contract, included all the property of said company, and for the division thereafter of its cash assets, and that after such division of cash assets the parties of the second part named in the contract—the plaintiffs herein—shall deliver to L. G. Phelps all the capital stock of the company

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held by them, viz., 1,100 shares, at a price of ten cents per share. A time limit was fixed for the sale or division of the property. Thus the sale of a specified ranch by the company to Phelps at a stated price was provided for within seven days from the date of the contract, with a provision for repayment of part of the price to Phelps by the plaintiffs if the scrip title to a 40-acre tract should fail within two years from the contract date. The division of certain live stock within six days was provided for, and also within the same period the purchase of other live stock of the company by Phelps at a valuation fixed by the plaintiffs, or, upon his failure to purchase them, within said period of six days, then for their purchase at such valuation by the plaintiffs. Provision was made for rebranding all such live stock, and for suspending the use of their former brand for one year; and that if Phelps should purchase the cattle as authorized he should have two years in which to gather them, at the expiration of which time the brand should become the property of plaintiffs, or if the cattle were purchased by plaintiffs the title to the brand should vest in them at the expiration of one year.

It appears from the evidence that all the shares of stock of the plaintiffs in said company were delivered to Mr. Phelps some time in August, 1913, thereby eliminating the condition fixing the price to be paid for the land at $20 per acre. The provision of the contract for the payment of that sum instead of $14 per acre is explained in the testimony of the plaintiff Nicholson as follows:

"If the land was deeded to us prior to the delivery of the stock to Mr. Phelps, Merrill, Pennoyer, and myself would have participated in our $20 paid. After the delivery of the stock, $14 went to Mr. Phelps, and we had no participation in it then."

The question which we think first necessary to be considered is the character and extent of the obligation of the defendants, under the contract, to convey any of the land therein described to the plaintiffs, and in that connection what obligation was imposed upon defendants to tender a deed to the land in controversy, or submit muniments of title thereto. The contract contains two provisions which, while interdependent and to be construed together in the light of the whole contract, are in a sense separate and distinct. The one which we shall refer to as the first, because it first appears in the contract, requires due diligence on the part of the defendant company to obtain title to the lands described in a preceding paragraph within two years from the date of the contract and the conveyance thereof to the plaintiffs for the sum of $14 per acre, and that the plaintiffs shall pay that sum per acre upon tender of good and sufficient title during said period of two years, as the same may be secured from time to time, during that period. That is to say, we think that provision is to be construed as obligating the plaintiffs to accept and pay for any of the land upon tender of good and sufficient title during said two-year period, so that the plaintiffs would not be bound under that provision, even though title was secured during said two-year period, to accept or pay for any land unless a good and sufficient title was tendered during that period; and a tender of title under that provision is required to be made to S. C. Parks of Cody, who was to be authorized by the plaintiffs to receive such deed or deeds and make payment therefor within 30 days of the tender.

The consideration for the agreement to use diligence in securing title and then to convey was the reciprocal agreement of the plaintiffs contained in the same paragraph to pay the prescribed sum per acre upon tender during the two-year period of good and sufficient title. The consideration for such agreement was not the payment of the sum of $20,800 recited in the beginning of the paragraph, for that was the consideration passing to the plaintiffs for their quitclaim deed. And that sum was actually paid to the plaintiffs for their conveyance back to the company, as representing, according to the evidence, the amount which had been charged against them on the books of the company for the land. We find nothing in the evidence or admitted facts to substantiate the statement in the brief of plaintiffs that the contract was made to relieve the company from its covenant of warranty, and that for such release defendants agreed to acquire title to the 1,040 acres and convey same to plaintiffs. On the contrary, we think the reasonable inference from the evidence and the contract itself is that the plaintiffs did not care to rely on the warranty and hold the lands with the imperfect titles, dut preferred a return of the money charged against them therefor, and thereafter to take the lands only if and when good title should be acquired and conveyed within the time specified in the contract. And that would not, have been an unreasonable preference in any case in the absence of some intended special use sufficient to justify the taking of chances of title being perfected; the future prospective value of the land for oil purposes not being then apparent. But since all the property and assets of the company were soon to pass into private hands, leaving no ostensible reason for the continued existence of the company, it seems entirely reasonable for plaintiffs to have preferred a return of the money consideration.

The second provision requires the company, at the expiration of said period of two years, to submit to E. E. Enterline and E. T. Clark at Sheridan, Wyo., such muniments of title as it or its agents or trustees then "possess-

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es or possess" to lands which had not in the meantime been conveyed to the plaintiffs, who shall determine what muniments of title are sufficient, in their judgment, to warrant a conveyance or assignment by the company of its right to the plaintiffs, or their receiving the same, and designate the character of instrument to be executed to pass the ownership in the lands to which such muniments pertain, and that "for all such lands or muniments of title so conveyed or assigned" plaintiffs shall pay said sum of $14 per acre. This provision seems to eliminate the necessity of tender of a deed or deeds to Mr. Parks for any land embraced in or covered by muniments of title submitted thereunder at the expiration of said two-year period. There is a slight indication by the words used in this provision that there may have been in the minds of the parties at the time a thought of a transfer under it of something less than a complete and perfect title; but, if so, it must certainly have comprehended more than was possessed at the date of the contract.

[1] Now this contract is in some important respects unlike the ordinary contract for the sale of land, where there is an unqualified agreement to sell and buy assuming that the vendor has or will be able to convey a good and sufficient title. The parties to this contract all understood that the vendor did not have a perfect title and might not acquire such a title to any of the lands within the specified time, if at all; and the plaintiffs knew exactly the kind of right and title then held. And since the plaintiffs had objected to that title as imperfect or insufficient, and required by the contract as a condition to their accepting and paying for any of the land, first, a tender of good and sufficient title within two years, expressly without a guaranty that such title would be secured within that time, or, second, a submission, at the expiration of said period, of muniments of title to parcels not previously conveyed, then in the possession of defendants, their agents or trustees, for determination by certain named representatives of the parties respectively, as to whether the right to lands shown thereby shall be conveyed or assigned or accepted, the defendants had the right to assume that, if they had no further muniments of title than at the date of the contract, they would not be accepted nor a deed conveying the land covered thereby. And they were not required, we think, at or before the expiration of the two-year period, as to lands for which they possessed only such muniments of title as they had at the date of the contract, to either tender a deed thereto or submit such muniments of title. That this was also the understanding of the parties may be inferred from the fact stated in the testimony of Mr. Phelps and undisputed that as to each tender of a deed during the two-year period a very clear showing of good title was required, supplemented, if needed, by the testimony of Mr. Merrill that Mr. Parks did not feel capable of determining whether a tendered deed was good and thought some one should be appointed, and that Mr. Walls (an attorney of Cody) was suggested "to say whether it was a good and sufficient deed." This testimony of Merrill was given when asked on cross-examination what his instructions were in reference to muniments of title before the money of plaintiffs in the hands of Mr. Parks should be paid, the witness having testified that Mr. Parks had been instructed to pay over the money if there was a sufficient deed.

[2] This contract was the result of an arrangement between the stockholders of the defendant company to dispose of its property and assets by distributing the same among such stockholders according to their respective interests, and was a part of the process adopted to accomplish that object. The buying of certain of the property by particular stockholders or by one of them seems to have been but a means to that end. And this tends to explain the care exercised by the plaintiffs to have a good title to the lands described in the contract if they were to take them, instead of their estimated value in money, and the provision of the contract for the conveyance and acceptance thereof only with good title and within the limited period aforesaid. Time was clearly of the essence of the contract. Even the right of possession reserved in the plaintiffs by the contract and quitclaim deed was limited thereunder to two years; possession, as shown by the evidence, having been taken under the warranty deed. The provisions of the contract relating to these lands are to be construed in the light of the purpose aforesaid clearly revealed by the contract itself.

Although the patent to the parcel now in controversy was issued at Washington, D. C., on May 7, 1914, two days before the expiration of the two years, that fact was not known to either of the parties until at least ten days after the expiration of said period, when the defendant Phelps received notice by mail from the Land Office where the entry had been made. In the meantime, Mr. Enterline, representing the plaintiffs, was notified an behalf of defendants that they had no further muniments of title than at the date of the contract for land not already conveyed, and upon receiving that information he declared that he should consider the contract closed and would write his clients, the plaintiffs, to that effect. In that notice to Mr. Enterline there was clearly no intentional misrepresentation of the fact, nor, as we think, any actual misrepresentation, within the meaning of the contract.

To complete the title held at the date of the contract, not only a patent from the

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United States was necessary, but also a deed from the grantee named in the patent, though provision for the latter, as we understand, had been made through a power of attorney, presumably in the possession or under the control of the defendants at the date of the contract, since, as admitted by the pleadings, the land was entered at the Land Office in April, 1911. But the execution of a deed from such grantee could not properly be required or expected until the issuance and delivery of patent, or at least until the parties knew that the patent had been issued; and if a deed had been executed and tendered or submitted under this contract, without a showing or knowledge that patent had issued, and a deed from the grantee named therein it is quite improbable that it would have been accepted or regarded as a compliance with the contract requiring payment of the agreed price. And there is nothing in the case even tending to show that the ignorance or want of knowledge of the parties that patent had issued was inexcusable.

[3, 4] Thus the only muniments of title to the parcel in question that could in fact or actually have been tendered or submitted on that date were those which the defendants held at the date of the contract; and there was no apparent reason for submitting those muniments of title on the date of the expiration of the two-year period, unless accompanied by other muniments acquired after the contract was made. But the contention of the plaintiffs as to this particular parcel is that, as title was actually obtained by defendants within the two-year period, they became obligated to convey the same to the plaintiffs for the stipulated price. That is not, however, technically, or in fact, true. A legal or fee-simple title was not then acquired by defendants, because no deed to either of them conveying the title of the grantee named in the patent had been executed, and the defendants, through no fault on their part, were without knowledge or information of the fact that might have made the execution of such a deed proper. Title did actually pass to Jed L. Washburn, the grantee named in the patent, on the date that it was issued and recorded in the proper office at Washington, viz., May 7, 1914, assuming that it was recorded on the date that it was issued, for delivery of a land patent by the United States is not essential to the taking effect of the granting clause in the instrument, and the defendant Phelps or the company had the right to possession of the patent, upon complying with the rules of the Land Department in that respect. United States v. Schurz, 102 U. S. 397, 26 L. Ed. 167. On that date, however, as well also on the date of the expiration of the two-year period, the defendants did not have actual possession of the patent, and could not produce it in support of a tender of title by deed or for submission as a muniment of title; and they did not obtain such possession of it until August 13, 1914. According to the notice received by Mr. Phelps from the Land Office, proper evidence of ownership was required as a condition to the delivery of the patent.

While in a broad sense, taking into consideration the fact of the issuance of the patent not known to either of the parties at the time, the tender of a deed during the last three days of the two-year period properly conveying Washburn's title to the plaintiffs might have been a tender of good and sufficient title, the defendants were not then in a position to make such tender with muniments of title confirming its sufficiency, as contemplated by the contract and as required in the case of tender of title to other parcels, to require acceptance and payment by the plaintiffs. And we think it plain that the defendants were not at fault in failing to make a tender as to the parcel in question. Indeed, this action does not seem to be predicated upon a wrongful failure to tender title under the first provision of the contract for transferring title, but only upon the alleged refusal of the defendants to submit muniments of title at the expiration of the two-year period. For there is no averment in the petition to the effect that the defendants wrongfully failed or refused to tender title within the time prescribed therefor.

[5] We think there can be no doubt that the provision of the contract requiring the defendant company to submit to Mr. Enterline and Mr. Clark, at the expiration of two years from the date of the contract, such muniments of title as it or its agents or trustees "then possesses or possess," has reference to muniments possessed at the expiration of said period, that is to say, on May 9, 1914, as distinguished from muniments possessed after but not on or before that date; and also, we think, to muniments so possessed as to be capable of being submitted in some proper way at the time specified. The word "possess" or "possesses," as used in that provision of the contract, must be considered and construed in connection with what was required to be done, and in view of the circumstances aforesaid under which the contract was made, and the evident purpose thereof. The word seems to be used in this contract, not only in the sense of or as implying ownership, or the right to possession or control, but equally in the sense of custody or actual as distinguished from merely constructive possession. "Muniments of title" is said to be a general expression for all means of evidence, by which title to real property may be defended. 28 Cyc. 1779. Or as generally defined it refers to title deeds and other documents relating to the title to land. That which is required to be submitted at the expiration of said period is therefore documentary evidence of title.

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The defendant company did not, however, at the time stated, possess the patent, except perhaps constructively, and of that it had no knowledge, nor was it in the possession of an agent or trustee of the company. Constructive possession merely without knowledge of the fact or facts creating it, due diligence having been used to obtain title, is not, we think, what was intended or contemplated. And it may be doubtful if mere knowledge that it had been issued, communicated to the arbiters, without ability then to submit it, would have required them to consider it, or the plaintiffs to accept and pay for the land.

So that without fraud, collusion, or fault on the part of the company or any agent or trustee, it could not submit the patent for the consideration and determination provided for, at the time specified. It did all that it was then able to do. Promptly at the expiration of the period aforesaid notice was given to Mr. Clark and by the latter to Mr. Enterline that the defendants had no further muniments of title to land covered by the contract provisions aforesaid not already conveyed. And upon that, the contract was verbally declared closed. This, we think, amounted to a rejection of muniments held at the date of the contract as insufficient and relieved the defendants from the duty of presenting them.

No provision was made in the contract for any further examination of titles; but the plaintiffs bound themselves as to land for which muniments were to be submitted at the expiration of the period aforesaid only to pay for lands or muniments of title conveyed or assigned under the determination provided for upon muniments so submitted. If the defendants had been negligent or at fault in failing to learn of the patent, or had fraudulently concealed a fact known to them, a different question might, perhaps, be presented. But within the meaning of the contract, as we think it must be construed, they complied with the provisions of the contract as to this land for submitting muniments of title at the expiration of the period of two years. Had they thereafter proposed to submit the patent after learning of its issuance and receiving it, or other muniments acquired or received after the expiration of the two-year period, plaintiffs might or might not have accepted the same, but without obligation to do so. And there would be lacking a determination of the arbiters named in the contract as to the sufficiency of such muniments and the character of instrument for assignment or conveyance, provided for as a condition to the obligation of plaintiffs to pay the specified price. Church v. Shanklin, 95 Cal. 626, 30 Pac. 789, 17 L. R. A. 207; Farm Land Mort. Co. v. Wilde, 41 Okl. 45, 136 Pac. 1078; Bank v. Clay (Okl.) 177 Pac. 115; Simmons v. Zimmerman, 144 Cal. 264, 79 Pac. 452, 1 Ann. Cas. 850; Goodwine v. Kelley, 33 Ind. App. 57, 70 N. E. 832; Hudson v. Buck, 7 Eng. L. Rep. Chan. Div. 1877–1878, 683; Averett v. Lipscombe, 76 Va. 404; Warvelle on Vendors (2d Ed.) §§ 300–302.

Church v. Shanklin, supra, was an action to foreclose a mortgage to secure notes made payable by defendants to plaintiff "whenever he perfects the title to" certain described lots "to the satisfaction of Church & Cary, attorneys." It was conceded that there was a defect in the title when the notes were executed requiring action by the plaintiff to cure; and it was not shown that the disapproval of the title by the attorneys named was through any fraudulent or improper motive. It was held that, as the parties had made the attorneys the umpires between them, if the latter exercised their best judgment in good faith, their conclusion was final and binding, and not subject to the revisory power of the courts without doing violence to the plain words of the contract. This upon the principle upheld in many cases and stated in Butler v. Tucker, 24 Wend. (N. Y.) 447, 449, as follows:

"But when parties fix on an umpire and agree to abide by his decision, neither of them, without consent of the other, can withdraw the question of performance from the common arbiter for the purpose of referring it to the decision of a jury."

In Bank v. Clay, supra, it appeared that a contract for the sale of an oil and gas lease stipulated that the vendor should furnish to the plaintiffs a complete abstract of title to the land to be submitted to a certain named attorney for the vendees, and that the lease should take effect and the mutual obligations of the parties accrue only in case such attorney should approve the title. The abstract was furnished, and upon examination by the attorney named he disapproved the title. Suit was thereupon brought by the vendees to recover a sum of money which had been deposited by them as "earnest money" to secure their faithful performance of the contract. The plaintiffs were allowed to recover, and the following rule was stated:

"A vendee cannot be compelled to accept a title which is in fact perfect, but which his attorney in good faith refuses to approve where his contract requires the title to be perfected 'to the satisfaction of' such attorney."

In the English case above cited, Hudson v. Buck, the contract provided for approval of title by the solicitor of Buck, the vendee. And it was held that, said solicitor having disapproved the title, the vendor could not enforce specific performance, in the absence of mala fides or unreasonableness on the part of the purchaser or his solicitor. Discussing the question, the court said:

"What, then, does the law imply in the sale of a leasehold property? It implies that the

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vendor shall make a good title to the property. Is that the same thing as a stipulation that the contract shall be subject to the approval of the title by the purchaser's solicitor? It appears to me that it is not. Observe the difference between the results in the two cases. In the one case the approval or disapproval of the person specified is, in my opinion, in the absence of bad faith or unreasonable conduct, conclusive as to the goodness of the title shown. In the other case the goodness of the title may be a matter for the decision of the court. * * * It appears to me that it is not unreasonable to suppose that the purchaser should desire to preclude the possibility of such a protracted litigation, and that he should intend to stipulate that the opinion of a particular person, his own solicitor, should be conclusive as to the sufficiency of the title deduced, and that, in the absence of compliance with that condition, the contract should not be capable of being enforced."

Thus upon the theory that the contract requires the defendants to convey the land in controversy to the plaintiffs, the requisite mutuality of obligation and remedy to justify a decree for specific performance would be lacking, under either provision of the contract relating thereto. In Frank v. Stratford-Handcock, 13 Wyo. 37, 77 Pac. 134, 67 L. R. A. 571, 110 Am. St. Rep. 963, after stating that several so-called exceptions to the general rule that as a prerequisite to specific performance there must exist both mutuality of obligation and remedy had become established in modern equity practice, this court said:

"Where a contract is intended to bind both parties, or where it is of such form or nature that it contains mutual executory provisions—that is to say, where both parties have bound themselves or intended to bind themselves by reciprocal obligations—then no doubt the doctrine as to the requirement of mutuality applies; and in such a case, if for any reason one of the parties is not bound, he cannot compel performance by the other."

[6] And in our opinion that principle would apply to the contract in this case if it is to be construed as obligating the defendants to convey this land upon the facts aforesaid. We do not, however, understand the obligation of defendants to convey land to which title shall be obtained within two years to be as broad as plaintiffs contend. The agreement in that respect does not stand alone, but is qualified by the provisions for tendering title within said period and submitting at the expiration thereof muniments of title then possessed, for examination as to whether the title is good and sufficient in case of a tender, or the determination provided for upon the submission of muniments of title as to whether they are sufficient to warrant conveyance or acceptance. So that the defendants would not become obligated to convey any particular parcel of the land described unless title thereto was obtained, and they were also in a position, acting diligently and in good faith, to tender good and sufficient title within said two-year period, or, at the expiration of said period, could produce and submit muniments of title that might be declared sufficient to warrant conveyance under the provision of the contract for a determination as to that matter.

And without an obligation to convey there would be no ground for specific performance. Certainly the agreement to use all due diligence to obtain title within the period named, standing alone, would not furnish a basis for specific performance. Parker v. Sargent, 201 Ill. App. 574. In the case cited it was held that an agreement of a defendant to use his "best endeavors to convey" property to the complainant is not an agreement to convey. But here it is alleged that due diligence was used to obtain title.

[7] For the above reasons, the judgment denying specific performance must be affirmed. But there is a further ground upon which we would feel constrained also to affirm the judgment, and that is the laches of the plaintiffs in asserting their alleged right, in view of the changed conditions affecting the value of the land and the rights and interest of the parties.

[8] A decree for the specific performance of a contract for the sale of real estate does not go as a matter of course, but is granted or withheld according as equity and justice seem to demand in view of all the circumstances of the case. McCabe v. Matthews, 155 U. S. 550, 15 Sup. Ct. 190, 39 L. Ed. 253. And courts of equity will not decree specific performance when to do so would be plainly inequitable and unjust. Pomeroy v. Fullerton, 131 Mo. 581, 33 S. W. 173. In Holgate v. Eaton, 116 U. S. 33, at page 40, 6 Sup. Ct. 224, at page 228 (29 L. Ed. 538), it is said by Mr. Justice Miller that the following language of Mr. Justice Story in Taylor v. Longworth, 14 Pet. 172, 174, 10 L. Ed. 405, has become a legal maxim in this class of cases, viz.:

"In the first place, * * * there is no doubt that time may be of the essence of a contract for the sale of property. It may be made so by the express stipulation of the parties, or it may arise by implication from the very nature of the property, or the avowed objects of the seller or purchaser. And even when time is not, thus, either expressly or impliedly, of the essence of the contract, if the party seeking a specific performance has been guilty of gross laches, or has been inexcusably negligent in performing the contract on his part; or if there has in the intermediate period been a material change of circumstances, affecting the rights, interests, or obligation of the parties—in all such cases courts of equity will refuse to decree any specific performance, upon the plain ground that it would be inequitable and unjust."

In Pickering v. Pickering, 38 N. H. 400, the court said, stating a well-settled principle:

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"Relief by specific performance is matter not of absolute right in the party, but of sound, reasonable discretion in the court, and the granting of such relief must always * * * be entirely equitable. The court will never compel specific performance, where, looking at all the circumstances on both sides, it is apparent that injustice would or might probably be done thereby."

In such cases a court of equity will not allow of a delay which would enable a party to take advantage of the turn of the market, and have the contract performed, only in case it suits his interest. And in Drees v. Waldron, 212 Fed. 93, 128 C. C. A. 609, it is said:

"The existence of laches is primarily determined not by lapse of time but by considerations of justice."

In Patterson v. Hewitt, 195 U. S. 309, 25 Sup. Ct. 35, 49 L. Ed. 214, the court, by Mr. Justice Brown, speaking for the court, states the rule applicable under circumstances such as are found in this case as follows:

"The defense of laches, which prompted the dismissal of the bill in this case, has so often been made the subject of discussion in this court that a citation of cases is quite unnecessary. Some degree of diligence in bringing suit is required under all systems of jurisprudence. In actions at law, the question of diligence is determined by the words of the statute. If an action be brought the day before the statutory time expires, it will be sustained; if a day after, it will be defeated. In suits in equity the question is determined by the circumstances of each particular case. The statute of limitations consorts with the rigid principles of the common law, but is ill adapted to the flexible remedies of a court of equity. The statute frequently works great practical injustice—the doctrine of laches, never. True, lapse of time is one of the chief ingredients, but there are others of almost equal importance. Change in the value of the property between the time the cause of action arose and the time when the bill was filed; complainant's knowledge or ignorance of the facts constituting the cause of action, as well as his diligence in availing himself of the means of knowledge within his control—are all material to be considered upon the question whether the suit was brought without unreasonable delay."

In an opinion by the same learned justice, in a case involving mining property, where there had been a great increase in value, it is said:

"Under such circumtsances, where property has been developed by the * * * energy and at the expense of the defendants, courts will look with disfavor upon the claims of those who have lain idle while awaiting the results of this development, and will require, not only clear proof of fraud, but prompt assertion of plaintiff's rights." Johnston v. Standard Min. Co., 148 U. S. 360, 13 Sup. Ct. 585, 37 L. Ed. 480.

And we quote the following from the case of Twin Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328, referring to the fluctuating value of oil wells:

"Property worth thousands to-day is worth nothing to-morrow; and that which to-day would sell for a thousand dollars at its fair value may, by the natural changes of a week, or the energy and courage of desperate enterprise, in the same time be made to yield that much every day. The injustice, therefore, is obvious, of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit."

And see Anderson v. Luther Min. Co., 70 Minn. 23, 72 N. W. 820.

In Patterson v. Hewitt, supra, it was further said:

"Indeed, in some cases the diligence required is measured by months rather than by years."

So in the case of In re Casey (D. C.) 195 Fed. 322, the court said:

"Laches is measured sometimes by years and sometimes by days, depending on the nature of the case and the circumstances."

In this case the land involved was of comparatively small value when the contract was made, but at or about the time of the expiration of the two-year period a possible or prospective increase in value became apparent through the discovery of oil upon other lands, and it appears that the plaintiffs were approached by representatives of the Ohio Oil Company, who proposed a lease to them for drilling upon the land; but the plaintiffs declined to lease it on the ground that they did not have title to it, showing this contract disclosing the extent of their interest. They learned of the issuance of the patent some time thereafter, but just when does not appear, though, as we have stated above, probably between the early part of June and some time in August, 1914, and then through Mr. Enterline made some demand upon the defendants—probably for a conveyance, since the answer alleges that no demand for a conveyance was made until August 28, 1914.

After such demand, it appears that the plaintiffs entered into some arrangement with another party to whom they assumed to give possession of the land, presumably for the purpose of exploring for oil; for it is shown that some oil well casing was placed on the land. On September 21st, the Ohio Oil Company also placed some casing on the land; and the petition alleges, without stating the time, that said company, although warned not to enter into possession of the ground, did actually by force enter thereon and exclude the plaintiffs therefrom, and commenced drilling thereon. They succeeded in drilling a producing oil well in October of the same year. This suit was brought by the filing of the original petition on Feb-

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ruary 18, 1915, praying, in addition to specific performance as against the principal defendants, a showing and accounting by the Ohio Oil Company of the oil and other substances taken from the land, a judgment against said company therefor, and the appointment of a receiver, if found necessary, pending the litigation.

Thus, with knowledge of the facts, the plaintiffs waited before asserting their right here claimed until the value of the land for oil purposes had been demonstrated by the defendant Phelps through his lease to said operating company, allowing their decision to insist upon what they now claim as their right to depend upon the success or failure of the drilling operations carried on at the expense of others. We think that a very prompt assertion of their alleged right was necessary to justify the exercise of equity jurisdiction for the enforcement thereof. With respect to the time intervening before suit was brought, as affecting the question of laches, it is apparent that the situation would not be materially different if there had been a much longer delay. The changed conditions causing the increase in value had already occurred, and while the plaintiffs remained inactive so far as this record discloses.

The defendants strongly insist upon another ground as a complete defense to the action, in addition to the matters above considered, viz., the failure of the plaintiffs to execute the bond provided for in the contract. And the point is discussed at some length in the briefs, especially with reference to whether the defendants waived the bond by tendering title to and conveying other parcels of land, or are estopped from claiming any right under the provision for the bond and a noncompliance therewith. While we are not convinced that there was a waiver of the bond as to the parcel of land in controversy here, or that the doctrine of estoppel applies, we think it unnecessary to decide those questions or any other question relating to the effect of the provision for the bond or the failure of the plaintiffs to comply with it.

The judgment is affirmed.

BEARD, C. J., and BLYDENBURGH, J., concur.

(66 Colo. 288)

SHERMAN v. GREELEY BUILDING & LOAN ASS'N. (No. 9142.)

(Supreme Court of Colorado. June 2, 1919.)

1. TAXATION ⇐668—TAX SALE—EXCESSIVE AMOUNT—CHARGE OF PENALTY.

Tax sale on which was based deed under which defendant claimed the land in suit *held* not invalid in that the land was stricken off for more than was due thereon in taxes and in interest, despite the fact that the tax sale certificate showed a charge of 50 cents in the column headed "Amount of Penalties and Costs Paid," the county treasurer being entitled to such amount for issuing the certificate of purchase, and the sum not being mentioned or calculated elsewhere in the certificate.

2. TAXATION ⇐788(5)—PRESUMPTION—OFFICIAL ACTION—NOTICE OF TAX SALE.

There is a presumption that the mailing, publishing, and posting of notice of tax sale were regularly done.

3. TAXATION ⇐670—TAX SALE—OFFER BY COUNTY TREASURER TO RECEIVE BID.

Mailing, publishing, and posting of notice of tax sale, presumed to have been regularly done, and reading of the notice by the county treasurer at the sale, was equivalent to offer to receive any proper bid, including one upon less than the whole amount of any tract of land, or town lot, or parcel subject to sale; it not being necessary for the treasurer to inquire expressly if any one present desired to bid on a less amount of any parcel than the whole.

4. TAXATION ⇐671—SALE FOR TAXES—SALE OF LOTS AS ENTIRETY—STATUTES.

Under Rev. St. 1908, §§ 5718, 5720, where at a tax sale only one bid was received, made for the whole of three town lots assessed and offered for sale as one parcel, and no one offered to take less than the whole of the property, the county treasurer was not only warranted in selling, but also required to sell the lots as an entirety to the bidder for all three.

5. TAXATION ⇐676—SALE FOR TAXES—RATE OF INTEREST.

Where no one offered to take lots offered by the county treasurer on sale for taxes at less than the maximum rate of interest, the county treasurer was bound as well as authorized to sell the lots to the bidder who offered to take them at the maximum rate.

6. APPEAL AND ERROR ⇐173(2)—QUESTIONS REVIEWABLE—WAIVER.

Where, in suit involving title to lots sold to defendant for taxes, plaintiff in the trial court in no manner raised the question of proof of defendant's possession of the premises, the question is deemed to have been waived, and cannot be raised by plaintiff on review on defendant's writ of error.

7. TAXATION ⇐784—SALE FOR TAXES—EXTINGUISHMENT OF LIEN.

Valid tax deed covering certain town lots extinguished the lien of a prior trust deed thereon.

Error to District Court, Weld County; Neil F. Graham, Judge.

Action by the Greeley Building & Loan Association against Clarence E. Sherman. To review judgment for plaintiff, defendant brings error. Reversed, with directions to enter decree for defendant.

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Mann & Mann, of Greeley, for plaintiff in error.

John F. Mall, of Denver, for defendant in error.

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ALLEN, J. This is an action which originated as one in ejectment by the Greeley Building & Loan Association, hereinafter designated as the plaintiff, against Clarence E. Sherman, defendant, to recover the possession of lots 1, 2, and 3 in block 5, Mountain View, an addition to the city of Greeley, Weld county, Colo. The defendant filed a cross-complaint, alleging that he is the owner in fee simple and in the possession of the above-described real estate, and praying that the title thereto may be quieted in him. At the trial the plaintiff dismissed its complaint in ejectment, and the cause was tried as a suit brought by defendant to quiet title.

The plaintiff in its answer to the defendant's cross-complaint alleged, in substance, that it is the owner of a certain deed of trust; that the trust deed is a valid and subsisting lien upon the lots involved in this suit; that the defendant claims title to the property by and through a certain tax deed; and that such tax deed is void.

The trial court found the issues for the plaintiff, and the facts to be in accord with the above-mentioned allegations of the plaintiff's answer. The defendant's tax deed was adjudged to be void. The defendant brings the cause here for review, an the main question presented for our determination is the validity of the above-mentiond tax deed, upon which the defendant bases his title.

[1] One of the contentions of the plaintiff, to establish the alleged invalidity of the tax deed, is that at the tax sale upon which the deed is based the land was "stricken off for more than was due thereon in taxes and interest." The evidence does not support this contention. As said in 37 Cyc. 1339:

"It will not be lightly assumed that the sale was made for an excessive amount; on the contrary, this must be clearly shown."

The record fairly shows that the lots were sold for the amount which was actually due. The plaintiff's contention to the contrary is based, principally it seems, upon the fact that the tax sale certificate contains the figure "50" (meaning cents) in the column headed "Amount of Penalties and Costs Paid." The plaintiff asserts that the "penalty" could not be 50 cents. However, the county treasurer was entitled to 50 cents for issuing the certificate of purchase, and, since this sum is not mentioned or included elsewhere in the certificate, it is reasonable to infer that it was placed under the above-mentioned heading, and that the 50 cents referred to was the cost of issuing the certificate.

It is also contended by the plaintiff that the defendant's tax deed is void because "the property was never offered by the treasurer to any one who would take a less amount than the whole thereof."

[2, 3] The evidence shows that, at the tax sale at which the property in controversy was sold, the county treasurer, before receiving any bids or offering any lands for sale, read the notice of tax sale. The notice was in the form prescribed by section 5706, R. S. 1908, and stated, among other things, that the county treasurer would "offer for sale at public sale * * * on the 9th day of December, A. D. 1911, * * * so much of the following described real estate * * * as shall be necessary to pay the tax herein below set down, interest and penalties, to wit." Then follows the list of lands to be sold. No objection was made to the form of the notice, nor to any other matter relating thereto, and it must be assumed, therefore, that the notice sufficiently states, as required by the statute, that "so much of each tract of land, or town lots" described in the list "as may be necessary for that purpose" will be sold for taxes, interest, and charges, etc. The mailing, publishing, and posting of the notice of tax sale, which is presumed to have been regularly done, and the reading of the notice by the treasurer at the sale, was equivalent to an offer to receive any proper bid, including one upon less than the whole amount of any tract of land or town lot, or parcel, subject to tax sale, and it was not necessary for the county treasurer, in order to conduct the tax sale legally, expressly to inquire if any one present desired to, or would, take or bid upon a less amount of any parcel than the whole thereof.

[4] At the tax sale in question only one bid was received or made; the same being for the whole of the three town lots in controversy which had been assessed and were offered for sale as one parcel. No one offered to take less than the whole of the property. Under these circumstances, the statutes relating to tax sales not only warranted, but also required, that the county treasurer sell the real estate in question to the bidder above mentioned, or to the person offering to take the whole of the tract when no one offered to take a lesser quantity. The statutes clearly contemplate that ordinarily and usually a tax sale shall be made of the whole of any tract or parcel rather than a portion of the same. Under section 2314, G. L. 1877, repealed in 1902, it was, in effect, provided that the sale should be made to "the person who offers to pay the amount due on any parcel for the smallest portion of the same." Under the statute now in force, section 5720, R. S. 1908, enacted in 1902, the provision above quoted is omitted, and the county treasurer is directed to sell the land to the person offering to pay the taxes, etc., "and who shall further offer to accept any lower rate or rates of interest," etc. The form of the tax deed prescribed by the old and repealed statute (section 2332, G. L. 1877),

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recited that the property sold "was the least quantity bid for," while the form of tax deed prescribed by the statute now in effect (section 5729, R. S. 1908), omits any such recital, but, instead thereof, recites that the rate of interest offered by the purchaser was "the lowest rate of interest at which any person offered to pay the said taxes, interest and costs," etc. Section 5713, R. S. 1908, authorizes the sale of the whole of any tract, since it provides that a tax sale may be continued "until each parcel shall be sold, or so much of each parcel as shall be sufficient," etc. Reference could be made to other clauses found in the statutes, to the same effect.

Counsel for the plaintiff call attention to a clause found in section 5720, R. S. 1908, to the effect that the land "shall be sold as an entirety to the person offering to accept the lowest rate or rates of interest." However; neither this language nor any other language in the section prohibits the sale of the land "as an entirety" if no such lower rate of interest is offered, or if only a bid at the maximum rate of interest is received from one offering to take the whole of the tract.

In view of the language and provisions of the statutes now in force, above cited, and of the circumstances attending the tax sale in question, as above noted, the defendant's tax deed is not invalid upon the ground here urged by the plaintiff and above considered.

[5] It is further contended that the tax deed is void because the land "was struck off to the bidder at the maximum rate of interest." The fact on which this contention is based does not, under the circumstances which attended the tax sale, invalidate the sale or the deed thereafter issued. No one offered to take the property at a lower rate of interest, and therefore the county treasurer was bound, as well as authorized, to sell the lots to the bidder who offered to take the property at the maximum rate of interest.

[6] The plaintiff, for the first time upon this review raises the question of proof of the defendant's possession of the premises in controversy. This question was not in any manner raised in the trial court, and under the principles announced in Relender v. Riggs, 20 Colo. App. 423, 428, 79 Pac. 328, is deemed to have been waived.

[7] The defendant's tax deed is valid on its face, and, for the reasons hereinbefore stated, the plaintiff's various contentions to the effect that the deed is void cannot be sustained. We hold that the tax deed is valid, and find that it was issued long after the execution of the plaintiff's trust deed. The tax deed, being valid, extinguished the lien of the trust deed. Wells v. Brown, 23 Colo. App. 190, 128 Pac. 869; 37 Cyc. 1476. The trial court therefore erred in holding the tax deed to be void and in finding that the deed of trust is a valid and subsisting lien on the premises.

The judgment is reversed, with directions to enter a decree quieting title to the lots in controversy in the defendant.

Reversed.

GARRIGUES, C. J., and BAILEY, J., concur.

(66 Colo. 292)

INDUSTRIAL COMMISSION OF STATE OF COLORADO et al. v. JOHNSON.
(No. 9389.)

(Supreme Court of Colorado. June 2, 1919.)

MASTER AND SERVANT ⊜417(7)—WORKMEN'S COMPENSATION — FINDINGS BY COMMISSIONS—CONCLUSIVENESS.

Findings of fact by the Industrial Commission in a workmen's compensation proceeding, having competent testimony to support them, are conclusive.

Scott, J., dissenting.

En Banc.

Error to District Court, City and County of Denver.

Workmen's compensation proceedings by Guy M. Johnson against the Electrical Supply & Construction Company, employer, and the London Guarantee & Accident Company, insurance carrier. Finding of the Industrial Commission being adverse to claimant, he instituted suit in the district court, which rendered judgment in his favor, and the Commission, employer, and insurance carrier bring error. Reversed and remanded, with instructions.

Leslie E. Hubbard, Atty. Gen., John L. Schweigert, Asst. Atty. Gen., and Walter E. Schwed, William E. Hutton, and Bruce McCay, all of Denver, for plaintiffs in error.

Charles F. Morris, of Denver, for defendant in error.

BAILEY, J. The Industrial Commission of Colorado, hereinafter called the commission, seeks to have reviewed on writ of error a judgment of the district court in favor of defendant in error Guy M. Johnson, hereinafter called the claimant, by which he was awarded compensation at the rate of eight dollars per week so long as disabled, or until he had received the maximum amount of $2,080.00, provided for in such cases.

The claimant, while in the scope of his employment was injured in May, 1916, and at a hearing before the commission on December 20, 1916, it was found that he was neither totally nor permanently disabled, and was allowed six weeks compensation, in addition to that which he had already been paid, for

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temporary disability. On January 23, 1917, having made no application for a rehearing, the claimant filed a complaint in the district court for a review of the findings of the commission. The commission filed its answer thereto, and the other defendants, plaintiffs in error here, interposed a general demurrer and also an answer to the merits. The demurrer was overruled and after a full hearing the cause was remanded to the commission. An additional hearing was had beginning on July 11, 1917, which was continued from time to time to allow claimant to receive further medical attention. His trouble consisted of an injury to his left foot, which he contended was permanent, but which physicians testified would yield to treatment.

A final hearing was had on October 9, 1917, at which time three physicians testified as to the claimant's physical condition. One physician, a specialist, testified that a minor operation, involving no risk, would greatly benefit him. The others testified that the disability then present amounted to approximately twenty-five per cent. of total disability of his left foot at the ankle, and all agree that his condition would improve with proper treatment. The insurance company then offered to provide claimant with one month's treatment, involving the minor operation above mentioned, free of cost to him. The commission ordered this treatment and directed that compensation should cease until such time as Johnson had undergone such operation, to which he refused to submit, and thereupon and on October 20, 1917, the commission entered its findings and award by which claimant was found to have sustained a twenty-five per cent. total disability of the use of his left foot at the ankle, and that he was then able to work. The amount fixed by law to be paid for such disability having been already exceeded, no further compensation was awarded.

The claimant, without applying for a rehearing, filed a motion in the same suit previously filed by him in the district court, to reopen the case, and to require the return of the files of the commission to the district court. This motion was sustained and claimant was permitted to file a supplemental or amended complaint. To this a demurrer was interposed, which was overruled. The insurance company then answered, and by stipulation the answer of the commission to the original petition was allowed to stand as its answer to the amended complaint.

On February 26, 1918, a hearing was had upon the issues as made. No further evidence was taken, but the court found that the order entered by the commission was not supported by its findings of fact and entered judgment as hereinabove stated.

It is urged that the district court had no jurisdiction to enter any order in the cause, because the proper procedure was not followed in taking the case before it, and that, in any event, the award is in conflict with the findings of fact of the commission. The claimant contends that the circumstances of this case made the procedure adopted by him necessary, as the only way open to bring the case before the district court. It is not necessary to determine this case upon a question of procedure, as it conclusively appears from the record that in entering the award the district court absolutely ignored and refused to recognize the findings of fact of the commission, and reached a conclusion and rendered judgment contrary to and plainly inconsistent with such findings.

After an exhaustive hearing, continued from time to time in order to give the claimant every opportunity to substantiate his claim, the commission found that he had sustained an injury to his left foot, which resulted in permanent disability of that member amounting to twenty-five per cent. of the total loss of the foot at the ankle, and further found that in other respects he was at that time able to do ordinary work. There is ample competent testimony to support and uphold these findings. In fact, the evidence as to the physical condition of the claimant is practically uncontradicted, and no other findings could be logically adduced or result from the testimony.

This court, in Passini v. Industrial Commission et al., 171 Pac. 369, in discussing the effect of findings of fact by the commission, at page 370, said:

"This court may consider only the legal question of whether there is evidence to support the findings, and not whether the commission has misconstrued its probative effect. The award is conclusive upon all matters of fact properly in dispute before the commission, where supported by evidence, or reasonable inference to be drawn therefrom."

And further, on page 371, it is said:

"The purpose of the act is to confine the settlement of compensation cases to the commission itself, so far as is consistent with justice."

As there is manifestly nothing in the record to justify the setting aside of the findings of the commission the judgment of the trial court will be reversed and the cause remanded with instructions to the trial court to approve, and accept, the findings of the Industrial Commission, and enter judgment accordingly.

Judgment reversed and cause remanded, with instructions.

SCOTT, J., dissents.

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(66 Colo. 296)

HENRYLYN IRR. DIST. et al. v. THOMAS.
(No. 9530.)

(Supreme Court of Colorado. June 2, 1919.)

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1. MANDAMUS ⊂=187(4) — REVIEW QUESTIONS NOT RAISED — STATUTORY CONSTRUCTION—ADOPTION BY PARTIES.

Where both parties assumed that Rev. St. 1908, § 3457, as amended, required irrigation district directors to certify certain amounts to the county commissioners for purposes of a tax levy, the Supreme Court in denying relief by mandamus on writ of error against directors, will assume that such statutory construction was correct.

2. WATERS AND WATER COURSES ⊂=231—IRRIGATION DISTRICTS—ASSESSMENT—SPECIAL TAX.

Tax to pay irrigation bond coupons is a special tax.

3. MANDAMUS ⊂=14(1) — DEMAND — NECESSITY.

Right of irrigation bondholder to have irrigation district directors certify amount necessary to pay his coupons to county commissioners so that they can levy tax is personal in nature, necessitating demand upon, and refusal of, directors, before mandamus can be maintained.

Department 1.

Error to District Court, Weld County; Neil F. Graham, Judge.

Mandamus by Theodore H. Thomas against the Henrylyn Irrigation District, F. A. Hensley, J. R. Scott, and J. S. Williams. Judgment for plaintiff, and defendants bring error. Reversed.

See, also, 173 Pac. 541; 181 Pac. 980.

In this case the defendant in error brought mandamus against the plaintiffs in error to compel them to certify to the board of county commissioners of Weld county the amount necessary to pay certain interest coupons on the outstanding bonds of the irrigation district, which coupons were then held and owned by defendant in error. The parties are hereinafter designated as in the court below.

It was stipulated that the plaintiff should procure the alternative writ and the defendants plead or demur thereto within ten days. The writ was issued October 11, 1918. It appears therefrom that in September, 1916, the defendant district issued and sold 198 of its coupon bonds, of the face value of $5,000 each, attached to each of which were 22 interest coupons, each for the sum of $15, 288 of which coupons the plaintiff holds and owns; that some of these coupons were due and payable June 1st and December 1st of each of the following years, 1913, 1914, 1915, 1916, 1917, and 1918; that these coupons had been presented to the county treasurer of Weld county (ex officio treasurer of the defendant district), and not paid for lack of funds; that the board of directors of defendant district had failed and refused to determine the amount of money required to pay these coupons and certify the same to the board of county commissioners; and that the defendants Hensley, Scott and Williams constituted the board of directors of the defendant district. A demurrer was filed to this writ on the grounds: First, that the writ did not state facts sufficient to constitute an action in mandamus against the defendants; second, that it did not show any demand by petitioners for the performance of any duty imposed upon them by law, or any refusal by them to perform; third, that the board of county commissioners of Weld county were necessary parties; fourth, that the writ was ambiguous and uncertain. This demurrer was overruled, and the defendants elected to stand thereon. The alternative writ was made perpetual and final, and from that order and the judgment following, the defendants prosecute this writ of error.

A supersedeas was heretofore issued herein upon the ground upon which this judgment is now reversed. A reversal was not, at that time, ordered for the reason that the rules of this court, as they then stood, made no provision therefor. They have since been so amended. Time for reply brief having been waived herein, this case is now considered by us in connection with No. 9567, 181 Pac. 980.

John R. Smith, of Denver, for plaintiffs in error.

Rush & Cline and Theodore H. Thomas, all of Denver, for defendant in error.

BURKE, J. (after stating the facts as above). The irrigation law of the state of Colorado provides: That these interest coupons shall be paid by revenue derived from an annual assessment on the real property of the district; that it shall be the duty of the board of directors, on or before September 1st of each year, to determine the amount of money required to meet the maintenance, operating and current expenses for the ensuing year, and to certify to the county commissioners of the county in which the office of the said district is located said amount, and, further, that it shall be the duty of the county commissioners, immediately upon receipt of such certificate, to fix the rate necessary to provide the amount of money required to pay the interest and principal of the bonds of said district as the same shall become due. It is admitted that the board of directors of the defendant district have not made this certificate to the board of county commissioners, and that no formal demand has been made upon them to so certify. The question here to be determined is the necessity for such a demand.

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It will be observed that section 3457, Revised Statutes 1908 (amended by chapter 101, p. 384, Laws 1913, chapter 105, p. 302, Laws 1915, and chapter 83, § 8, p. 302, Laws 1917), fixes upon the board of directors of an irrigation district the duty of certifying "the amount of money required to meet the maintenance, operating and current expenses for the ensuing year," but says nothing about any certificate of the amount necessary "to pay the interest and principal of the bonds of said district."

Section 3459 (amended by chapter 83, § 10, p. 305, Laws 1917) makes it the duty of the board of county commissioners, "upon the receipt of the certificates of the board of directors * * * to fix the rate of levy necessary to provide said amount of money, and to fix the rate necessary to provide the amount of money required to pay the interest and principal of the bonds of said district."

[1] It is assumed by both sides in the present case that it was the duty of the board of directors of the district to include in its certificate "the amount of money required to pay the interest and principal of the bonds of said district." For the purpose of the determination of this cause we therefore make the same assumption, and express no opinion thereon.

[2, 3] If relators in an action in mandamus have a private interest, peculiar to themselves, in the act or duty the performance of which is demanded, demand and refusal would be an essential condition precedent to the relief sought, but the weight of authority is that where a duty is enjoined by law which is strictly public in its nature, and concerns one individual no more than another, no formal demand or refusal is necessary. Rizer v. People, 18 Colo. App. 40–47, 69 Pac. 315; People ex rel. v. Rio Grande Co., 7 Colo. App. 229, 42 Pac. 1032; Grand County v. People, 16 Colo. App. 215, 64 Pac. 675.

The tax which plaintiff seeks to have levied by the board of county commissioners is, under our irrigation law, a special tax. Interstate Tr. Co. v. M. V. Irr. Dist., No. 9153, 181 Pac. 123, decided by this court April 7, 1919 (not yet officially reported).

Plaintiff's action to compel the issuance of this certificate to support the levy is an action for his personal benefit, the relief sought is personal, and the duty of the defendants to make the certificate can by no construction be held to be a duty "enjoined by law which is strictly public in its nature and concerns one individual no more than another." Prior demand and refusal are therefore essential.

Counsel for defendant in error assert in their brief that there has been demand and refusal in this, that in 1914 the plaintiff brought an action in the district court of the city and county of Denver against defendants, and recovered judgment therein on these identical interest coupons. That case was brought here for review and reversed; this court saying that petitioner's remedy lies in mandamus, and not for money judgment on the interest coupons. Henrylyn Irr. Dist. v. Thomas, 173 Pac. 541.

If this were equivalent to an allegation in the writ that there had been demand and refusal, and that it consisted of the bringing of said action in the city and county of Denver, and such judgment and reversal, it would be a sufficient answer to say that that was in no respect a demand upon the district for the required certification, but was a demand upon the district for the payment of the interest coupons, a demand with which the defendant district had no power to comply.

As no demand was made by plaintiff prior to the bringing of this action, and as such demand was an essential precedent thereto, the judgment must be reversed. In view of our opinion this day filed in Henrylyn Irr. Dist. et al. v. Thomas, No. 9567, 181 Pac. 980, we deem it unnecessary to consider the other questions raised herein.

Judgment reversed.

GARRIGUES, C. J., and TELLER, J., concur.

(66 Colo. 300)

HENRYLYN IRR. DIST. et al. v. THOMAS. (No. 9567.)

(Supreme Court of Colorado. June 2, 1919.)

1. MANDAMUS ⇐149—TAX LEVY—IRRIGATION BONDS—PARTIES.

Mandamus by irrigation bondholder to compel district commissioners to certify amount necessary to pay his coupons to district directors so that tax may be levied is not precluded because plaintiff owns only portion of outstanding bonds and coupons.

2. MANDAMUS ⇐187(4) — REVIEW — QUESTIONS PRESENTED—CONSTRUCTION OF STATUTE ADOPTED BY PARTIES.

Where both parties assumed that Rev. St. 1908, § 3457, as amended, required irrigation district directors to certify certain amounts to county commissioners for purposes of a tax levy, the Supreme Court, in denying relief by mandamus on writ of error against directors, will assume that such statutory construction was correct.

Department 1.

Error to District Court, Weld County; George H. Bradfield, Judge.

Mandamus by Theodore H. Thomas against the Henrylyn Irrigation District, F. A. Hensley, J. R. Scott, and J. W. Baldwin. Judgment for plaintiff, and defendants bring error. Affirmed.

See, also, 173 Pac. 541.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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The facts in this case are substantially those set forth in Henrylyn Irr. Dist. et al. v. Thomas, No. 9530, 181 Pac. 979, this day reversed by this court, except that in No. 9530 the levy sought was for the payment of interest coupons, in this case it is also for the payment of bonds; in No. 9530 no demand had been made upon the board of directors of the district to make the required certificate to the board of county commissioners, for which failure the judgment was reversed; in this case the demand and refusal are admitted. The parties are hereinafter designated as in the court below.

The alternative writ was issued January 27, 1919. February 24th following a demurrer thereto was overruled, and the defendants filed their election to stand thereon. The case was set for trial March 22, 1919, hearing was had, evidence taken, and the alternative writ, commanding defendants to make the required certificate, was made perpetual and final. From that order, and the judgment following, the defendants prosecute this writ of error. The cause comes to this court upon the record, defendants' motion for a supersedeas, and briefs supporting and opposing said motion.

John R. Smith, of Denver, for plaintiffs in error.

Theodore H. Thomas, of Denver, pro se.

BURKE, J. (after stating the facts as above). There are assigned five alleged errors of the trial court. They may all be briefly disposed of under the single contention that this plaintiff, holding only a fraction of the outstanding bonds and coupons, is not entitled to compel the board of directors of the district to certify, and the board of county commissioners to levy, for their payment only. The answer is that the law fixes the duty upon the board of directors of the district to "determine the amount of money required," and upon the board of county commissioners to "fix the rate necessary to provide the amount of money required." This plaintiff has no concern with those bonds and coupons not owned by him, and relief cannot be denied him because he owns but a fraction. It is enough that he seeks relief as to that portion of the bonds and coupons which he owns. He is required to go no further; and the objection is one which defendants cannot make. City of Galena v. Amy, 5 Wall. 705, 18 L. Ed. 560.

When the alternative writ is made peremptory the board must proceed, at least, as to the amount necessary to pay the bonds and coupons of the plaintiff.

It is suggested in the briefs, but not disclosed by the record, that some plan of settlement has been entered into between the irrigation district and the holders of the remaining bonds and coupons outstanding, whereby practically the entire indebtedness of the district, aside from that held by the plaintiff, has been adjusted. For aught we know it may be that no amount of money is now required to take care of bonds and coupons not held by the plaintiff, or the amount required, if any, may be much less than the face thereof, with interest. The writ requires certification as to plaintiff's bonds and coupons. It does not limit it thereto. If the action of the board of directors of the irrigation district, in response to the judgment herein, is such as to prejudice the holders of any other outstanding bonds and coupons, it is for them to complain.

[2] It should be observed that the same assumption is made by both sides in the instant case with respect to the provisions of sections 3457 and 3459, Revised Statutes of Colorado 1908 (original or amended), and the duty of the board of directors of the irrigation district to certify "the amount of money required to pay the interest and principal of the bonds of said district" as was made in No. 9530, supra. For the same reason we accept it as correct and express no opinion thereon. The supersedeas is denied, and the judgment is affirmed.

GARRIGUES, C. J., and TELLER, J., concur.

(56 Mont. 237)

GREEN v. WIEDERHOLD. (No. 4162.)

(Supreme Court of Montana. July 3, 1919.)

1. JUDGMENT ⇐142, 143(3) — DEFAULT—VACATION.

Where personal service is had, the defaulting defendant may excuse his default by showing that it was taken through mistake, inadvertence, surprise, or excusable neglect, while, if service is had by publication, or its equivalent, the defaulting party may show that he did not have notice of the impending action in time to defend.

2. JUDGMENT ⇐159—DEFAULT—VACATION—AFFIDAVIT.

Where defendant, a nonresident, had actual notice of a suit against him begun by attachment of his property in Montana, *held*, that an order vacating his default was improper; the affidavit, which merely alleged that counsel whom defendant had engaged through his son did not appear, and that defendant was unable, by reason of his health, to protect his interest, not showing the default was taken through mistake, inadvertence, or excusable neglect.

3. JUDGMENT ⇐153(5)—DEFAULT—VACATION—AFTER EXECUTION.

A default judgment cannot be vacated where, upon judgment rendered and entered, execution was issued against the property attached, and returned by the sheriff showing complete satisfaction of judgment.

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Appeal from District Court, Chouteau County; John W. Tattan, Judge.

Action by William H. Green against John A. Wiederhold. From an order setting aside a default judgment, plaintiff appeals. Order reversed.

C. A. Spaulding, of Helena, for appellant.

COOPER, J. Appeal from an order setting aside a default judgment. On May 2, 1916, comlaint was filed, summons issued, and an attachment levied upon property of the defendant in Chouteau county, Mont. On July 14th of the same year alias summons was issued, and published, and on August 7, 1916, said alias summons, together with a copy of the complaint, was delivered personally to the defendant in the county of Henry, state of Illinios, by a person named Lowry. On October 13, 1916, a default judgment was entered in favor of plaintiff and against defendant in the sum of $836.48, execution issued thereon, delivered to the sheriff, and the judgment fully satisfied out of the property attached. On April 27, 1917, Messrs. Stranahan & Stranahan, attorneys at law residing at Ft. Benton, presented to the court a motion to set aside the default, an answer on the merits, and an affidavit of defendant sworn to before a notary public of the state of Illinois in support of an application to have the case reopened. The material parts of the affidavit so filed are as follows: That defendant received a copy of the complaint and summons at the hands of one Lowry on or about August 7, 1916, and "immediately forwarded the same to the attorney" retained by the son of defendant "to represent and look after affiant's interest in said action"; that said attorney was by affiant admonished "to be diligent and active in affiant's behalf"; that affiant "at other times during said summer months wrote to said attorney and urged him to diligent and effective action in his behalf, and sent him facts and data with which to prepare" the defense, and "fully believed that every preparation for a vigorous and effective defense had been made, until later informed that judgment by default had been entered in said cause against him." Said affidavit also contains statements to the effect that the son of defendant, "Fred Wiederhold, about 23 years of age, wholly unacquainted with legal procedure and actions in court," attempted to look after the interests of affiant in said cause "and secure and retain a competent attorney at law at Ft. Benton, Mont., to defend said action in court, and, as affiant supposed and believed, and as his said son so informed affiant, he had secured and retained a competent attorney to perform all and every legal and necessary service by way of pleadings and answer to safeguard and defend affiant's interest in said action; that through some mistake, inadvertence, misunderstanding, or excusable neglect of his son or attorney, or both, wholly unknown to affiant," default was taken and judgment rendered and entered on or about October 13, 1916, in said cause. Defendant further states in his affidavit that "now, and for several years last past, [he] has been without the state of Montana, and has been during all of said time a resident of Henry county, state of Illinois; that during the entire year of 1916 he was a resident of said state of Illinois, and was without the confines of the state of Montana;" that during the year 1916 "his health was in a precarious condition"; and that he was forced to and did rely upon his son and said attorney to look after his interests in Montana. It also appears in the affidavit that immediately upon the delivery to him of the complaint and summons he "forwarded the same to the attorney whom his said son informed affiant had been retained to represent and look after" his interest in the action.

The court, upon the affidavit of affiant alone, sustained the motion of defendant and vacated the judgment. The correctness of this ruling is challenged by appellant upon the ground that the showing was insufficient. With this contention we agree.

[1, 2] The admission by defendant in his affidavit that complaint and summons were delivered to him personally on August 7, 1916, more than six months before entry of the judgment, brings him within the rule laid down in numerous decisions of this court. Smith v. McCormick, 52 Mont. 324, 157 Pac. 1010, L. R. A. 1916E, 472, Ann. Cas. 1917E, 619; State ex rel. Smotherman v. District Court, 51 Mont. 495, 153 Pac. 1019; Smith v. Collis, 42 Mont. 350, 112 Pac. 1070, Ann. Cas. 1912A, 1158; State ex rel. Happel v. District Court, 38 Mont. 166, 99 Pac. 291, 35 L. R. A. (N. S.) 1098, 129 Am. St. Rep. 636. In Smith v. Collis, supra, Mr. Justice Holloway, for this court, said:

"If personal service was had, the defaulting defendant may excuse his default by showing that it was taken through mistake, inadvertence, surprise, or excusable neglect. If service was had by publication or its equivalent, the defaulting party ought to show that he did not have actual notice of the pendency of the action in time to defend. This does not impose any hardship upon him. In either case the defaulting party ought to show that he moved promptly upon discovering that default had been taken against him, that he has a good defense upon the merits, and that the judgment, if allowed to stand, will prejudicially affect him."

The proof was utterly insufficient to meet the requirements. The affidavit of defendant affirmatively shows that he relied solely upon his son and the attorney retained by him; that with this attorney he was in constant communication and sent him "facts and data" with which to prepare his defense. It does not, however, assume to set forth any fact

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by which it can be determined when he first learned of the entry of judgment, or if, after that fact came to his knowledge, he acted promptly, as he was bound to do, in an effort to obtain relief therefrom. Smith v. Collis, supra. His proof in support of the motion is lame in other respects, for the name of the attorney employed is not given, although, as appears by the affidavit, he was a resident of Ft. Benton, the county seat of Chouteau county, and the place at which the court sat in the determination of the matters now sought to be reviewed. Under these circumstances, the requisite proof to support the affidavit of defendant, if it existed, could have been supplied by the two resident interested persons. Furthermore, if, as the defendant states, his health in the interim was in such a "precarious condition" that the default could be fairly attributed to that fact, an affidavit from his attending physician could have been produced to show it.

[3] There is still another ample reason why the action of the court below cannot be sustained. Upon the judgment rendered and entered October 13, 1916, a writ of execution was issued, delivered to the sheriff, and by him returned showing complete satisfaction of the judgment. The matter had therefore passed beyond the jurisdiction of the court in this proceeding. Foster v. Hauswirth, 5 Mont. 566, 6 Pac. 19; 2 Black on Judgments, § 1010.

The order is reversed.

Reversed.

HOLLOWAY, J., concurs.

BRANTLY, C. J., being absent, takes no part in the foregoing decision.

(56 Mont. 144)

In re GULLICKSON. (No. 4353.)

(Supreme Court of Montana. June 10, 1919.)

ATTORNEY AND CLIENT ⇐58—MISCONDUCT—PUNISHMENT—SUSPENSION.

Where an attorney admitted that during the time he was addicted to the excessive use of intoxicants and was to all intents and purposes in a state of intoxication he practiced deception upon a client and wrongfully appropriated funds belonging to the client, *held*, that such attorney should not be disbarred, but should only be suspended until further order; it appearing that he had reformed his habits of life, entered upon other work, and had repaid the major portion of the funds he had misused.

Original disbarment proceedings against John A. Gullickson. Accused suspended until further order.

Stephen J. Cowley, of Great Falls, for accused.

I. W. Choate, of Helena, for respondent.

HOLLOWAY, J. John A. Gullickson, an attorney admitted to practice in the courts of this state, was accused by the Attorney General of misconduct in his profession, particularly in practicing deception upon his client, Edward Engelbrecktson, and in wrongfully appropriating to his own use funds belonging to his client. The answer of the accused admits some of the allegations of the complaint, and denies knowledge of the others. The hearing before Referee R. E. Bancroft resulted in a finding that the charges as made are true. Indeed, in fairness it may be said that they are admitted by the accused, and the only duty imposed upon this court is to fix a punishment commensurate with the offense, in the light of the circumstances disclosed by the record.

It appears from the evidence that prior to the fall of 1916 the accused was a man of good reputation and trustworthy in the practice of his profession; that he then became addicted to the excessive use of intoxicating liquor, and was, to all intents and purposes, in a state of intoxication for the ensuing two years, the period covered by the transactions involved in this proceeding; that his condition was such that he was incompetent to discharge the duties of an attorney; that prior to the time this complaint was filed he ceased using intoxicants, repaid the major portion of the funds he had misused, gave up his office, entered upon other work, and since has been apparently making an honest effort to re-establish himself in the confidence of the community where he resides. The accused testified in his own behalf. He did not deny any of the charges or seek to shield himself. He assumed that the damaging testimony of his former client was true, but stated that he had no recollection of the several acts of deception mentioned. He offered the evidence of his disgrace merely in palliation of his delinquency, and not as excusatory of his conduct or in justification of it. He acknowledged the gravity of his offense and the justness of adequate punishment. Under the circumstances we are not disposed to close for all time the avenue to his complete reformation and to his reinstatement as a member of the bar in good standing. We are of the opinion that the ends of justice will be served best by an indefinite suspension.

It is ordered that the accused be suspended from his office as attorney and counselor at law until the further order of this court. Whenever, after January 1, 1920, the accused is able to satisfy this court that he is worthy of the confidence and respect which should characterize a member of the bar of this state, he may apply for reinstatement, and, upon paying the costs of this proceeding, he may thereafter be reinstated.

BRANTLY, C. J., and COOPER, J., concur.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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(56 Mont. 211)

STATE ex. rel. LOUNDAGIN v. TATTAN, District Judge. (No. 4359.)

(Supreme Court of Montana. June 24, 1919.)

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1. JUDGES ⟸36—CIVIL LIABILITY.

A judicial officer cannot be held liable for damages in a civil suit for any act of his in that capacity, if he had jurisdiction of the subject-matter and of the person whose rights were affected by the particular proceeding.

2. JUDGES ⟸36—CIVIL LIABILITY.

A judicial officer who acts in a matter not colorably within his jurisdiction is civilly liable for the consequences of his acts.

3. JUDGES ⟸36—CIVIL LIABILITY.

Though refusal of change of venue, upon application pursuant to Rev. Codes, § 6315, subd. 2, to disqualify presiding judge because of his relationship to defendant, was clearly erroneous, *held*, that judge was not so far acting without jurisdiction as to render him personally liable for costs incurred by plaintiff in proceeding by writ of supervisory control.

4. COURTS ⟸207(1)—WRIT OF SUPERVISORY CONTROL—WHEN AVAILABLE.

The writ of supervisory control issues only "to correct rulings made by the lower court acting within jurisdiction, but erroneously, where there is not an appeal, or the remedy by appeal cannot afford adequate relief, and gross injustice is threatened as the result of such rulings."

5. COSTS ⟸58—PROCEEDINGS BY WRIT OF SUPERVISORY CONTROL.

Decision in proceeding by writ of supervisory control being in favor of relatrix, she is entitled to recover her costs incurred in the proceeding, in view of Rev. Codes, § 7154, subd. 4.

6. COSTS ⟸96 — OFFICERS — PERSONAL LIABILITY.

Rev. Codes, § 7177, contemplates that, whenever a public officer sues or is being sued in his official capacity, he cannot be held personally responsible for the costs, but that the state or subdivision thereof represented by such official shall bear the burden.

Proceeding by the State, on the relation of Hazel Loundagin, against John W. Tattan, as judge of the District Court of the Twelfth Judicial District in and for the County of Chouteau. On application of relatrix to have costs incorporated in judgment. Denied.

McGinley & McConnell, of Ft. Benton, for relatrix.

Galen, Mettler & Toomey, of Helena, and W. S. Towner, of Ft. Benton, for respondent.

HOLLOWAY, J. In an action pending in the district court of Chouteau county, wherein Hazel Loundagin was plaintiff and C. M. Morrison et al. were defendants, an affidavit was filed on behalf of plaintiff, seeking to disqualify the presiding judge, Hon. John W. Tattan, because of his relationship to defendant Morrison. On January 8, 1919, upon motion of plaintiff, the court made an order transferring the cause to Cascade county, but two days later revoked the order. An application was thereupon made to this court for a writ of supervisory control, and such proceedings were had that on February 13th a judgment was duly given and made awarding the writ and directing the transfer of the cause to Cascade county. Thereafter the relatrix served and filed her cost bill, and the same was approved by this court. The present controversy arises upon the application of relatrix to have the costs incorporated in the judgment, and for execution or other appropriate writ to enforce payment.

[1] The judgment runs against John W. Tattan, as judge of the district court, and if the costs be made a part of the judgment, a civil liability will be imposed upon Judge Tattan because of the order, made on January 10th, revoking the order of the 8th. It is unnecessary to enter upon a discussion of the rule of civil liability applicable to judicial officers, or the reason for it. In Grant v. Williams, 54 Mont. 246, 169 Pac. 286, we considered the subject and expressed our conclusion as follows:

"The rule is well established by the current of authority that a judicial officer cannot be held liable for damages in a civil suit for any act of his in that capacity, if he had jurisdiction of the subject-matter and of the person whose rights were affected by the particular proceeding. In this respect no distinction is made between judges of courts of general and those of inferior and limited jurisdiction. The immunity is not extended to these officers to protect them as individuals, but for the protection of society, upon the theory that the interests of society are best served if the judicial officer is left entirely free to act upon his independent convictions, uninfluenced by fear or apprehension of consequences personal to himself. The rule extends even to acts grossly erroneous or prompted by corrupt or malicious motives, provided only they are done within jurisdiction clearly conferred."

Many authorities are cited in the opinion, to which may be added 23 Cyc. 567, 15 R. C. L. 543, and the numerous cases referred to in 29 Century Digest, 1745.

[2] Conversely, a judicial officer, who acts in a matter not colorably within his jurisdiction, is civilly liable for the consequences of his acts. State ex rel. Streit v. Justice Court, 45 Mont. 375, 123 Pac. 405, 48 L. R. A. (N. S.) 156; Grove v. Duyn, 44 N. J. Law, 654, 43 Am. Rep. 412; Bradley v. Fisher, 13 Wall. 335, 352, 20 L. Ed. 646; 23 Cyc. 570; 15 R. C. L. 544. The distinction between acts done entirely without jurisdiction and acts done in excess of jurisdiction, is indicated clearly in Bradley v. Fisher, above.

[3, 4] The affidavit seeking to disqualify

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Judge Tattan was made pursuant to the provisions of subdivision 2 of section 6315, Revised Codes, and was not affected by the provisions of subdivision 4, which have to do with an affidavit of disqualification for imputed bias. The effect of the order of January 10th was to refuse a change of venue upon the showing made, and, while it was clearly erroneous, it cannot be said that Judge Tattan was so far acting without jurisdiction as to render him personally liable. Indeed, we have proceeded in this matter altogether upon the assumption that he was acting within jurisdiction; otherwise, the application of relatrix would not have been entertained, or the writ of supervisory control granted, for that writ issues only "to correct rulings made by the lower court acting within jurisdiction, but erroneously, where there is not an appeal, or the remedy by appeal cannot afford adequate relief, and gross injustice is threatened as the result of such rulings." State ex rel. Carroll v. District Court, 50 Mont. 428, 147 Pac. 612.

[5, 6] There cannot be a doubt that relatrix is entitled to recover her costs incurred in this proceeding. Section 7154, Rev. Codes, subdiv. 4; State ex rel. Baker v. District Court, 24 Mont. 425, 62 Pac. 688. It is necessary that the judge of the court whose order is under review be made a party, to the end that there may be some one against whom the process of this court may be enforced, and in the strictest sense of the term the proceeding is against the judge in his official capacity. The proceeding is one authorized by the Constitution of this state, and, in prosecuting it, costs are necessarily incurred. We think it is reasonably clear that our Code contemplates that, whenever a public officer sues or is being sued in his official capacity, he shall not be held personally responsible for the costs, but that the state or subdivision thereof represented by such official shall bear the burden. Rev. Codes, § 7177. It would appear that in this instance Judge Tattan represented Chouteau county—the county in which the proceeding arose—in the same sense that a state or county officer, when suing or being sued in his official capacity, represents the state or county, as the case may be, and that the costs of this proceeding constitute a proper charge against Chouteau county; but upon this we express no opinion. The only inquiry now before us is, Shall Judge Tattan be held personally liable? and this inquiry we answer in the negative.

The order nisi heretofore issued is quashed, and the judgment of this court, rendered on February 13th is modified, by striking therefrom the concluding words: "Costs herein to be taxed against respondent." It is so ordered.

BRANTLY, C. J., and COOPER, J., concur.

(92 Or. 606)

DE VOL v. CITIZENS' BANK.

(Supreme Court of Oregon. June 24, 1919.)

ESTOPPEL ⟸98(1)—TESTIMONY OF WITNESS OF ADVERSE PARTY.

A party in a case cannot be estopped or concluded by the mere testimony of a witness offered by the adverse party.

In Banc.

Appeal from Circuit Court, Multnomah County; Robert Tucker, Judge.

On petition for rehearing. Denied.

For former opinion, see 179 Pac. 282.

Ralph R. Duniway and George N. Woodley, both of Portland, for petition.

Malarkey, Seabrook & Dibble, of Portland, opposed.

BENNETT, J. It is urged in the petition for rehearing that Mary De Vol is estopped by her testimony in this case from afterwards commencing a proceeding to recover the money in question in an action on her own behalf, and therefore it is reasoned that on this account an estoppel of the defendant from making the claim that the money belonged to her is in some way brought about, and that her testimony in regard to the ownership of the money is therefore conclusive upon the defendant.

The learned attorney clearly confuses what might work an estoppel of Mary De Vol with what would be necessary to create an estoppel on the part of the defendant.

It would be a startling and unusual doctrine if a party in a case could be estopped or concluded by the mere testimony of a witness offered by the adversary party.

Much stress is placed upon the opinion of this court in Gardner v. Kinney, 60 Or. 292, 117 Pac. 971, but upon a careful examination of that case it will clearly appear that it is in no way in point upon the question here presented.

In the Gardner Case the plaintiff was an agent of the defendant and claimed to have authority to employ labor and pay the employés. He had employed one Johnson and paid him and was asking to have that claim added to his own. Both the plaintiff and Johnson testified that he looked to plaintiff for his pay. The question was not taken away from the jury, as in this case, but was submitted to the jury, and the jury found in favor of the plaintiff upon the issues. It was in relation to such a case and arguendo only that the court used the language about estoppel referred to. If the question in this case had been submitted to the jury, and that body had found in favor of the plaintiff upon that issue, basing its verdict partly or wholly upon the testimony of Mary De Vol, it may well be that, as said in the Gardner

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Case, she would have been estopped from bringing another suit for the same money, having, by her evidence, caused the defendant to once pay it to George De Vol, but this could in no way work an estoppel upon the defendant, as to the defense pleaded and insisted upon in this action.

The defendant did not know when it made its defense what would be the claim of Mary De Vol, or what she would testify to; and, having made that defense, and offered ample evidence to support it; it had the right to have the question submitted to the jury, and the court had no right to say that her evidence was conclusively true, or to disregard the evidence to the contrary offered by the defendant.

It may be unfortunate, as contended by respondent, that the case should be reversed upon this ground. But for this the defendant is not to blame. The respondent had it in his own hands to have the question properly submitted to the jury at the first trial and passed upon and decided. Apparently he opposed this being done, or at least he did not specifically consent to its being done. If he had joined with the defendant in asking to have this issue submitted to the jury, the court would have submitted it. Plaintiff is not now in a position to complain because the case has to be sent back, so that the question can be properly and regularly submitted.

(94 Or. 70)

GRABER v. BOSWELL.

(Supreme Court of Oregon. July 1, 1919.)

1. MORTGAGES ⟸463—FUTURE ADVANCES — SUFFICIENCY OF EVIDENCE.

In suit to foreclose a mortgage for future advances, evidence *held* insufficient to establish plaintiff's right to more than $83.40 on an amount of $250 claimed by plaintiff to have been paid by the original mortgagee, her deceased husband, as attorney for defendant mortgagor, for a metallic casket for the remains of defendant's husband.

2. MORTGAGES ⟸463—FUTURE ADVANCES.

In suit by widow of attorney, who had acted for defendant widow of his friend, to foreclose a mortgage given by defendant to such attorney to secure advances, the attorney having filed a voucher against the estate for an amount of $50 claimed to have been paid for exhuming and transporting the remains of defendant's husband for interment elsewhere, the additional charge of $111 shown in his personal account against the widow, who insisted that even the $50 charge is excessive, should be eliminated.

Department 1.

Appeal from Circuit Court, Douglas County; G. F. Skipworth, Judge.

Suit by Ada Graber against Emma E. Boswell. From decree for plaintiff, defendant appeals. Modified and affirmed.

This is a suit to foreclose a mortgage upon real estate. The complaint is in the usual form. The note and mortgage were both executed in favor of Thomas F. Graber, who subsequently died, leaving a will naming his widow, the plaintiff herein, as his sole legatee.

The answer admits the execution of the instruments upon which the suit is based, but denies that they were executed for a valuable consideration, and then pleads affirmatively that defendant is the widow of Benjamin D. Boswell, who died May 19, 1907, and who for a long time prior to his death was a client and close personal friend of Thomas F. Graber, who was a practicing attorney at law in Oakland, Cal.; that Boswell in his last will and testament had appointed Graber to be the executor thereof, but, owing to the fact that Graber was a resident of California, he could not qualify as such executor, and the defendant was therefore appointed administratrix with the will annexed of her husband's estate. She then retained Graber as her legal adviser in the administration of the estate, relying implicitly upon him faithfully and honestly to direct her therein, placing special confidence in him by reason of his intimate friendship for her deceased husband. She avers that Graber represented to her that it would be necessary for her to have some ready money wherewith to pay the debts of the estate, including a mortgage of $700 due to the state land board of Oregon, and suggested $1,000 as the sum necessary to be raised, but later induced her to execute the note and mortgage above mentioned in the sum of $2,000. She further asserts that he promised to protect her interests and that she would only be required to pay thereon such sums as should be thereafter actually advanced by him for such purposes, that thereafter, and prior to the final settlement of the estate, the defendant, with the advice of Graber, sold a portion of the real estate for $2,000, and this sum was used to pay the $700 mortgage to the state land board, and all of the debts of the estate, including the expenses of administration, leaving a surplus after all debts were paid, and that all claims of said Graber against the estate or herself have been fully paid. It is further alleged that she has repeatedly sought to obtain a settlement and adjustment with Graber, but the same had always been postponed by him, and she has never succeeded in securing the same.

The reply admits the personal friendship and professional relations existing between Graber and Boswell, the allegations in regard to the appointment of defendant as adminis-

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tratrix of her husband's estate, the sale of certain real estate for $2,000, and the employment of Graber as defendant's legal adviser, but denies generally all other allegations of the affirmative answer.

A trial was had, resulting in a decree in accordance with the prayer of the complaint, and defendant appeals.

O. P. Coshow, of Roseburg, for appellant.

Carl E. Wimberly, of Roseburg (Neuner & Wimberly, of Roseburg, and C. L. Colvin, of Oakland, Cal., on the brief), for respondent.

BENSON, J. (after stating the facts as above). The history of this case presents an unfortunate situation. Thomas F. Graber, the payee named in the note and mortgage, was a lawyer, having his offices in Oakland, Cal. After the final settlement and distribution of the Boswell estate, and after all of the transactions involved in the present litigation, he died, and the plaintiff, being his widow, succeeded to his interests. She evidently knew very little of her husband's business affairs prior to his death, and there is no one else who can supply the information. If the defendant ever kept any connected record of her financial transactions, it is not before us. Thomas F. Graber apparently left no detailed record of his financial dealings with Mrs. Boswell, other than an account book which was found among his effects in his office after his decease. Our investigation of the facts, then, is confined to the records of the county court in the matter of the estate of B. D. Boswell, deceased, the book accounts and canceled checks of Thomas F. Graber, deceased, and the parol testimony of Mrs. Boswell. After a careful investigation of the entire record, we are impressed with the fact that there is no evidence of any conscious bad faith upon the part of any of the parties hereto, or of any desire to deal otherwise than in perfect honesty and fairness.

[1] Prior to his death, which ocurred on May 19, 1907, B. D. Boswell owned certain lands in Douglas county, Or., known as Boswell Springs, whereon he conducted a hotel which was to some extent popular by reason of the reputed medicinal value of the mineral springs situated upon the premises. For several years prior to May 19, 1907, Thomas F. Graber, a practicing attorney, of Oakland, Cal., had been a close personal friend and the legal adviser of Capt. Boswell, and the latter in his last will and testament had nominated Graber to be the executor thereof, without exacting any bond for the faithful performance of the duties involved therein. Owing to the fact of his being a resident of another state, Graber could not qualify as such executor, and the widow and sole legatee, Emma E. Boswell, received letters testamentary as administratrix with the will annexed, and Graber was retained by her as her legal adviser. It was soon discovered that, while the claims against the estate were considerable, the only ready money amounted to no more than $108. After her husband's death, Mrs. Boswell continued to conduct the hotel with some success until the summer of 1908, when the buildings were destroyed by fire. Thereafter Graber suggested to Mrs. Boswell, who in the meanwhile was living in Oakland, Cal., that she would need money to meet the claims against the estate, as well as for her personal requirements; that she should execute to him a note and mortgage for $2,000 upon the real estate, out of which claims would be paid, and money provided for her maintenance. This was done on October 22, 1908. Subsequently a portion of the land was released from the lien of the mortgage, and sold for the sum of $2,000. On September 1, 1909, Graber mailed to Mrs. Boswell an itemized statement of the fund thus acquired, from which it appears that, after paying the principal and accrued interest on a note to the state land board, together with taxes thereon, and certain obligations of Mrs. Boswell's, there was a balance of $578.30, which he paid her by check. This statement disposes satisfactorily of any contention that this fund was applied to the payment of any other claims of Graber against Mrs. Boswell, and brings us to the definite conclusion that any other advances made to her or in her behalf were directly chargeable to the fund provided by the note and mortgage which are the subject of this suit. These items were kept by Graber, in a separate and distinct account in his daybook, and consist, first, of an item of $976.64 for claims against the Boswell estate which had been paid by him. The correctness of this item is disputed by Mrs. Boswell, who testifies that of the $250 which had been paid for a metallic casket for the remains of the deceased Mr. Graber paid only $83.40. An examination of the vouchers filed with the final account discloses that the claim of the undertaker shows three credits of $50 each "by check," and credits for poultry and eggs, and a cash payment of $10, all at dates while Mrs. Boswell was conducting the hotel and sanitarium. The only voucher filed by Graber in this connection is for the balance of $83.40, and we are driven to the conclusion that plaintiff has not established her right to a credit of more than $83.40 thereon, by a preponderance of the evidence.

[2] Another item is that for exhuming and transporting the remains of Capt. Boswell to San Francisco for interment at the Presidio. This item is set out in the final account as being $50 and Mr. Graber filed a voucher therefor in that amount. But we also find him making an additional charge of $111 therefor in his personal account against Mrs. Boswell, who insists that even the $50 charge is excessive. We think the item of $111 should be eliminated.

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The remaining items going to make up the consideration of the note sued upon consist of a number of sums of money advanced to defendant at various times, certain bills of hers paid by him, and the sum of $500, which constitutes his charge for legal services, and $75 as traveling expenses necessarily incurred in the same connection. We are satisfied that these items are correct and reasonable, and should be allowed.

Making the deductions indicated above, the amount of the decree will be reduced from $3,364.44 to $2,934.83, with which modification the decree of the trial court is affirmed, without costs to either party in this court.

McBRIDE, C. J., and BURNETT and HARRIS, JJ., concur.

(93 Or. 1)

WADE v. MARTIN.

(Supreme Court of Oregon. July 1, 1919.)

PARTNERSHIP ⊂⊃53 — SILENT PARTNER—EVIDENCE.

Plaintiff, in action for half of the expenses of an option taken in his name, *held* to have failed to establish by a preponderance of the evidence that defendant was a silent partner in the transaction.

Department 2.

Appeal from Circuit Court, Multnomah County; Robert G. Morrow, Judge.

Action by W. T. Wade against E. J. Martin. Judgment for defendant, and plaintiff appeals. Affirmed.

For his cause of action plaintiff alleges that about January 1, 1910, he entered into an agreement with the defendant by which the plaintiff was to procure an option to purchase a tract of land of about 917 acres in Wallowa county from one Ewing; that such option, when obtained, should be taken in the name of the plaintiff only, but that the defendant should have an equal interest therein with the plaintiff, and each should bear one-half of the expenses, and should share equally in any proceeds realized under the option. Pursuant to said agreement plaintiff did procure an option for a period of five years from January 3, 1910, and plaintiff took and accepted said option under the express stipulation that the defendant was in all things equally interested therein with himself. The purchase price of the land was $25 per acre, and the option provided that in consideration thereof the plaintiff should pay $150 per year for the first three years, and $250 for each of the last two years of the term of the option, and that such payments should be evidenced by a promissory note to be executed on January 3d of each year. On January 3, 1910, pursuant to the terms of the option, the plaintiff executed in favor of Ewing the first $150 note, to become due and payable January 3, 1911. The complaint alleges that on or about its maturity the plaintiff paid that note, and, according to the terms of the agreement between them, the defendant paid him one-half of the amount thereof; that about January 3, 1911, the plaintiff executed to Ewing the second promissory note for $150, which became due one year from that date, and which he paid at maturity, and that, as before, the defendant reimbursed the plaintiff for one-half the amount of the note.

It is averred that about January 1, 1912, Ewing sold and conveyed the land to Fargo and Baker; that for failure to execute and pay the third promissory note for $150 they commenced an action against the plaintiff to recover that amount; that after a contest they recovered judgment for $150 and costs, and that the defendant paid to the plaintiff one-half of that amount. The plaintiff further avers that thereafter Fargo and Baker commenced an action against him to recover upon the fourth and fifth yearly payments, of $250 each, provided for in the option; that he and the defendant mutually employed counsel to defend, and contested the action; that the defendant agreed to pay plaintiff one-half of the expense thereof; that a judgment was finally entered against the plaintiff for the full amount prayed for, which plaintiff paid in full; that the defendant promised and agreed to repay the plaintiff one-half of the final judgment of $804.88; and that the latter has demanded and defendant has refused payment. The plaintiff asks judgment for the amount, with accrued interest.

In his answer the defendant denies each material allegation of the complaint, and avers that without consideration, and as an accommodation only, he signed the first promissory note for $150. The plaintiff's reply denied the new matter of the answer and by stipulation the case was tried without a jury.

When the plaintiff rested his case, the defendant filed a motion for nonsuit, which was overruled. The defendant introduced his evidence, and after all the testimony was taken again moved the court for judgment of nonsuit upon the grounds: First, that the proof was insufficient; and, second, that the alleged transaction was a partnership, for which a recovery could not be had in an action at law, as "the only remedy of the one partner who claims to have made disbursements on behalf of the firm is that of an accounting in equity."

The case was taken under advisement by the court, which, without making any findings of fact or conclusions of law, rendered a

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judgment "that the motion of defendant for an involuntary nonsuit should have been allowed, and it is now hereby adjudged that plaintiff take nothing herein, that defendant go hence without day," and that he have judgment for costs. The plaintiff appeals.

Conrad P. Olson, of Portland, for appellant.

Charles A. Hart, of Portland (W. H. Fowler, of Portland, on the brief), for respondent.

JOHNS, J. (after stating the facts as above). Under our view of this case, it will not be necessary to decide the legal questions ably presented by opposing attorneys. As the material allegations of the complaint were denied by the defendant, it devolved upon the plaintiff to establish them by a preponderance of the evidence. One of these allegations was that the defendant was a "silent partner" of the plaintiff in the Ewing contract, and that for value he had promised and agreed with the plaintiff that he would pay one-half of the latter's liability under that contract and his own share of the expense arising therefrom.

The case is peculiar, and the alleged contract is founded upon parol testimony only. The plaintiff's testimony sustains the allegations of the complaint, but is flatly contradicted by that of the defendant. The testimony of Mr. Lomax, who was formerly his attorney, tends to corroborate the plaintiff, and the evidence of Mr. Fowler, formerly of counsel for the defendant, tends to substantiate the latter's testimony. There is a sharp conflict in the effect of the testimony of the two attorneys, and it is very apparent that as between the plaintiff and the defendant one of them is not telling the truth. There is much of the evidence that sustains the theory of either litigant, but after a careful reading of all the record once, and a large portion of it the second time, we are impressed with the direct, clear, and positive testimony of the defendant.

There is another feature of the evidence to which we attach importance. During the trial of the case of Fargo and Baker to recover from this plaintiff upon one of the notes which he executed under the Ewing contract, at the instance of counsel the court took a recess. At that time Fargo and Baker, as plaintiffs, were represented by Hart and Fowler, who are now attorneys for the defendant in this action, and Wade, the plaintiff here, as defendant in that action, was represented by Lomax as his attorney. Martin, the defendant in the present action, was in court as a witness at the trial of that cause. During the adjournment there was a conference between the litigants in that case and their respective attorneys for the purpose of arriving at a final settlement of all matters then in dispute between them. This occurred in a room connecting with and adjoining the courtroom where the trial was had. A general discussion ensued, and different memorandum contracts were prepared by the respective attorneys, one of which was that in lieu of the Ewing option, at a price of $25 per acre, the plaintiff here should purchase the lands at an agreed price of $20 per acre. All of these negotiations consumed more than an hour, and there is no claim or pretense that the defendant Martin was present at any time, or that he was then consulted, yet he was close at hand in an adjoining room.

Counsel for the plaintiff contends that the defendant was not consulted, for the reason that he was only a "silent partner." This was more than three years after the alleged secret agreement between them, and there is nothing in the record which tends to show that the plaintiff and the defendant had ever conferred about or discussed the subject-matter of the proposed agreement at any previous time, yet, if the defendant was a "silent partner," it was an important matter to him, and, if consummated, the plaintiff would have become the sole purchaser of 900 acres of land at a price reduced $5 per acre below that of the Ewing option, and the option would have been wiped out and merged in the purchase. This is strong evidence that the defendant was not a "silent partner" in the Ewing contract. It is also significant that during the period of more than seven years of the alleged silent partnership there is no written evidence of its existence. While some of the testimony is contradictory and there is a direct conflict between that of the plaintiff and that of the defendant, as we analyze it, the plaintiff has failed to establish his case by a preponderance of the evidence.

The judgment is affirmed.

McBRIDE, C. J., and BEAN and BENNETT, JJ., concur.

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(94 Or. 318)

FIRST NAT. BANK OF UNION v. WHITE PINE LUMBER CO. et al.

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WRIGHT v. SAME.

(Supreme Court of Oregon. June 24, 1919.

1. APPEAL AND ERROR ⟸418—NOTICE OF APPEAL—SUFFICIENCY.

Where two cases were virtually, if not formally, consolidated for trial, a single notice of appeal, describing both decrees, *held* a sufficient notice for both cases.

2. APPEAL AND ERROR ⟸426—NOTICE OF APPEAL—SERVICE.

Under L. O. L. § 550, providing that notice of appeal may be served on adverse party or his attorney, and section 540, authorizing service by mail where person to be served resides in a different place, a notice of appeal may be served by mail on attorney residing in another county, though parties themselves reside in same place.

In Banc.

Appeal from Circuit Court, Union County; J. W. Knowles, Judge.

Action by the First National Bank of Union, Or., against the White Pine Lumber Company, P. C. Wright, and George F. Hall, and by P. C. Wright against the White Pine Lumber Company, the First National Bank of Union, Or., the La Grande National Bank of La Grande, and George F. Hall. From adverse decrees, P. C. Wright and George F. Hall appeal. On motions to dismiss the appeals. Motions denied.

The foregoing causes arise out of the insolvency of the White Pine Lumber Company, a partnership engaged in the lumbering business in Union county, Or. The lumber company, evidently being in straitened circumstances in the conduct of its business, secured a loan from the respondent First National Bank of Union, Or., and gave a promissory note and a chattel mortgage upon certain of its lumber product to secure the payment of the note. It also secured a like loan from the La Grande National Bank of La Grande, Or., and gave another mortgage upon certain other lumber not covered by the mortgage to the Union Bank.

The appellant P. C. Wright is the holder of the lien claim of a large number of the employés of the lumber company, and as such claims loggers' and lumbermen's liens upon the lumber covered by the mortgages of each of the banks. The appellant Hall is the trustee in bankruptcy of the lumber company, and as such trustee claims possession and the right to administer on all of the property in dispute.

The respondent First National Bank of Union commenced a suit against the lumber company to foreclose its mortgage, and made Wright, as representing the lien claimants, a party defendant. Afterwards Wright commenced a suit to foreclose his loggers' and lumbermen's liens, and made the First National Bank of Union a party defendant. It was stipulated that the complaint in this case should stand as an answer to the complaint of the First National Bank of Union. Afterwards the La Grande National Bank intervened, and asked for the foreclosure of its mortgage upon the lumber covered thereby.

The appellant Hall also intervened as a defendant, and, as trustee in bankruptcy, claimed possession of all the property. By stipulation of the parties, and an order of the court based thereon, the cases were tried together upon the same evidence, but separate decrees were entered.

In the Wright case the court found against the plaintiffs and in favor of the La Grande National Bank, decreeing the foreclosure of its mortgage upon the lumber covered thereby, and that the balance of the same, if there was any, should be turned over to the defendant Geo. F. Hall, as trustee in bankruptcy. In the case of the First National Bank of Union, the court also found against the lien claimants and in favor of the bank, and decreed the foreclosure of its mortgage upon the lumber covered by it. Wright, the plaintiff in one case and defendant in the other, is attempting to appeal from both decrees, and the defendant Hall, as trustee in bankruptcy, has also filed a similar notice of appeal. This case comes up now solely upon motions to dismiss the different appeals.

The appellant Wright served a single notice of appeal, in which he appeals severally from each of the decrees entered in the two suits, describing each of them fully and separately in the notice. He served the notice of appeal on the intervening defendant Hall, by mailing a copy of the same to John L. Rand, his attorney, in Baker City. It is claimed that Wright's notice of appeal is fatally defective, because there was only one notice covering both decrees, and also because, as is claimed, a notice of appeal cannot be served by mail, where the parties reside in the same place, even if the attorneys for one of them reside in another county.

The notice of appeal filed by Hall is also a double notice, and the first ground of the motion as to the Wright notice applies equally to that of Hall.

John L. Rand and J. H. Nichols, both of Baker, and R. J. Green and H. E. Dixon, both of La Grande, for appellants.

Crawford & Eakin and Cochran & Eberhard, all of La Grande, and B. F. Wilson, of Union, for respondents.

BENNETT, J. (after stating the facts as above). We are of the opinion that the motion to dismiss in the Wright case is not well taken. There seems to have been a virtual, if not a formal, consolidation of the cases for trial.

[1] It is very plain from the notice, that Wright intends to appeal and does appeal from both decrees, and indeed each decree is separately and fully described. It is impossible that the adverse party should have been in any way misled. Perhaps it might have been more appropriate to have served an entirely distinct and separate notice in each case; but we cannot say, under the circumstances and conditions of the record, that the notice was fatally defective as to either one. Certainly it would not be defective as to both, and it would be impossible to distinguish, and say that it would be defective in one and not in the other.

It is urged that the effect of this duplicate appeal would be to save a filing fee in one case or the other. Whether or not this is true, we do not think it would justify us in dismissing an appeal, where the notice sufficiently describes each of the decrees, and fully notifies the adverse parties that it is the intention to appeal from each of them.

[2] As to the service by mail, we are of the opinion that that also is sufficient. Section 550, L. O. L., as amended, provides that the notice of appeal shall be served upon the adverse party, "or upon his or their attorney at any place in the state." Section 540, L. O. L., in regard to service by mail, provides: "Service by mail may be made when the person for whom the service is made, and the person upon whom it is to be made, resides in different places."

Under these sections the appellant Wright had the option to serve his notice of appeal either upon the party individually, or upon his attorney, at any place in the state, and, having selected that option in favor of the attorney, such attorney became the "person" who was being served, and he living at a different place, to wit,

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the town of Baker, the service upon him could be properly made by mail. This seems the natural construction of the language; but, besides this, it is the usual, and we think the appropriate, practice, where there is an attorney of record, to serve the notice of appeal upon him, even although such attorney does reside out of the county. This being a proper and usual thing to do, the service can unquestionably be made by mail.

What is said above in regard to the Wright appeal also disposes of the motion to dismiss the appeal of the intervener Hall. The double notice of appeal in his case was somewhat more general than in the Wright case, but we think it was sufficient under the holding in Robinson v. Phegley, 177 Pac. 942, Fraley v. Hoban, 69 Or. 180, 133 Pac. 1190, 137 Pac. 751, and Tucker v. Nuding, 180 Pac. 903.

The motion to dismiss the appeal in both cases is denied.

(93 Or. 160)

FULLER v. OREGON-WASHINGTON R. & NAV. CO.

(Supreme Court of Oregon. July 22, 1919.)

1. APPEAL AND ERROR ⊂⊃999(1)—REVIEW—EVIDENCE.
Evidence in support of the verdict will be deemed conclusive on appeal.

2. MASTER AND SERVANT ⊂⊃285(7)—INJURIES TO SERVANT—JURY QUESTION.
In an action for the death of a trainman killed in a collision, the question whether the tail lights of the caboose in which he was riding were burning *held* under the evidence for the jury.

In Banc.

Appeal from Circuit Court, Union County; J. W. Knowles, Judge.

On petition for rehearing. Denied.

For former opinion, see 181 Pac. 338.

W. A. Robbins and A. C. Spencer, both of Portland, and Crawford & Eakin, of La Grande, for appellant.

George W. Peterson, of St. Paul, Minn., and George C. Stiles, of Minneapolis, Minn., and R. J. Green, of La Grande, for respondent.

McBRIDE, C. J. In a vigorous petition for rehearing the soundness of the opinion heretofore rendered is challenged in several particulars.

It is first called to our attention that in several instances the opinion refers to Guy E. Chapin, the engineer in charge of train 2140, as the "conductor," instead of the "engineer," and this criticism is technically correct. Train 2140 consisted of a locomotive with tank attached, and had no technical conductor, but was in charge of the engineer; but we submit that, being in charge of the locomotive, his position approached quite as nearly that of a conductor, as the locomotive and tank approximated to a train, which is what defendant's witnesses called it. We apologize, and hereafter Mr. Chapin will be known and designated in the Oregon Reports as "engineer of train 2140."

Our attention is also called to the fact that we have inadvertently called the intermediate signal, half a mile east of the North Fork bridge, the "home signal," and this criticism is also correct; but we call attention to the fact that it showed just as red and indicated danger just as effectually as though it had been designated by its proper title, and Engineer Chapin says that it was "red and showed danger." The opinion nowhere indicates that train 2140 ran past the intermediate signal without stopping. It did stop for five minutes, and then, with the danger indication still showing, went ahead at the rate of at least 6 miles an hour, with the knowledge on the part of those operating it that 255 was on the main track half a mile ahead.

[1, 2] We are also criticized for saying, in effect, that, if the tail light of 255 had been burning, the engineer of 2140—called in the opinion the "conductor"—could have discovered that fact at a distance of 200 feet east of the bridge, if other conditions had been favorable. Such is the testimony of Hoskins, which, for the purpose of an appeal, is conclusive, but stronger than this is the testimony of Engineer Chapin, who testified as follows upon cross-examination:

"Q. If those tail lights had been burning in the caboose, which you say they were not, you would not have had any difficulty in seeing the end of the caboose and stopping 2140? A. No, sir."

This left for the jury the question as to whether the tail lights were burning, and—as shown in the original opinion—they had a right to weigh the statement of a witness having a strong moral interest in the result against the intrinsic improbability that all three of the tail, or marker lights, which are independent of each other, should have been extinguished, when it had been shown that all three had been burning a little over two miles back, and especially when Engineer Chapin's testimony, as to natural light conditions, had been contradicted by Hoskins, an entirely disinterested witness.

It is earnestly urged that the testimony shows that 2140 was running "under control" at the time of the accident. It is true that several very estimable gentlemen connected with the railroad testified that in their opinions such was the case; but, viewed from the standpoint of the rules, their judgment is not sustained. The words "under control" are defined in the defendant's book of rules, as follows: "*Under Control.*—To be able to stop within the distance track is seen to be clear." This does not mean to run 6 miles an hour, which is the maximum speed at which a train may be said to be under control under any circumstances, but means such a rate of speed as, under the particular conditions, will enable those in charge of a train to stop in time to avoid accident. If the circumstances are such that objects upon the track may be discovered a considerable distance ahead, 6 miles an hour may be a sufficiently low rate of speed; but if there is a considerable down grade, combined with dark or foggy weather, and no light in front of the train, a speed of one mile an hour may be required in order to conform to the rule. Taking defendant's testimony alone, there was every condition demanding the most extreme caution. The route was over a heavy down grade from the summit of a high range of mountains; the locomotive left Kamela in the night, backing down this grade without any light upon the tank, which then constituted the front of the train; what little natural light that ordinarily would have existed was diminished by smoke; the intermediate signal east of North Fork showed a train on the main track, about half a mile ahead. Under all these circumstances it was for a jury to say whether defendant's engineer acted prudently in maintaining a speed of 6 miles an hour, and, considering the force and physical consequences of the impact, whether he in fact was running at so low a rate of speed as that claimed by him. They were the exclusive judges of the value of his testimony as to the conditions and speed of the train, and we think there was sufficient testimony to justify a finding that he was negligent.

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It is true that there is evidence on behalf of defendant tending to explain these circumstances; but the people of this state, in their collective wisdom—or unwisdom—have seen fit to ordain that in law actions the comparative weight of testimony shall not be examined upon appeal, and therefore we are precluded from a full discussion of that subject, having no right to substitute our own judgment for that of the jury.

Our statement, that it was fairly deducible from the evidence that Fuller had agreed to flag 2140 against No. 4 passenger, is criticized as not borne out by the testimony. Let the testimony speak for itself. On page 218 of the evidence we find the following testimony of Engineer Chapin upon cross-examination:

"Q. And, if necessary, Fuller would flag you against No. 4? A. Yes.

"Q. Of course, No. 4 was a passenger train?

"Mr. Crawford: I think you are misquoting the witness in saying he was to flag as against No. 4.

"Q. Then Fuller was to flag you and protect you as against No. 4? A. Yes."

Whether sufficient time elapsed between the breaking in two of train 255 and the collision to have enabled Fuller to get his lantern and fusees and start back east to signal 2140 were questions of fact for the jury. As remarked in the original opinion, it may well be that he was in the act of starting when the collision occurred. The only voice that could have explained his movements is stilled by death, and we are not prepared to say that he, who is shown to have been careful and diligent upon other occasions during the trip, was neglecting his duty and recklessly exposing his own life in this instance.

Our attention is called to the fact that the train order for 2140 is in the transcript. This criticism is correct, although the fact itself is not material. The order reads: "September 3, 1917. Engine 2140, run extra Kamela to Pilot Rock Junction; take siding; meet extra 2162 east at Duncan." No time of starting is given. How long 2140 would have been delayed at Kamela, in order to have turned around and proceeded west with the locomotive in front, does not appear. There is a long double track at Kamela, and the train sheets indicate that the only train there when 2140 left was the one 2140 had helped to pull up the grade to that point. This train was due to proceed on its eastward course, and it would seem, under the conditions, reasonable prudence would have dictated that 2140 should have delayed its departure a few minutes and turned around, so its engineer might have the benefit of the powerful lights on the locomotive on the westward trip. At all events, the order does not indicate that 2140 was required to run backward.

While it is not negligence per se to run a train backward, and while it is not unusual for trains to be so run, especially in daylight and for comparatively short distances, conditions may exist when so operating a train, and especially in the dark and down steep grades and without lights sufficient to indicate possible obstruction on the track, may constitute negligence, and this is as far as the original opinion goes or was intended to go.

The court's instruction as to the headlight was, we think, sufficiently discussed in the original opinion. We think it fair to assume that the headlight, required by the Interstate Commerce Commission, which is shown to be one of high power, supposed to disclose objects 1,000 feet ahead of the train, is the standard headlight, made so by the order and by general acquiescence, and used all over the country; and this, evidently, was what was in the court's mind when the instruction complained of was given. The complaint charged, in substance, that neglect to have such a light on the west end of the train was one of the causes contributing to the accident. We are of the opinion that there is evidence tending to show that, if such a light had been maintained, the engineer of 2140 would have seen the caboose of 255 in time to have stopped his train; so that in any event it was not error for the court to instruct as it did in regard to that branch of the case.

The objection urged seems more to the court submitting to the jury the question of the propriety of running without the light particularly described in the instruction, rather than the necessity of having *some* kind of light. Had there been any light whatever on the tank, and a dispute as to its sufficiency, an instruction of the character indicated might possibly have been prejudicial; but it is conceded that there was no light of any kind on the tank except the markers, which it is also conceded were not useful in enabling the persons operating the train to discern obstructions on the track, so the instruction in substance left the jury to determine whether it was negligence for defendant's servants to operate the train without lights under the conditions disclosed by the testimony.

The jury were fully instructed in accordance with the contention of defendant as to Fuller's duty to go back and flag trains when his own train was delayed upon the track; whether he had time to do this after he became aware that his train was more than momentarily delayed, for the purpose of heading in, was left to the jury. Whether there was time for him to have gotten his lantern and fusees, and got out of the caboose, was a question of fact for the jury. While, in view of the testimony and the instruction of the court, the statement in the original opinion, that "the rule does not absolutely require the flagman to go back with stop signals every time the train stops," etc., may be in the nature of dictum, the writer, speaking for himself, is firmly of the opinion that the rule bears the construction indicated.

Taken as a whole, we are of the opinion that the trial and instructions were eminently fair to the defendant, and that no substantial error was committed to its prejudice, and that while this court, sitting as a jury of seven to try the facts, might come to a different conclusion from that arrived at by the jury that tried the cause, there is sufficient evidence to support their finding.

We adhere to the conclusion reached in the original opinion.

END OF CASES IN VOL. 181

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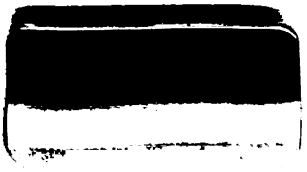
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